Executive Summary

This report seeks to answer a seemingly straightforward question: Does the Commonwealth of Massachusetts need more prison space in order to reduce crime and improve public safety?

To answer that question, we need to consider three others:

1) How much prison space do we have now?
2) How have sentencing practices changed to increase the incarceration rate?
3) Are we filling the prisons with people who don't belong there?

PRISONS: STILL OVERCROWDED AFTER A DECADE OF EXPANSION

In 1985, the state faced a major problem: prison overcrowding. From 1975-1985, the state inmate population had more than doubled, rising from 2,047 to 5,100—creating major overcrowding problems in facilities designed for 3,500. In county jails and Houses of Correction, the inmate population rose by 89 percent, reaching 3,700 inmates in facilities built to hold 2,700.

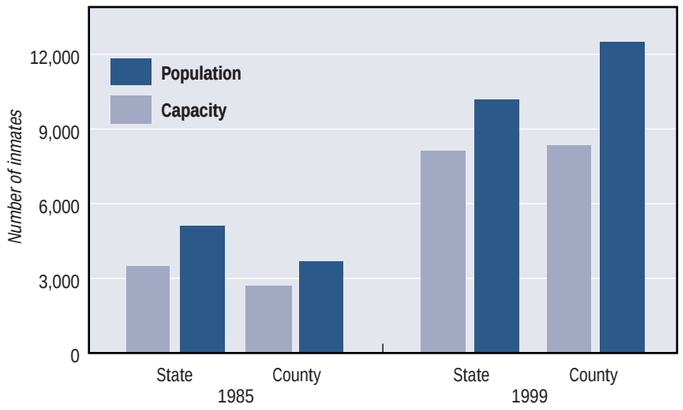
Since 1985, the state has poured nearly $1.5 billion into new and replacement facilities, increasing capacity to 8,130 state and 8,356 county inmates. That building boom culminated last November when the Department of Correction opened the Souza-Baranowski Correctional Center, a new 1,024-bed maximum-security prison—the single largest institution the department has ever built and its first new maximum-security facility since 1956.

Despite this massive public investment in expanded prison capacity, the overcrowding problem has by no means been solved. As of February, the state Department of Correction had custody of more than 10,000 offenders (in facilities designed for 8,130), while the counties had custody of more than 12,000 inmates (in facilities designed for 8,356). (See chart 1). Even after the major expansions in the past 14 years, DOC today is operating at 25 percent above capacity, the counties at 50 percent beyond their design limits.

This phenomenon—of major investments in expanded prison facilities matched by equally large increases in inmate populations—has not been unique to Massachusetts. Nationally, state corrections budgets almost tripled—from $7 billion to more than $20 billion—from 1986 to 1996. At the same time, the number of inmates in state and federal prisons quadrupled from 1970 to 1990. In 1985, state, federal and local prisoners numbered 744,000; today, that total is 1.8 million.

Incarceration rates vary too widely across the country to offer much guidance on whether Massachusetts is using its prison resources wisely. Massachusetts has the second-highest incarceration rate in New England (278 adults behind bars per 100,000 population) but falls far behind the average of 506 per 100,000 in southern states. Washington, D.C. imprisons a whopping 1,682 per 100,000 residents.

Chart 1: **PRISON OVERCROWDING 1985 AND TODAY**



Source: "A Balanced Plan to End Prison Overcrowding," 1985; Massachusetts Department of Correction countsheet, February 22, 1999.

In the last 15 years, Massachusetts, like much of the country, has made a massive commitment to prison expansion. But to answer the question of whether we need still more prison space to serve our crime-control goals, we must look more closely at the sentencing policies that are directing so many convicted criminals to serve time behind bars and at what we know about the people already serving time in the state's correctional facilities.

SENTENCING: AN UNFINISHED REVOLUTION

Until the 1970s, sentencing policies in Massachusetts and across the country were based on a rehabilitative model that gave judges wide discretion in setting the length of sentence for almost all crimes. These sentencing policies also offered inmates rewards for good behavior in the

form of sentence reductions for "good time" (rule-abiding behavior in the prison) and "earned good time" (participation in education, job training or substance-abuse treatment) and the possibility of "early" release on parole. Punishment was indeterminate (largely left to the discretion of the judge) and release was discretionary (subject to reduction for good behavior and parole release).

In Massachusetts, indeterminate sentencing took its most extreme form in the so-called "Concord sentence." A Concord sentence typically consisted of a relatively long nominal sentence, but with parole eligibility at just one-tenth of the stated term. Even the more conventional state-prison sentence contained large elements of indeterminacy and discretion that could substantially reduce the amount of time served by the inmate. A sentence of seven-to-ten years could translate, in practice, to as little as three years in prison, and almost always meant no more than seven. Such discrepancies between sentences imposed and time served became a lightning rod for public criticism when crime rates climbed in the 1970s and 1980s.

This led to a push for "mandatory minimums"—sentences that require a certain amount of prison time be served by every person convicted of a crime, with no exceptions. In Massachusetts, the first mandatory minimum was the Bartley-Fox gun law, whose passage in 1973 created a mandatory one year of jail time added onto the punishment for any other crime committed while in possession of a firearm. That was followed in the 1980s by mandatory minimums for drunk driving and, finally, a series of penalties for drug dealing that are not only irreducible but among the most severe in the nation.

More systematic sentencing reform finally came to Massachusetts in 1993, with the passage of the law known as the "Truth in Sentencing Act." That law abolished the Concord sentence (for crimes taking place after July 1, 1994) and eliminated statutory, or automatic good time. The act also eliminated the "early release" aspect of parole, setting parole eligibility at the full minimum sentence, which could be no less than two-thirds of the maximum sentence.

But even after the passage of this sweeping law, the sentencing revolution in Massachusetts remains unfinished. The Truth in Sentencing Act also established the Massachusetts Sentencing Commission, whose mandate was to develop sentencing guidelines that would make sentencing more consistent—so that criminals who committed similar crimes and had similar criminal records would be more likely to receive similar sentences than they are today. Its sentencing guidelines were also designed to set priorities for the use of incarceration to ensure costly prison space would be used to house the most serious and dangerous offenders.

The sentencing commission made its report to the legislature in April of 1996, recommending a sentencing "grid" that, compared to past practice, would increase prison terms for serious violent crimes committed by repeat offenders while promoting the use of "intermediate sanctions" for lesser lawbreakers. But more than three years later, the commission's sentencing guidelines are still languishing in the legislature, with no discernible political push behind them.

Thus the "truth in sentencing" measures designed to lengthen prison terms—with the effect of driving up prison populations—have gone into full effect, while measures intended to make punishment more consistent and more targeted to serious offenders languish in political limbo.

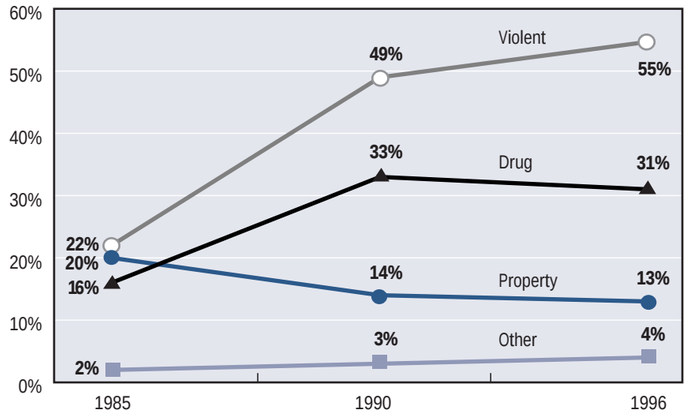
PRISONS ARE NOT FULL OF PEOPLE WHO DON'T BELONG THERE

Over the past 20 years, changes in sentencing practices have combined with rising crime rates and vigorous law enforcement to send unprecedented numbers of Massachusetts residents to prison, where they will serve terms that are longer than ever. In 1980, the courts committed 998 male inmates to the custody of the state Department of Correction; in 1996, 1,968 men were sent to the state prisons. Annual commitments to county jails and Houses of Correction nearly quadrupled in that period, from 5,441 to 19,482.

Critics of mandatory-minimum drug laws, both state and federal, claim that these draconian penalties are jamming prisons with nonviolent offenders, many of them serving long sentences for a first conviction. Their central contention is that, if only we would stop filling the prisons with inmates serving mandatory minimums, we could alleviate the pressure on our overcrowded prisons.

But for Massachusetts, at least, the available evidence does not support these claims. Simply put, based on the best available data, there is no reason to believe that our prisons are full of people who don't belong there.

Chart 2: **MALE COMMITMENTS TO STATE PRISON BY OFFENSE TYPE (percent)**



Source: Massachusetts Department of Correction, Court Commitments, 1990 and 1996.

It's true that imprisonment for drug crimes accounts for substantial growth in both the state and county prison population—but the pace of imprisonment for violent crimes has risen just as fast.

In 1985, drug offenders made up 16 percent of men sent to state prison, violent offenders 22 percent; since 1990, drug offenders have represented roughly 30 percent of new commitments, while fully half (49 to 55 percent) have been violent offenders. (See chart 2). The pattern is less sharp, but not dissimilar, at the county level.

Thus, drug offenders are not the primary offenders we are sending away to prison. Violent offenders make up almost a majority of those sent to state prison, and the largest group sent to county facilities. Two violent offenders are sent to state prison for each drug offender.

Nor is it true that drug offenders alone—by virtue of their long, mandatory sentences—are clogging the Commonwealth's correctional facilities. The percentage of state inmates serving sentences for drug crimes did rise through the 1980s. But since 1990, the proportion of drug offenders in state prisons has remained constant, while the percentage of violent offenders has continued to creep upward. From 1990 to 1996, the number of drug offenders increased from 1,502 to 1,942, but held steady at 20 percent of the state-prison population. In the same period, the number of violent offenders grew from 4,651 to 6,253—from 62 percent of the population to 65 percent.

Nor do inmates serving mandatory-minimum sentences account for more than a portion of prison overcrowding. If every one of the 1,851 mandatory-minimum offenders in state prison were released tomorrow, DOC's population would still be 1,000 inmates above current capacity. Similarly, letting every one of the 282 inmates serving a mandatory minimum at the Suffolk County House of Correction walk out the door tomorrow would leave behind 1,455 men in a building designed for 1,146.

Even the popular characterization of many mandatory-minimum inmates as nonviolent, first-time offenders having their "first run-in" with the law is dubious at best. *The Boston Globe,* for instance, cites DOC statistics to claim that "more than 84 percent of those [currently] serving mandatory sentences on drug charges in Massachusetts are first-time offenders in the state." But in fact, the DOC figures only show that those drug offenders had served no previous time in state prison; prior county or federal prison terms are no longer compiled in the DOC inmate database, nor are previous periods of probation. By this standard, 84 of *all* DOC inmates are "first-time offenders"—that is, they're serving their first state prison sentence. In fact, most DOC inmates have extensive criminal records. In 1995, 44 percent of DOC inmates whose criminal history was known had a previous incarceration in a county House of Correction, 19 percent in a state or federal prison.

Data on inmates serving mandatory-minimum sentences, while limited, hardly exonerate these drug offenders. The Criminal History Systems Board checked the records of 1,445 state-prison inmates serving mandatory minimums for drug crimes (out of 1,748 in custody in December, 1997) and found that these inmates had faced an average of 1.5 charges as a juvenile, had been

arraigned on 22.5 charges as an adult, and had been convicted on 10.1 charges.

The Plymouth County District Attorney's office performed a similar review of the records of all 157 drug offenders sentenced to mandatory-minimum sentences in that county's Superior Court in 1996 and 1997 and found that they had been arraigned on an average of 20 criminal charges and had been convicted 11 times.

This criminal history does not make drug offenders the most hardened and dangerous of state inmates. The most thorough analysis of drug-offender records to date found that more than half of mandatory-minimum drug offenders had only "minor" or "moderate" criminal records. But 57 percent of these state inmates had served prison time previously (versus 64 percent of non-drug offenders), and one third had a prior conviction for a violent crime.

None of this settles questions about whether mandatory-minimum sentences are too long, too rigid or applied unfairly. Nor does it certify the wisdom of using drug prosecution as the weapon of choice in a broader anti-crime effort. But it does absolve the "war on drugs" of sole responsibility for the burgeoning prison population in Massachusetts. And it should disprove the assumption that abandoning mandatory-minimum penalties for drug dealers would, by itself, solve the prison overcrowding problem.

The increased incarceration of drug offenders is a significant factor in the rapid growth of prison populations. At the same time, however, our prisons have never been more full of violent criminals. Even a dramatic change of course with regard to drug prosecution and sentencing will not, by itself, solve the prisons problem.

WHAT DOES THIS MEAN FOR STATE POLICY IN MASSACHUSETTS?

Prison populations at the state and county level are projected by reputable experts to continue growing in the next five years. While more research is needed, currently available evidence simply does not support the often-repeated claim that current sentencing practices are wasting prison cells on inmates who don't belong there.

In fact, if all drug offenders serving time on mandatory-minimum sentences were released tomorrow, both state prisons and county facilities would still be well over design capacity—and the expected growth in the prison population over the next five years would still necessitate the building of new facilities. Changes in sentencing practices may moderate this trend toward a higher inmate population, but will not reverse it.

Thus, the time to start thinking about the next capital investment in prisons is now—before overcrowding once again reaches crisis proportions at the state level. Preparation for the next round of correctional expansion should include a number of elements, including:

I. Building a New Generation of Correctional Facilities

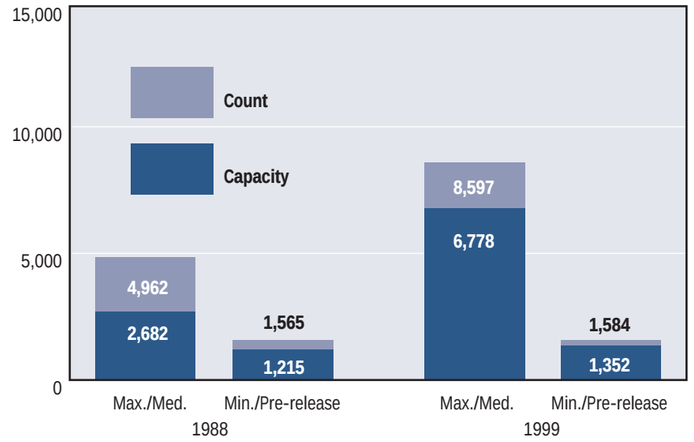
Given the current level of overcrowding and projections of future prison populations, there can be little doubt about the need for more correctional capacity. That leaves the question of what kind of prisons to build.

Here's what we should do:

1) Build state prison beds in a graduated sequence of security levels to prepare inmates for their return to society.

- DOC research has proven that inmates released from minimum-security facilities and pre-release programs are less likely to violate parole or to commit a new crime than those discharged directly to the streets from maximum- and medium-security institutions.
- However, most of the new capacity we've built in the last decade has been medium or maximum security.
- Despite the increased capacity we've added at the medium-security level, much of today's medium-security capacity is not truly secure—at least for the inmates who live there and the corrections officers who work there. Entire medium-security institutions in DOC—including the venerable MCI Norfolk, in which 80 percent of inmates are serving time for violent crimes—are nothing more than dormitories surrounded by 20-foot fences and razor-ribbon.
- Even as the state-prison population more than doubled over the last decade, minimum-security and pre-release capacity has remained flat. (See chart 3). In fact, DOC has actually reduced its pre-release capacity by more than half, from 459 beds in 1988 to only 202 today, 52 of which are earmarked for women inmates.
- Even with violent offenders making up 65 percent of state-prison inmates, 35 percent are doing time for a non-violent crime. And all but a few of these inmates, including many of the violent offenders, will eventually be released. Yet DOC places just 16 percent of inmates in lower-security settings today, compared to 24 percent less than a dozen years ago. Only 150 men at a time—out of nearly 10,000—are preparing for life on the outside in pre-release programs.
- In 1995, 2,761 inmates were released from the Department of Correction. That's more than were in state prisons in 1975.
- Fewer than 300 offenders are released from pre-release programs each year, while more than 1,000 inmates per year are discharged directly from locked cells. Every week, more than twenty felons are put back on the street with little preparation for a crime-free life.

Chart 3: **STATE PRISON CAPACITY AND UTILIZATION BY SECURITY LEVEL**



Source: Massachusetts Department of Correction countsheets, February 23, 1988, and February 22, 1999.

Recommendations

- Support the Department of Correction's next request for a medium-security prison, because the department does need more true medium-security beds.
- As a condition of funding the next high-tech, high-security institution for medium-security custody, insist that DOC convert one bed to true minimum security—without maximum security walls, and with more opportunity for structured, supervised contact with the outside world—for every new medium-security bed built in that facility.
- Require the Department of Correction to expand its pre-release capacity, to at least double its current 150 pre-release beds for men, by building additional pre-release centers or contracting with qualified vendors to provide those beds.

2) Expand and develop specialized, therapeutic facilities, not just generic secure institutions, for state and county inmates.

- The state's inmate population has doubled since the creation of specialized facilities like the Longwood Treatment Center in Boston, the Western Massachusetts Correctional Alcohol Center in Springfield, and the Eastern Massachusetts Correctional Alcohol Center in New Bedford, yet these centers have not been substantially expanded or replicated during the latest round of prison-building.
- National statistics indicate that three-quarters of inmates are drug- or alcohol-involved. Nineteen percent of state prisoners said they committed their current offense to obtain money for drugs.
- Our state and county correctional institutions are also among the largest and busiest providers of adult education and job training in the state. But few institutions can offer advanced training in any skill area, and for inmates who progress through several facilities, programmatic continuity is limited.

Recommendations

- Develop more and new types of facilities with specialized uses for state and county inmates—not just generic, secure institutions to keep inmates behind bars. The possibilities include free-standing facilities with the same therapeutic focus as programs inside correctional institutions, such as substance-abuse treatment and anger management, and a correctional vocational center—perhaps located near industry clusters that could provide technical expertise and job opportunities for promising ex-offenders—which could offer more advanced job training to inmates as they approach their release date.
- Add specialized residential facilities to the menu of community corrections options now being developed by the Office of Community Corrections. Strong consideration should be given to developing a Halfway-In House option

that could provide a setting akin to pre-release—nighttime custody and daytime monitoring of outside activity—for those who need around-the-clock accountability but do not present a clear threat to public safety.

3) Improve data collection and analysis, for the purpose of determining the appropriateness of prison-facility use and the effectiveness of prison programs.

- Given the enormous—and growing—expense of incarceration, the data on Massachusetts inmates that are collected routinely, analyzed regularly and readily available for review by policy-makers are woefully inadequate. State and county correctional officials maintain detailed files on individual inmates—their offenses, their criminal histories, and their institutional records—for the purposes of classification, but only the barest outlines of this information are entered into official databases for system-wide reporting and analysis.
- Facility planning and independent policy analysis—including this report—are severely hampered by the lack of available data on who is in prison and why. With millions, even billions, of taxpayer dollars at stake, not to mention public safety today and in the future, the haphazardness of correctional record-keeping is simply unacceptable.
- Data on county inmates—now the largest and fastest-growing population behind bars—are even more scant. Houses of Correction have been keeping computerized records for only four or five years. The counties follow no common protocol for data collection, so information is not compiled on a uniform basis. And with the exception of court-commitment and population-count data—mandated by statute since 1985—no county-level statistics are centrally reported to DOC or any other authority.

Recommendation

- The Executive Office of Public Safety should establish a uniform reporting program for criminal-justice statistics that covers the Department of Correction, the Criminal History Systems Board, the Parole Board and the county sheriffs' departments. The Secretary of Public Safety should convene a panel of state and county correctional officials and outside experts to determine what data should be routinely compiled and publicly available for the purposes of policy and planning. And the Secretary—and the Governor—should seek adequate funding from the Legislature for the various agencies to compile the data and the Department of Correction to produce reports and analysis on a timely basis. Only in this way can policy-makers make informed decisions about the future of the Commonwealth's criminal-justice system.

II. Completing the Sentencing Revolution

The fitful process of transition from the indeterminate sentencing of the past to the truth-in-sentencing of the present has left some important unfinished business. For prison expansion to be done judiciously and responsibly, using imprisonment to its greatest effect in crime control, balance and proportionality has to be built into the much-altered Massachusetts criminal code. The Governor, the Legislature, and all criminal-justice interests should work together to accomplish the following:

1) Adopt sentencing guidelines to ensure that punishment is certain and predictable, proportionate to the crime, applied equally to like offenders, and subject to limited discretion in termination.

- Despite their representation on the Sentencing Commission, prosecutors have slammed the Commission's proposed sentencing guidelines as insufficiently tough. Their counterproposal includes an across-the-board increase in recommended penalties and an increase in the number of crimes for which incarceration would be presumptive.
- The Sentencing Commission objects that this wholesale escalation of criminal penalties would add 8,500 inmates to the prison population within eight years over and above the growth already anticipated. Of that number, 6,000 would be at the county level, a 50 percent increase in what is already the fastest-growing segment of the correctional system.
- Without the adoption of sentencing guidelines in some form, judges will continue to exercise almost unlimited discretion in most criminal cases.

Recommendation

- Prosecutors need to accept that the guidelines will not be a vehicle for increasing every penalty on the books. And the Sentencing Commission has to be willing to join in a discussion of how the sentencing guidelines could be modified, rather than just protecting its elegant and carefully balanced product from adulteration. Legislative and executive branch leaders with an interest in consistency and proportionality in sentencing—as well as some regard for the cost of an endlessly expanding prison system—should convene negotiations that bring the Sentencing Commission and the District Attorneys back to the negotiating table to iron out a workable compromise.

2) Revise mandatory-minimum drug sentences to incorporate supervised reintegration of offenders.

- Current mandatory-minimum sentences prohibit any reduction in sentence for "earned good time" (participation in education and drug/alcohol treatment programs), despite the proven benefits these programs can produce in reduced criminal recidivism.
- Current mandatory minimums also prohibit any participation in community-based corrections programs (like parole or pre-release) until the minimum term is served. However, because most judges view the minimum sentences as unduly lengthy, many of them do not provide a maximum term that is even lengthier than the minimum. Yet it's only the establishment of a maximum term that creates eligibility for parole. Consequently, most drug dealers serve their whole terms behind bars, and then are released directly back to the street, rather than being released under the guidance and supervision of parole authorities.
- The Sentencing Commission's proposal on mandatory-minimum drug laws is at once too sweeping and too timid. It would allow judges to "depart" from the mandated sentence in written (and appealable) rulings enumerating one or more "mitigating circumstances," giving them overly wide discretion. But it would leave in place the prohibitions on earned good-time reductions and supervised community-based corrections programs that can reduce future criminality.

Recommendations

- Begin a serious discussion about revising the length and the application of mandatory-minimum drug sentencing in a way that preserves what's most valuable about today's stiff drug laws—namely, mandatory jail time—in a more finely tuned sanction that also gives society the crime-control benefit of post-release supervision of these offenders. Potential modifications include reducing mandatory sentence lengths, raising the threshhold drug weights that trigger these penalties, and limiting "school zones"—now a 1,000-foot radius that takes in the surrounding neighborhood, treating every transaction in the vicinity as if it's drug peddling to children, subject to a two-year mandatory term—to school property itself.
- Begin the discussion by considering the option of turning the current mandatory minimums into maximums, with parole eligibility coming at the minimum, which is not less than 2/3 of the maximum. In that way, the current three-year mandatory minimum would become a sentence of two-to-three; the current 15-year minimum would become 10-to-15. Offenders would be under sentence for as long as under current mandatories, but eligible for parole during the last third of it.
- Allow downward departures from mandatory-minimum sentences only in very limited circumstances and limit the amount a judge can stray from the statutory minimum by requiring the new sentence remain in the sentencing grid for that offense. This will ensure that everyone convicted of a mandatory-minimum offense will serve jail time, without exception.

3) Require fiscal truth-in-sentencing for future proposed changes to the state's sentencing structure.

- The House and Senate Committees on Ways and Means routinely attach fiscal notes to bills that carry direct costs—but not to sentencing bills, since the financial impact is indirect and more difficult to project.
- The research and modeling done by the Sentencing Commission, in cooperation with the Department of Correction, now allows a more precise estimate of the brick-and-mortar consequences of proposed crime measures.

Recommendation

- The House and Senate Committees on Ways and Means should calculate the costs of any new sentencing proposal, based on the Sentencing Commission model, and attach it to the bill, so that the fiscal consequences of the proposed change can take their rightful place in the crime debate.

III. Bringing a Community Focus to Corrections

The more offenders the courts commit to state prisons and Houses of Correction, the more come out each year as ex-cons. The state Department of Correction releases nearly 3,000 inmates each year. County facilities, where shorter sentences make for rapid turnover, create ex-offenders at an even faster rate.

It's especially important to the communities they came from, and will return to, that we focus as much on how these offenders come out of prison as why they went in. Correctional authorities at all levels need to use the time they have offenders in custody and under supervision to rebuild their ties to the community on a constructive rather than destructive basis. They can do so in two ways:

1) Forge links to the community for inmates during incarceration and after.

- The Department of Correction is now reaching out to the state Department of Public Health and Department of Mental Health, as well as local shelter providers, as part of inmate discharge planning, helping to smooth the transition to community-based services for offenders with substance-abuse and psychological problems.
- Community-service work, even that performed under the watchful eyes of uniformed guards, offers an opportunity to make personal connections that improve an offender's sense of civic engagement and community responsibility.
- With the decline of parole, planning for discharge—and what comes afterward—is increasingly left to the state and county prisons themselves. Encouraging developments in Hampden and Suffolk County, among others, are providing new ways to smooth the transition to freedom for ex-offenders—and reducing future crime rates in the process.

Recommendation

- Maintain and expand programs that reconnect offenders to their communities on a positive, law-abiding basis, including transitional and post-incarceration support to inmates who complete their terms.

2) Expand the use of community supervision in managing the transition of inmates to society.

- Over the past few years, the Parole Board has exercised increasing restraint in granting release to eligible inmates, reflecting the public consensus that offenders should serve out most, if not all, of their given sentence behind bars. As a result, parole caseloads have fallen even as the prison population has doubled.
- But the role of parole is changing. In the days of indeterminate sentencing, parole meant early release, parole rates were high and parole terms were lengthy. Today, with truth-in-sentencing, parole is no longer early release and periods of parole supervision are much shorter. Parole is becoming exclusively a short-term period of supervised community reintegration for inmates nearing the end of their sentences.
- A period of parole supervision, during which the requirements of living in a free society can still be enforced by a swift return to prison, can impede an offender's drift back toward a life of crime. An effort should be made to provide parole supervision for a greater number of inmates who approach the end of their terms.

Recommendation

- Though control—supported by the authority to return a parolee to prison—will remain a vital part of its responsibility, the Parole Board must shift its emphasis to establishing the greatest number of offenders on a path toward crime-free living. This means developing programs—such as its current intensive parole for sex offenders—to effectively manage higher-risk inmates in a process of transition. After all, it is these offenders who most need control and guidance in learning how to live lawfully in the community.