Thinking outside of the Box: Why Prisons Are Only Part of the Solution

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THINKING OUTSIDE OF THE BOX: WHY PRISONS ARE ONLY PART OF THE SOLUTION

I want to be absolutely clear. I am not advocating that we reduce prison populations just to save money. Nonviolent offenders are still law breakers, and they will break laws until they learn their lesson. What I am saying is that we need to do a better job teaching nonviolent offenders the right lessons. That takes more than prison; it takes more than slap-on-the-wrist-probation. Drug and alcohol addiction must be broken; discipline and job skills must be learned. When that can be done better, outside of expensive prison walls, that is what we should do. Results matter, public safety matters, taxpayer dollars matter, saving lives and restoring families matter.

Chief Justice William Ray Price, Jr., Supreme Court of Missouri State of the Judiciary Address, February 9, 2011

I. INTRODUCTION

Prison populations in the last decade have increased steadily across the country, with prison facilities running at, or well over, capacity. This trend is not only costly to taxpayers, but it is doing little to curb crime and recidivism rates, which have remained steady throughout the same time period. A greater effort is needed to reduce recidivism and provide

2. See Lauren E. Glaze, Correctional Populations in the United States, 2009, BUREAU JUST. STAT. BULL. 7 (Dec. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf (providing national prison population statistics). From 2000 to 2009, the number of people incarcerated in the United States increased by approximately 800,000 people, rising to roughly 7.2 million inmates in total. Id.; see also Prison Population Trends 2010, MASS. DEPARTMENT CORRECTIONS 8 (Aug. 2011), http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prison-pop-trends-2010.pdf (detailing 2010 prison occupancy levels in Massachusetts). As of 2010, Massachusetts’s correctional facilities were constructed to hold 8,029 inmates, but the total population was 11,566. Id. Populations dipped slightly from 2009 to 2010, but the state is still operating at 144% occupancy. Id.
resources to nonviolent offenders, which will aid in their process of reintegration. The use of modern technologies—such as the use of electronic monitoring—paired with early sentencing measures are a step in the right direction. The use of these technologies provides a cost effective alternative to incarceration and better serves the needs of many nonviolent offenders who are currently incarcerated. Massachusetts currently has the technology and infrastructure in place to make use of these advantages, but sentencing guidelines have made implementation difficult, or almost impossible, to utilize.

The Massachusetts Electronic Monitoring Program (“ELMO”) is responsible for the oversight and monitoring of 2,000 offenders on probation or parole throughout the Commonwealth. As electronic monitoring has expanded and become more technologically advanced over the past decade, the need to greater utilize the ELMO Program as a viable alternative to incarceration has also expanded. Massachusetts has taken recidivism rate from 1999 to 2002 was at 45.4%. Id. The rate between 2004 and 2007 slightly declined to 43.3%. Id.; see also Prison Population Trends 2010, supra note 2, at 44 (detailing recidivism rates in Massachusetts). Recidivism rates or a recidivist is defined as “any criminally sentenced inmate released to the street from a DOC facility during [a given year] who is [re-]incarcerated for a new sentence or violation of parole or probation to a Massachusetts State or County facility or to a Federal facility within three years of his/her release.” Prison Population Trends 2010, supra note 2, at 44.


See RJ Parker, Comment, Home Confinement: Stretching the Limits on Restricting a Probationer’s Liberty, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 133, 133-34 (2008) (illustrating use of electronic monitoring); infra Part III and accompanying text (describing available monitoring equipment). There are varying degrees of electronic monitoring equipment available, ranging from voice recognition systems to measuring the blood alcohol level of an offender. See infra Part II (detailing various technological monitoring systems currently in use).


See ELMO Fact Sheet, supra note 7, at 1-2 (providing Massachusetts ELMO statistics). Massachusetts implemented the ELMO Program in 2001, and it falls under the control of the Massachusetts Probation Department. Id.

See Priscilla J. Smith et al., When Machines Are Watching: How Warrantless Use of GPS Surveillance Technology Violates the Fourth Amendment Right Against Unreasonable Searches, 121 YALE L.J. ONLINE 177, 189-90 (2011) (providing in-depth analysis on how GPS technology works and has changed surveillance); Sarah Shekhter, Note, Every Step You Take, They’ll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex
small steps towards meeting this need by expanding the program to include the use of global positioning systems ("GPS").\textsuperscript{10} With the infrastructure and technology already in place, Massachusetts has the ability to move the program beyond its current use—a punishment device—to a more useful tool that is able to punish as well as rehabilitate and reintegrate offenders, beginning in the early stages of sentencing.\textsuperscript{11}

This Note advocates for the expanded use of the ELMO Program in Massachusetts as a useful tool that will aid in the sentencing and rehabilitation process of non-violent offenders.\textsuperscript{12} Part II describes the varying types of monitoring equipment available to the Massachusetts court system and illustrates the manner in which the equipment functions.\textsuperscript{13} Part III examines the jurisprudence and legislation that has established the appropriate use of electronic monitoring in Massachusetts, which has formed the Commonwealth’s current ELMO program.\textsuperscript{14} Part IV compares the use of electronic monitoring in Massachusetts with other jurisdictions and evaluates the advantages within the respective programs.\textsuperscript{15} Part V concludes and advocates for an expanded use of ELMO in Massachusetts,

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  \item Offenders, 38 HASTINGS CONST. L.Q. 1085, 1089-91 (2011) (describing evolution of electronic monitoring); see also Kucharson, supra note 6, at 664-65 (discussing implementation and success of Ohio’s electronic monitoring program with addition of GPS technology). Roanoke County, Virginia utilizes GPS technology, and a study of that county found that only ten percent of monitored offenders returned to prison. Kucharson, supra note 6, at 664. The study also revealed that hundreds of thousands of dollars were saved with the implementation of the program and that safety concerns from the community were never realized. Id. at 661-63.
  \item See ELMO Fact Sheet, supra note 7, at 1-2 (detailing GPS monitoring of offenders in Massachusetts). Massachusetts expanded the ELMO Program to include GPS monitoring in May of 2005, providing all probation departments with the ability to monitor twenty-four hours a day. Id. at 2. GPS tracking utilizes twenty-four satellites that orbit the earth to determine the offender’s exact position. Id. Courts are able to create inclusion and exclusion zones that will automatically notify authorities if the offender leaves a specific area or enters a prohibited area. Id. at 1; see also BluTag Active, SATELLITE TRACKING OF PEOPLE LLC, http://www.stopllc.com/blutag-active.html (last visited Jan. 5, 2013) (describing how GPS is used to track offenders); Global Positioning Satellite (GPS) Tracking, SENTINEL OFFENDER SERVICES, http://www.senttrak.com/products_and_services.gps/ (last visited Jan. 30, 2013) (explaining GPS technology and how it is used).
  \item See ELMO Fact Sheets, supra note 7, at 1-2 (detailing ELMO Program currently in place in Massachusetts); infra Part V (concluding both community and offenders would benefit from expanded use of monitoring).
  \item See infra Part V (concluding and explaining how offenders benefit from monitoring).
  \item See infra Part II (detailing different levels of equipment available in Massachusetts and how equipment functions).
  \item See infra Part III (detailing current application and sentencing structure used to determine who is appropriate for ELMO use).
  \item See infra Part IV.A (discussing Massachusetts sentencing and implementation of sentencing); infra Part IV.B (evaluating successful monitoring programs in Michigan, Oregon, and Missouri).
\end{itemize}
where considerations for electronic monitoring occurs during the sentencing phase as an option or as an addition to the offender’s sentence.\textsuperscript{16}

II. FACTS: ELECTRONIC MONITORING EQUIPMENT

Massachusetts state courts currently utilize different levels and variations of monitoring devices to control and locate offenders throughout the Commonwealth.\textsuperscript{17} Depending on the nature of the crime committed, state trial courts may order that an offender be monitored by the Massachusetts Probation Department and confined to his or her home by electronic monitoring.\textsuperscript{18} The nature and level of the crime will also determine what type of equipment will be used to monitor the offender.\textsuperscript{19} Detailed below are the various monitoring devices used by Massachusetts’s courts as part of the ELMO Program.\textsuperscript{20}

\textsuperscript{16} See infra Part V (recommending expanded approach to ELMO in Massachusetts).
\textsuperscript{17} See ELMO Fact Sheet, supra note 7, at 1-2 (describing Massachusetts ELMO Program).
\textsuperscript{18} The statute assures that persons with a history of violence will not be placed under electronic monitoring supervision. Id.
\textsuperscript{19} See MASS. GEN. LAWS ch. 211F, § 3 (2010) (requiring offenders to meet several factors prior to becoming eligible for alternative sanctions). High-risk offenders will not be eligible to participate in the ELMO Program. See ch. 211F, § 3. The statute states in part:

No offender shall be eligible for sentencing to a community corrections program who is: (1) convicted of a crime that results in serious bodily harm or death to another person, excluding offenses in which negligence was the primary element, (2) convicted of rape, attempted rape, or sexual assault, or (3) convicted of a crime involving the use of a firearm.

Id. The statute assures that persons with a history of violence will not be placed under electronic monitoring supervision. Id.
A. Voice Verification

Traditionally used with offenders who pose the lowest risk to society, voice verification uses voice-coding technology to recognize an individual’s unique voice patterns over a landline telephone.\(^{21}\) The process is cost-effective and requires no additional equipment to be placed in the offender’s home.\(^{22}\) An automated call system will randomly call an offender during a twenty-four hour period and will require the individual to repeat commands so that his or her voice may be identified.\(^{23}\) If the offender fails to answer the phone call or the voice pattern does not identically match the offender’s file, he or she will be found in violation of probation.\(^{24}\)

B. Radio Frequency

Radio Frequency ("RF") is the simplest form of monitoring and records when an offender enters or leaves his or her home.\(^{25}\) In RF monitoring, a small, lightweight, battery operated bracelet is fastened to the offender’s ankle and sends or receives radio frequency signals to and from a home monitoring unit centrally located inside the offender’s home.\(^{26}\) The

\(^{21}\) See ELMO Fact Sheet, supra note 7, at 1-2 (stating eligibility for participation in ELMO Program); ShadowTrack, SATELLITE TRACKING OF PEOPLE LLC, http://www.stopllc.com/shadowtrack.html (last visited Jan. 20, 2013) (detailing voice verification technology); Voice Verification, SENTINEL OFFENDER SERVICES, http://www.senttrak.com/products_and_services.ivr/ (last visited Jan. 20, 2013) (explaining voice verification technology and how it functions). The voice verification program will make random or scheduled outbound calls to offender, or receive inbound calls to verify the offender is home during specified times set forth by the probation department. ShadowTrack, supra.

\(^{22}\) See ShadowTrack, supra note 21 (describing initial set up process in offender's home).


\(^{24}\) See id.


\(^{26}\) See id. The bracelet, known as a “transmitter,” sends an electronic signal to the home monitoring receiver unit when the offender enters and leaves the home and compares the data with a schedule that has been ordered by the appropriate authority. Id.; see also Monitoring Services, SATELLITE TRACKING OF PEOPLE LLC, http://www.stopllc.com/monitoringservices.html (last visited Jan. 5, 2013) (explaining notification systems available to probation departments). An automated alert will be sent immediately to the probation department if the offender has entered late or leaves home without permission, or attempts to tamper with the bracelet or home unit. House Arrest, supra note 25; see also BluBand, SATELLITE TRACKING OF PEOPLE LLC, http://www.stopllc.com/bluband.html (last visited Jan. 5, 2013) (describing use of
home monitoring unit is attached to a phone line and a power source and records the exact date and time of when the offender enters and leaves his or her home.27 The home monitoring unit will then automatically place a call into a centralized computer system, which notifies authorities of any violations.28 A violation occurs if the offender attempts to remove or tamper with the bracelet or is not at home at the specified time period set forth by the probation department.29

C. Global Positioning Systems

Global Positioning Systems ("GPS") technology, the most advanced form of monitoring, allows a probation department to actively track thousands of offenders per year.30 Real-time data of the offender’s location is sent to authorities from a GPS bracelet that is fastened to the offender’s ankle with a tamper resistant bracelet.31 Contained within the GPS unit is cellular technology that calls into a computer system and provides the probation office with the offender’s information.32 While RF only tracks when an offender is inside his or her home, GPS allows authorities to track the exact position of the offender worldwide.33 Because this technology is so accurate, authorities are able to limit where an offender can travel through the use of “exclusion zones” and “inclusion

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27 See supra note 26 and accompanying text (describing use of RF to monitor offenders).
28 See Monitoring Services, supra note 26.
29 See MASS. GEN. LAWS ch. 268, § 16 (2010) (stating punishment for attempted removal of electronic monitoring equipment). Attempted removal of monitoring equipment by an offender can produce a sentence of up to ten years in prison. Id.
31 See BluTag Active, supra note 10 (detailing GPS tracking systems).
32 See ELMO Fact Sheet, supra note 7, at 1-2 (explaining GPS monitoring technology and how it functions). Real-time data such as speed, position, cell coverage, and battery level are sent to a computer system every few minutes, providing authorities with up-to-date statistics. Id. The probation office does not have to monitor an offender at all times; but rather a computer system stores the information and it can be accessed at anytime. Id. Further, automated alerts notify the probation department if an offender is not home or at work at a specified time. Id.
33 See supra note 10 and accompanying text (explaining GPS technology and functionality).
D. Alcohol Monitoring

For offenders who have a previous history of alcohol related offenses, the Commonwealth has the ability to use electronic monitoring combined with random in-home alcohol testing during the entire length of probation. The Commonwealth may use one of two options: first, the Probation Department may pair the use of RF with an in-home breathalyzer unit that will require the offender to blow into a machine at random throughout the day and will test for alcohol on the offender’s breath; or second, the offender will wear an ankle bracelet that combines the previously discussed RF technology with technology that continuously reads alcohol levels from the perspiration on the offender’s leg. If any level of alcohol is detected, either option will immediately notify authorities of violations through computer software.

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34 See GPS: How it Works, ISecureTRAC Corp., http://www.isecuretrac.com/Services.aspx?p=GPS#howworks (last visited Jan. 20, 2013) (describing exclusion and inclusion zones). Through the use of a website and an online map, a supervising officer can create a “boundary zone,” an area on a map where an offender can or cannot travel (e.g. victim’s home, schools, etc.). Id. If the offender enters one of these prohibited areas, an alert will immediately be sent to authorities and police officers can be quickly dispatched to the location. Id.


37 See Commonwealth v. Galluccio, No. 10-P-327, 937 N.E.2d 522, at *1 (Mass. App. Ct. Nov. 22, 2010) (highlighting use of alcohol monitoring). In one of the more prolific cases in Massachusetts, former Sen. Anthony Galluccio was ordered to perform random alcohol testing in his home. Id. On the first day of the probation period Galluccio was found to have consumed alcohol and authorities were notified when the monitoring equipment sensed the presence of alcohol on his breath. Id. Galluccio’s probation was revoked and he was sentenced to one year in prison. Id.; Maria Cramer, Galluccio Sent Off to Jail for a Year, BOS. GLOBE, Jan. 5, 2010, available at 2010 WLNR 166357 (detailing Galluccio’s violation of probation); see also Commonwealth v. Couch, No. 10-P-834, 941 N.E.2d 725, at *1-2 (Mass. App. Ct. Feb. 17, 2011) (finding offender failed nine in-home sobriety tests). In Couch, the defendant failed to properly wear the Sobrietor mask and ignored alcohol tests when prompted to take them resulting in the
III. EVOLUTION OF ELECTRONIC MONITORING

Although the concept of electronic monitoring has been studied for more than forty years, it was not until the mid-1980s that its use gained notoriety in law enforcement and began to spread across the country.\textsuperscript{38} Massachusetts established its monitoring program in 2001 as an alternative to incarceration and to provide an added layer of supervision to non-violent probationers and parolees.\textsuperscript{39} After a decade of growth, monitoring equipment is now available in every probation office across the state.\textsuperscript{40} Just as monitoring equipment has developed over time, so has the jurisprudence regarding the use and application of monitoring devices in the Commonwealth.\textsuperscript{41} Applied as an alternative to incarceration, the Massachusetts Supreme Judicial Court ("SJC") was forced to interpret the applicable legislation and set forth monitoring and confinement limitations in their sentencing and parole guidelines.\textsuperscript{42}

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\item \textsuperscript{38} See Note, Anthropotelermetry: Dr. Schwitzgebel’s Machine, 80 HARV. L. REV. 403, 403-05 (1966) (describing first uses of electronic tracking devices). In 1964, Dr. Richard Schwitzgebel first tracked nonviolent, volunteer juvenile offenders in Cambridge, Massachusetts to learn about the behavioral patterns of individuals being monitored. \textit{Id.} at 403-04. Schwitzgebel began by using a tracking device that "consisted[ed] of two containers, each about the size of a thick paperback book." \textit{Id.} at 403. One container concealed a transmitter that automatically emitted radio signals, which then communicated with a receiver. \textit{Id.} The other contained a battery that powered the transmitter. \textit{Id.}; see also Sarah Shekhter, supra note 9, at 1089-91 (providing history of electronic monitoring). Electronic monitoring remained dormant until almost twenty years later, when in 1983 Judge Jack Love of Albuquerque, New Mexico’s Second Judicial District placed a monitoring device on a defendant who violated probation. See Shekhter, supra note 9, at 1089-90. Judge Love was inspired by a Spiderman comic where the villain placed a tracking device on Spiderman’s ankle. \textit{Id.} at 1089. The unique story and motive gained national attention, and electronic monitoring became increasingly popular across the country. \textit{Id.} at 1090-91.
\item \textsuperscript{39} See ELMO Fact Sheet, supra note 7, at 1-2 (describing evolution of Massachusetts electronic monitoring program). Under Governor Mitt Romney, Massachusetts expanded ELMO to include GPS in 2005, providing the Probation Department with a twenty-four hour monitoring option. See \textit{id.} at 2; see also iSecureTrac is Awarded Massachusetts Contract for GPS Electronic Monitoring of Offenders, iSECURETRAC CORP. (Jan. 27, 2009), http://www.isecuretrac.com/About.aspx?p=NewsPress (follow “View All Items” hyperlink) (demonstrating continued effort by Massachusetts to find best technology). In 2009, Massachusetts replaced an outdated GPS system with new technology. See iSecureTrac is Awarded Massachusetts Contract for GPS Electronic Monitoring of Offenders, supra.
\item \textsuperscript{40} See ELMO Fact Sheet, supra note 7 (detailing ELMO Program in Massachusetts).
\item \textsuperscript{41} See \textit{infra} notes 43-61 and accompanying text (providing case law and statutes defining use of monitoring equipment).
\item \textsuperscript{42} See \textit{infra} notes 47-61 and accompanying text (discussing sentencing measures).
\end{itemize}
In *Commonwealth v. Morasse*,\(^{43}\) the SJC was faced with the question of whether confinement to one’s home could be applied as credit for time served once sentencing took place.\(^{44}\) The court held that the term “confinement” does not pertain to being confined to one’s home and refused to correct mittimus for the defendant who had spent nearly three years on electronic home monitoring awaiting trial.\(^{45}\) The defendant argued that chapter 279, section 33A of the Massachusetts General Laws provides that credit shall be given for time spent held in confinement and that being confined to one’s home is within the meaning of the law.\(^{46}\) The court, noting other jurisdictions, disagreed and interpreted the meaning of “confinement” to “refer solely to confinement in a jail, prison, or other comparably restrictive institutional setting.” (emphasis added).\(^{47}\) The court further reasoned that there was no electronic monitoring program at the time section 33A was enacted; therefore, it was not the intent of the legislature to include such a “far less restrictive” means of confinement within the statute.\(^{48}\)

Two years after the *Morasse* ruling, the SJC in *Commonwealth v. Donohue*\(^{49}\) upheld the actions of the Middlesex County Sheriff’s Office releasing an inmate to the “confines of [his] home with a GPS monitoring bracelet” before the committed portion of his sentence was served.\(^{50}\) The court reasoned that serving the remaining committed portion of a sentence

\(^{43}\) 842 N.E.2d 909 (Mass. 2006).
\(^{44}\) Id. at 912-13 (interpreting historical definition of confinement).
\(^{45}\) Id. at 911-12 (providing facts and holding of case).
\(^{46}\) See id. at 912 (detailing defendant’s argument); see also MASS. GEN. LAWS ch. 279, § 33A (2010) (defining credit for time served while awaiting trial). The statute states in full:

> The court on imposing a sentence of commitment to a correctional institution of the commonwealth, a house of correction, or a jail, shall order that the prisoner be deemed to have served a portion of said sentence, such portion to be the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial.

ch. 279, § 33A.
\(^{48}\) See *Morasse*, 842 N.E.2d at 915 (noting section 33A was enacted in 1955).
\(^{49}\) 892 N.E.2d 718 (Mass. 2008).
\(^{50}\) See id. at 722, 725-27 (explaining court’s holding).
in the GPS program was authorized by statute.\textsuperscript{51} Furthermore, the 
Donohue Court distinguished this holding from Morasse, stating that “\textsuperscript{52}unlike pretrial confinement to one’s home, an inmate participating in the 
GPS program remains at all times under the supervision of the sheriff. . . .”

During 2006, the same year the SJC decided Morasse, the 
Massachusetts Legislature also enacted chapter 265, section 47 of the 
Massachusetts General Laws, providing that all persons who are convicted 
of a designated sex offense must wear a GPS device for the duration of 
their probation.\textsuperscript{53} In Commonwealth v. Cory,\textsuperscript{54} the SJC was called upon to 
consider if section 47 applied to offenders who were placed on probation

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\item[51]See id. at 727; see also MASS. GEN. LAWS ch. 127, §§ 48, 49, 49A (2010) (providing 
legislative authorization for inmate GPS program). It is mandated that correctional facilities 
provide and maintain educational, training, and employment programs for inmates. See ch. 127, 
§ 49. Section 49 also states:

\begin{quote}
The commissioner of correction, or the administrator of a county correctional facility, 
subject to rules and regulations established in accordance with the provisions of this 
section, may permit an inmate who has served such a portion of his sentence or 
sentences that he would be eligible for parole within eighteen months to participate in 
education, training, or employment programs established under section forty-eight 
outside a correctional facility. . . .
\end{quote}

ch. 127, § 49 (emphasis added).

\item[52]See Donohue, 892 N.E.2d at 728.
\item[53]MASS. GEN. LAWS ch. 265, § 47 (2010) (providing mandatory use of GPS monitoring for 
sexual offenders). The statute states in part:

\begin{quote}
Any person who is placed on probation for any offense listed within the definition of 
“sex offense”, a “sex offense involving a child” or a “sexually violent offense”, . . . 
shall, as a requirement of any term of probation, wear a global positioning system 
device, or any comparable device, administered by the commissioner of probation, at 
all times for the length of his probation for any such offense.
\end{quote}

ch. 265, § 47. Additionally, chapter 209A, section seven of the Massachusetts General Laws 
states a court may require GPS use as an alternative to incarceration for violations of abuse 
prevention orders. MASS. GEN. LAWS ch. 209A, § 7 (2012). The statute states in part:

\begin{quote}
Where a defendant has been found in violation of an abuse prevention order under this 
chapter or a protection order issued by another jurisdiction, the court may, in addition 
to the penalties provided for in this section after conviction, as an alternative to 
incarceration and, as a condition of probation, prohibit contact with the victim through 
the establishment of court defined geographic exclusion zones including, but not 
limited to, the areas in and around the complainant’s residence, place of employment, 
and the complainant’s child’s school, and order that the defendant to wear a global 
positioning satellite tracking device designed to transmit and record the defendant’s 
location data.
\end{quote}

ch. 209A, § 7.
\item[54] 911 N.E.2d 187 (Mass. 2009).
\end{itemize}
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after, but were sentenced prior to, the enactment of the statute. The Cory court found that the statute did apply to this specific type of defendant, but it would be in violation of ex post facto laws if applied. Because the defendant in Cory was sentenced prior to the enactment of the statute and was not in violation of his probation, adding the mandatory GPS requirement would be punitive in nature and therefore unconstitutional.

In 2007, former Governor Mitt Romney signed legislation providing courts with the option of requiring persons found to be in violation of a 209A Abuse Prevention Order to be monitored by a GPS device. The legislation was designed to provide an increased security to further protect victims from abuse. With the accuracy of GPS technology and the ability to locate an offender, courts are now able to limit where an offender can travel. If the offender travels to a prohibited area, authorities are now immediately notified and are able to provide the victim with greater protection.

55 See id. at 189 (identifying issue).
56 Id. at 197-98 (discussing reasoning of the court); see also MASS. CONST. pt. 1, art. XXIV (defining ex post facto laws). The Massachusetts prohibition on ex post facto laws states: “Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.” MASS. CONST. pt. 1, art. XXVI.
57 See Cory, 911 N.E.2d at 197 (stating holding of case).
58 See Massachusetts GPS Law to Protect Domestic Violence Victims, GOVT TECH. (Jan. 4, 2007), http://www.govtech.com/gt/articles/103129 (articulating expanded use of monitoring in Massachusetts). The legislation was spearheaded by former Lieutenant Governor Kerry Healey who wanted to provide abuse victims with greater protections. Id.; see also Julie M Hofmeister, Permission to Protect: Massachusetts Pioneering Law Requiring Electronic Monitoring for Civil Protective Order Violators Advances Safety for Domestic Violence Victims, SELECTED WORKS 12 (Jan. 2008), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=JulieHofmeister (articulating greater need for victim protection).
59 See Hofmeister, supra note 58, at 12 (highlighting abuse victims’ needs). Quoting then Lieutenant Governor Kerry Healy:

This law . . . provides a much-needed new level of protection to victims of domestic abuse, too many of whom continue to be victimized even after successfully obtaining a restraining order against their abusers. Today in Massachusetts, scores of victims are driven from their homes, their jobs, from their lives, by batterers who repeatedly violate existing court orders. This new ability to exclude offenders from areas frequented by the victims will not only protect them from further abuse . . . (but) it will give them their lives back.

Id. (alterations in original).
50 See ELMO Fact Sheet, supra note 7, at 1-2 (articulating use of “inclusion zones” and “exclusion zones”).
51 See id. (stating that computer software will automatically alert central command center).
The expansion of the GPS program statutorily in 2007, followed by the Cory decision in 2009, indicates a recent willingness and understanding by the legislature and the courts that new technology can serve the dual purpose of punishment and protection for victims of abuse.\textsuperscript{62} The focus has begun to shift, and the courts are realizing that electronic monitoring equipment can be used as a multifaceted tool that not only protects the community at large, but also rehabilitates the offender through a controlled release.\textsuperscript{63}

IV. ANALYSIS

Many non-violent offenders are in need of assistance and rehabilitation that cannot be achieved in prison.\textsuperscript{64} Release conditions such as electronic monitoring, coupled with community outreach programs, can provide the support offenders need to get back on their feet.\textsuperscript{65} While monitoring and confinement to one’s home still serves as a punishment, it also provides the offender with structure and opportunities to receive help.\textsuperscript{66} The use of home confinement allows an offender to receive support from family and friends, as well as receive training and education necessary to secure and maintain employment.\textsuperscript{67}

A. Front Door: Judicial Discretion and the Use of Alternative Sanctions During the Sentencing Phase

Trial judges in Massachusetts are afforded a high level of judicial discretion when imposing a sentence but are often limited by legislatively

\textsuperscript{62} See supra notes 54-61 and accompanying text (discussing Cory holding and new legislation providing option of GPS for Abuse Prevention Order violators).

\textsuperscript{63} See supra note 58 and accompanying text.


\textsuperscript{65} See infra Part IV.B and accompanying text (discussing different states’ approaches to reintegration).


\textsuperscript{67} See infra Part IV.B (discussing benefits of supervision programs in Michigan, Oregon, and Missouri).
enacted guidelines. Realizing a need for reform, the Commonwealth created the Massachusetts Sentencing Commission (“MSC”) in 1996. The MSC’s proposed reforms have not yet been adopted as law, but “as a practical matter, [the] guidelines are being used by prosecutors, defense attorneys, probation departments and judges every day.” Those in favor of the MSC argue that the goal is to “promote truth in sentencing” while opponents argue that the MSC’s “one size fits all” policy, along with mandatory minimums, result in disproportionately severe sentences for non-violent offenders, which does little to address the real needs of the offenders.

1. Mandatory Minimums

In Massachusetts, mandatory minimums for certain offenses, such as drug offenses, have been in place for over thirty years. The Massachusetts Legislature enacted the harsh minimums for drug offenses as a method to deter and thwart the use of drugs. Not only are the

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70 See D. Dunbar Livingston & Philip S. Nyman, Sentencing and Alternative Dispositions, MASS. SUPERIOR CT. CRIM. PRACT. MANUAL § 22.4.1 (2006) (stating that sentencing guidelines are voluntary). “The guidelines have become a starting point for meaningful discussion about sentencing, and a judge will likely sentence within their framework.” Id.

71 See MASS. GEN. LAWS ch. 211E, § 2(5) (2010) (articulating need for “truth in sentencing”). The statute promotes truth in sentencing so “that all parties involved in the criminal justice process, including the prosecution, the defendant, the court, the victim and the public, are aware of the nature and length of the sentence and its basis.” ch. 211E, § 2(5); see also Massachusetts, FAMILIES AGAINST MANDATORY MINIMUMS, http://www.famm.org/state/Massachusetts.aspx (last visited Jan. 20, 2013) (offering opponent’s opinions). Families Against Mandatory Minimums (“FAMM”) is a nonprofit organization that fights for “fair and proportionate sentencing.” Massachusetts, supra.


73 See, e.g., ch. 94C, § 32B(b) (applying two and one-half year minimum sentence for second offense); ch. 94C, § 32E(b)(2) (adopting five year minimum sentence for trafficking more than twenty-eight grams of Class B substance); ch. 94C, § 32I(a) (setting forth one year minimum for knowingly selling drug paraphernalia). But see Act of Aug. 6, 2010, ch. 256, §§ 67-72, 2010 Mass. Acts 808-10, 808-10. (amending Massachusetts sentencing for some drug offenders). Effective May 2012, some drug offenders serving time in the house of corrections may be eligible
Alternative sentencing guidelines are outdated, but studies have also shown that the mandatory minimums have done little to curb drug use. While it is apparent that non-violent offenders—especially drug offenders—need to be punished, it is becoming even more apparent that these offenders need treatment and support.

Realizing the need for reform, Massachusetts correctly amended chapter 94C of the Massachusetts General Laws and reduced school zone offenses from one thousand feet to three hundred feet on August 2, 2012. School zone offenses still require a mandatory sentence but now allow judges more discretion. The amendment not only provides judges with more discretion, but also allows for offenders to be eligible for parole after serving just half of their sentence under the supervision of a GPS bracelet.

for parole after serving half of their sentence. This is the first time in over 30 years that mandatory minimums have been amended and seems to show that Massachusetts is willing to take a different look at its sentencing policies. See generally Massachusetts, supra note 71. While this is a step in the right direction, offenders serving time in state prisons are not eligible for parole and must continue to fully serve mandatory minimums. Id.

Any person who violates the provisions of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I while in or on, or within 300 feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school if the violation occurs between 5:00 a.m. and midnight, whether or not in session, or within one hundred feet of a public park or playground shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years.

See David C. Leven, Our Drug Laws Have Failed—So Where is the Desperately Needed Meaningful Reform?, 28 FORDHAM URB. L.J. 293, 304-06 (2000) (explaining with statistics better results of drug treatment programs for offenders rather than incarceration). Studies have shown that incarcerated drug offenders are three times more likely to return to prison than offenders who are provided adequate treatment outside of incarceration. Id. at 304-05.

See MASS. GEN. LAWS ch. 94C, § 32J (2010) (detailing school zones and conditions). The amended portion of the statute reads in part:

Any person who violates the provisions of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I while in or on, or within 300 feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school if the violation occurs between 5:00 a.m. and midnight, whether or not in session, or within one hundred feet of a public park or playground shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years.

ch. 94C, § 32J; see also statutes cited supra note 73 (outlining mandatory minimums for various drug offenses).

See Michael Levenson, Patrick to Sign Crime Bill, Calls it Imperfect, BOS. GLOBE, Aug. 1, 2012, available at 2012 WLNR 16088868 (stating imperfections of new bill). Governor Patrick stated that "[t]he bill is] not a perfect bill, it's not a comprehensive bill, but it does some good." Id.

See MASS. GEN. LAWS ch. 94C, § 32J (2010) (setting forth eligibility and conditions for parole). The statute states in part:
The changes allow offenders to receive treatment outside of incarceration, thus better serving the offender and alleviating the taxpayers of Massachusetts of prolonged, expensive prison stays.\textsuperscript{79}

The use of mandatory minimums has been debated in and out of courtrooms since their inception.\textsuperscript{80} These sentencing guidelines bind judges and leave no room for discretion as to what sentence is suitable for specific offenders.\textsuperscript{81} Drug offense minimums were enacted well before programs such as ELMO existed.\textsuperscript{82} The ELMO Program now provides judges with an alternative to incarceration that was previously unavailable to them when the minimum sentencing guidelines were implemented.\textsuperscript{83} Allowing an offender to serve a portion of, if not the entire, sentence confined to their home is a valuable asset to the courts and correctional system.\textsuperscript{84} Not only does the ELMO Program keep inmate populations down, saving tax payers millions of dollars in the process, but treatment programs available outside of prisons are better suited to treat the needs of offenders, helping in the long run to reduce the number of repeat offenders.\textsuperscript{85}

While drug offenders make up one of the largest group of

\begin{quote}
A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.
\end{quote}

ch. 94C, § 32J.

\textsuperscript{79} See Office of Community Corrections, supra note 64 (describing programs available to offenders who are not incarcerated); see also Brian R. Ballou, "Melissa’s Bill” Signed in Nearly Private Ceremony; Some Supporters Feel Left Out at End, BOS. GLOBE, Aug. 3, 2012, available at 2012 WLNR 16268009 (“That provision will help reduce what the governor has branded the warehousing of criminals, while saving the state $2.5 million annually.”).


\textsuperscript{81} See supra notes 72-73 and accompanying text (setting forth mandatory guidelines judges must follow when imposing sentence).

\textsuperscript{82} See supra notes 72-73 and accompanying text (summarizing Controlled Substance Act); see also ELMO Fact Sheet, supra note 7, at 1-2 (detailing ELMO Program in Massachusetts instituted thirty years prior to mandatory minimums).

\textsuperscript{83} See ELMO Fact Sheet, supra note 7, at 1-2 (explaining that ELMO Program established in 2001; Massachusetts, supra note 71 (finding mandatory drug minimums implemented in 1971).

\textsuperscript{84} See infra Part IV.B (discussing benefits of monitoring upon release from incarceration).

\textsuperscript{85} See Office of Community Corrections, supra note 64 (describing programs available to offenders who are not incarcerated). Available programs include educational programs, job training, substance abuse help, and family support programs. \textit{Id.}
incarcerated, non-violent offenders in Massachusetts, the ELMO Program should be considered for all groups of non-violent offenders. The ELMO program provides offenders the opportunity to seek help from various treatment programs; however, some argue that the more important aspect of the program is the availability of support from family and friends to the released inmates. Incarcerated offenders are grouped into cells and isolated with others who have committed like crimes, reducing any chance of detaching from the very people who engage in similar behavior. Supervised release in the ELMO Program assures that the offenders abstain from the activities that put them in their current situation by allowing them to leave home only for religious activities, work, treatment, and specific programs that encourage the involvement of family and friends who can help guide them on the right path.

2. Massachusetts Sentencing Commission Guidelines

The MSC was formed under chapter 211E of the Massachusetts General Laws with the objective to promote “truth in sentencing.” The MSC is comprised of fifteen members representing many different perspectives on the criminal justice system. Over time, the MSC has

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86 See January 1, 2009 Inmate Statistics, supra note 74 (analyzing statistics for offenders serving time under mandatory drug offenses).


88 See Martin H. Pritikin, Is Prison Increasing Crime?, 2008 WIS. L. REV. 1049, 1054-56 (2008) (describing inmate experience). While the effect of inmates “rubbing elbows” in prison cannot be precisely determined, studies have shown that criminals learn the “technical know-how of criminality, [and] also internalize the norms of the prison’s antisocial subculture.” Id. at 1055.

89 See ELMO Fact Sheet, supra note 7, at 1-2 (describing Massachusetts ELMO Program).


91 See ch 211E, § 1 (establishing Massachusetts Sentencing Commission). Illustrating the diverse nature of the commission, the statute reads in part:

[The Commission] . . . shall consist of nine voting members and six non-voting members. The governor shall appoint the voting members of the commission, and shall designate one member as chairman. Three of the voting members shall be present district court, Boston municipal court or superior court department judges, selected from a list of seven judges recommended by the chief justice of the trial court, and at least one district court judge or Boston municipal court and one superior court judge shall be appointed. Two of the voting members shall be assistant district attorneys, selected from a list of seven assistant district attorneys recommended by the
developed a grid system to aid judges in imposing sentences. While the system has had a positive effect on sentencing practices in Massachusetts and many other states, it only addresses the first step. Massachusetts needs to establish a collaborative, organized effort to provide support and treatment that starts in the early sentencing phase, continuing through the incarceration phase, and ending well beyond the time of release.

B. Back Door: Reintegration and the Advantages of Supervised Release

The reintegration of past offenders as a productive members of society not only benefits the offender, but also benefits the community as a whole. Current research shows that recidivism rates across the country vary, but collectively remain at an unacceptably high level. While most
states would not argue with improved results, only a few have made considerable efforts to implement change.\(^{97}\)

In a 2011 study released by the Pew Center, three states—Michigan, Oregon, and Missouri—have had the best results in reducing recidivism over the last decade.\(^{98}\) Prior to the introduction of their respective programs aimed at combating the issue, repeat offenders in all three states made up a large portion of the incarcerated population, making it increasingly clear that a greater effort was needed to curb recidivism.\(^{99}\)

The state legislatures evaluated both the budget problem related to rising prison populations as well as the community safety issue when considering the early release of convicted criminals.\(^{100}\) All three plans to combat recidivism that were implemented by these states hinge on individualized needs, beginning at sentencing and continuing well beyond the offender's release from prison.\(^{101}\) Supervision levels and conditions are determined before an offender enters prison, and the use of monitoring and treatment has played a major role in the programs' success.\(^{102}\) The results have shown decreased prison populations, fewer inmates returning to prison, and reduced government spending.\(^{103}\)

1. Michigan Prisoner Reentry Initiative

Overcrowded prisons, shrinking budgets, and unacceptable recidivism rates caused the Michigan legislature to realize that it needed radical changes to transform its correctional system.\(^{104}\) In 2003, with...
bipartisan support, Michigan launched the Michigan Prisoner Reentry Initiative ("MPRI") with a mission to reduce crime, enhance public safety, and provide necessary services and tools to each offender to ease the successful reintegration into the community.\textsuperscript{105} The program is broken down into three phases: Getting Ready, Going Home, and Staying Home.\textsuperscript{106} Each phase highlights the need for individualized support and training to better assess the needs of the offender.\textsuperscript{107} The information and data collected during the first two stages determines the level of support and supervision needed once the offender is released, thereby ensuring a smoother and more successful reentry into society.\textsuperscript{108}

2. Oregon's Evidence Based Practice

Oregon's highly regarded, evidence-driven response to reducing recidivism has been greatly effective across the state.\textsuperscript{109} Legislation now

Michigan spent $1.6 billion per year on its correctional program, nearly one-fifth of the state's general fund. \textit{Id.} Yet, recidivism rates in Michigan from 1999-2002 averaged thirty-eight percent. \textit{Id.} at 10.\textsuperscript{105} See \textit{id.} at 21 (detailing reasons behind formation of MPRI). The MPRI was launched in 2003 and expanded to a statewide program in 2008. \textit{Id.; see also 2010 Progress Report, MICH. PRISONER REENTRY INITIATIVE} 4, http://www.michigan.gov/documents/corrections/MPRI_2010_Progress_Report_343664_7.pdf (last visited Jan. 21, 2013) (analyzing progress of MPRI since its inception).\textsuperscript{106} See \textit{The MPRI Model, MICH. PRISONER REENTRY INITIATIVE} 4-5 (Jan. 2006), http://www.michigan.gov/documents/THE_MPRI_MODEL_1005_140262_7.pdf (detailing "Three Steps to Success"). The first phase, Getting Ready, "starts at the reception center with a comprehensive assessment of each prisoner's risk factors, needs, and strengths," and begins the process of preparing the offender for life after prison. \textit{2010 Progress Report, supra note 105}, at 12 (emphasis added). The second step, Going Home, begins about two months prior to the offender's release, and evaluates progress to provide the necessary structure (jobs, treatment, education) needed to transition back into the community. \textit{Id.} The final phase, Staying Home, requires the offender to be released mid-week and to immediately meet with parole officer. \textit{Id.} at 13.\textsuperscript{107} See \textit{2010 Progress Report, supra note 105}, at 9-11 (recommending each phase address individualized needs of offenders).\textsuperscript{108} See \textit{id.} at 20-25 (providing resources to offenders once needs have been addressed). The MPRI identifies and addresses needs in the following areas: employment, housing, substance abuse treatment, transportation, family support, victim support, healthcare, life skills, and mentoring. \textit{Id.} at 21. The services are provided through the Michigan Department of Corrections that, partnered with various other state departments, develop focused community teams to address the needs of specific communities. \textit{Id.}\textsuperscript{109} See \textit{State of Recidivism: The Revolving Door of America's Prisons, supra note 96}, at 20 (discussing success of Oregon's evidence-based approach to reducing recidivism). In 2004, Oregon recorded recidivism rates of slightly less than twenty-three percent, the lowest recidivism rates among all reporting states. \textit{Id.} It was not only the lowest reported rate, but between 1999-2004 it was also the greatest decline. \textit{Id.}
mandates that any correctional facility or treatment program receiving state funds be evidence-based in design.\footnote{See id. at 20 (detailing legislation requiring correctional facilities to develop evidence-based practices to receive funding); see also OR. REV. STAT. § 182.525 (2010) (providing specific requirements). The statute states in part: “[a]n agency as defined in ORS 182.515 shall spend at least [seventy-five] percent of state moneys that the agency receives for programs on evidence-based programs.” § 182.515.} These reforms require support and cooperation from all levels of government, beginning with the legislature and ending with the probation officers who are charged with supervising the offenders.\footnote{See State of Recidivism: The Revolving Door of America’s Prisons, supra note 96, at 20 (detailing collaborative effort needed for successful program).} Because the program relies on evidence from individual results, the program is continually modified to ensure its effectiveness.\footnote{See id. at 20 (examining how evidence changes manner in which offenders are supervised).}

3. Missouri Reentry Program

Like most states in 2004, Missouri was faced with prison overcrowding and shrinking budgets, but their largest concern was a recidivism rate that ranked third highest in the nation.\footnote{See id. at 20 (discussing subpar recidivism rates in Missouri). In 2004, Missouri recorded a recidivism rate of nearly fifty-five percent, an increase of twelve percent from 1999 to 2004. Id. at 22-23.} Realizing that building more prisons would not adequately address the issue; then-governor Matt Blunt established the Missouri Reentry Program (“MRP”).\footnote{See id. at 20 (discussing unwillingness to build more prisons in Missouri to address prison populations due to costs).} Like Oregon, the MRP is evidence-based in its design and categorizes offenders to set supervision levels.\footnote{See id. at 20 (discussing evidence-based practice in Oregon); see also Tom Clements et al., The Missouri Re-Entry Process, 2004 J. INST. JUST. & INT’L STUD. 127, 130-31 (2004) (detailing how supervision levels determined). The Missouri Department of Corrections creates an offender-specific Transition Accountability Plan (“TAP”) that provides reliable information to those helping to assure that the offender receives the necessary support and supervision. Clements, supra, at 130-31.} Once released back into society, offenders face a number of obstacles, many of which the Missouri Department of Corrections recognized it could not handle alone.\footnote{See Missouri Reentry Process, MO. DEPARTMENT CORRECTIONS, http://doc.mo.gov/mrp/mrp.php (last visited Jan. 21, 2013) (discussing challenge for one agency to handle alone). “Offenders leaving prison have many challenges that create barriers to their success, such as substance abuse issues, lack of family support, mental health issues, medical issues, lack of education and skills, no housing, and many more.” Id.} To address these needs, MRP Steering Teams comprised of representatives from various state agencies are established to focus on a particular
These teams are responsible for providing the tools and support to each individual offender to ensure a successful return to their communities.

C. Massachusetts: Implementing Change

Each of the aforementioned three states has a slightly different approach to their prisoner release programs, but they all rely on cooperation between government branches and state agencies. All three plans also depend on new monitoring technologies to better supervise and control the offenders once released back into the community. This cooperation and monitoring, paired with effective treatment programs received during incarceration and after release, has created positive results, lower recidivism rates, decreased spending, and safer communities.

Massachusetts has not been entirely complacent in this regard and has taken great steps to aid in the reintegration of offenders by establishing the Office of Community Corrections (“OCC”) in 1996. Like those in

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117 See id. (listing various state agencies comprising steering teams). The teams consist of:

- State representatives from the Department of Corrections, Department of Mental Health, Department of Revenue, Department of Elementary and Secondary Education, Department of Social Services, Office of the State Court Administrator, Department of Economic Development, Department of Public Safety, Department of Transportation and the Department of Health and Senior Services. Local community representatives include law enforcement, the faith-based community, crime victims, and service/treatment providers.

118 See id. (discussing level of support needed post release); see also Clements, supra note 115, at 130-33 (detailing needs and support provided to offenders during incarceration and post-release).

119 See supra notes 104-108 and accompanying text (describing similarities and differences between programs in Michigan, Oregon, and Missouri).


121 See supra notes 104-114 and accompanying text (discussing positive results of individualized programs).

122 See Office of Community Corrections, supra note 19 (discussing goals and establishment
Michigan, Oregon, and Missouri, the Massachusetts program’s goal is to reduce prison overcrowding and enhance public safety by providing alternative and intermediate sanctions designed to rehabilitate offenders. Data suggest that the program has had a positive effect, but it has not done enough to fully meet its goals. Prisons remain overcrowded and recidivism rates remain high in Massachusetts; therefore, a greater collaboration across all levels of the criminal justice system is needed before there will be any significant progress made in the rehabilitation of offenders.

V. CONCLUSION

Nonviolent offenders will continue to place a heavy burden on society and the taxpayers of Massachusetts if the Commonwealth continues to accept the status quo in corrective sentencing and procedures. Decades of inmate population growth and prison expansion have failed to reduce recidivism rates in Massachusetts, while also failing to provide the necessary treatment and support that many nonviolent offenders need to reintegrate into society. Advancements in current monitoring technologies coupled with the implementation of programs such as the ELMO Program and the OCC have Massachusetts poised for a shift in its sentencing approach. History has shown that such a shift is vital for nonviolent offenders to learn the necessary lessons required to keep them from reoffending.

Punishment is part of the criminal justice process, but treatment and support from family, friends, and the community is essential toward the end goal of eliminating recidivism. Successful programs implemented within the last ten years in Michigan, Oregon, and Missouri show that when a greater individualized approach is used, it is met with success. The results have placed less of a burden on tax payers, increased public safety, and have provided nonviolent offenders with the education and training necessary to obtain a job, have families, and remain free from the confines of prison. Massachusetts already has the infrastructure, treatment programs, and monitoring equipment in place; it simply needs the

\[^{123}\text{See } \text{id. (stating goal is providing “efficient criminal justice sentencing and specifically address prison overcrowding”)}; \text{see also } \text{MASS. GEN. LAWS ch. 211F, § 2 (2010) (detailing OCC eligibility requirements).}\]

\[^{124}\text{See } \text{Kohl, supra note 95 (providing recidivism data for Massachusetts).}\]

\[^{125}\text{See } \text{Prison Population Trends 2010, supra note 2, at 8 (stating Massachusetts correctional facilities operating at 144% capacity).}\]
cooperation necessary from all levels of government for a stronger program to be implemented.

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