

# Improving Parole Release in America



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This article lays out a ten-point program for the improvement of discretionary parole-release systems in America. Taken together, our recommendations coalesce into an ambitious model that has never before existed in the United States. Even if adopted separately, our recommendations would achieve substantial incremental improvements in the current practices of all paroling systems.

The article is written by three authors who have taken sharply different views on the fundamental question of whether contemporary determinate or indeterminate sentencing systems have been the more successful systems across American states. Likewise, the authors have given different advice to jurisdictions on whether parole-release should be retained, abolished, or reinstated.<sup>1</sup> Nonetheless, the authors agree that discretionary parole-release is an important feature of U.S. sentencing and corrections that will not disappear in the foreseeable future—and all three share a common interest in improving those systems as much as possible.

### Recommendation 1. Institutional Structure

*The institutional structure and composition of parole boards should be reconstituted to ensure members possess the requisite education, expertise, and independence relative to release decision making. In pursuing these goals in the American context, such a system would include the following features, or others equally effective: (a) Parole Board members should be recommended for appointment by a special nonpartisan panel subject to gubernatorial approval; (b) Their terms of appointment should be defined by law, with conditions for removal governed by a protocol administered by the special panel.*

Across the nation in 2013, 340 parole board members in 46 states granted 187,035 discretionary entries to parole.<sup>2</sup> This small group exercises enormous power over the nation's prison policy. In a majority of states, boards determine the amount of time offenders spend in confinement, conditions of post-release supervision, and whether violations will result in revocation.

The institutional structure of paroling authorities is shaped profoundly by how members (and chairs) are appointed, and by the absence of meaningful statutory qualifications informing their selection. Direct gubernatorial appointments, usually subject to legislative confirmation, account for membership on the majority of parole boards. In most states, board members may be removed as easily as they are hired.

Few formal credentials are required for appointment to the parole board.<sup>3</sup> Once appointed, institutional vulnerability and personal job insecurity push parole boards toward risk aversion in their decision making. Boards experience immense public and political pressure to dramatically reduce their rates of parole release in the aftermath of tragic incidents of violence by parolees.<sup>4</sup>

These factors undermine the institutional structure necessary to support a reasonable measure of independence and insulation for paroling authorities, thus requiring dramatic change.

*The eligibility standards for becoming a parole board member should by statute require: (a) the possession of a college degree in criminology, corrections, or a related social science, or (b) a law degree; and, (c) at least five years of work experience in corrections, the criminal justice/community corrections field, or criminal law. Consideration should be given to balancing the relevant competencies of board members, and the importance of including members with an expertise in victim awareness and the prison experience.*

Parole board members are called upon to apply complex legal rules, as well as social science research findings in criminology and corrections across the whole of their decision making.<sup>5</sup> These requirements would engender greater competency and balance in parole board memberships.

*The process for appointment to the parole board should begin with a nomination and review of candidates by a special nonpartisan panel, followed by a recommendation of appointment, subject to affirmative action by the Governor.*

The special panel offers a critical buffer to direct gubernatorial appointments to paroling authorities. The membership of these panels may be broadly inclusive of representatives from across all three branches of government and the criminal justice system, and/or of individuals drawn from the criminal justice system.

*The term of parole board membership should be established by law, including the possibility of reappointment. The board should be chartered as an independent authority housed in the executive branch, with a protocol for removal of board members adopted and administered by the special panel.*

The provision for fixed terms, and the possibility of reappointment for a second term, establish some insulation from the vicissitudes of election cycles. The administration of a protocol for removing parole board members by the

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special nonpartisan panel would offer a meaningful degree of insulation and independence to board members.

### **Recommendation 2. How Much Release Discretion?**

*The amount of prison-length discretion given releasing authorities should not eclipse the sentencing discretion of courts, and for most cases should not exceed 25 to 33 percent of the maximum term. For extremely long sentences, release eligibility should occur no later than 15 years. The relative amounts of discretion held by sentencing courts and releasing agencies should reflect the different goals and considerations operative at judicial sentencing and the prison-release stage.*

Should we approve of New Jersey's highly indeterminate system, in which a ten-year maximum sentence produces first-release eligibility at 1 year, 11 months, and 5 days?<sup>6</sup> Here, discretion over more than 80 percent of the maximum term is held by releasing authorities. At a greater extreme, some sex offenders in Colorado receive indeterminate prison sentences of 1 year to life.<sup>7</sup> In contrast, in Pennsylvania and Washington, release eligibility in most cases is set at 50 percent of the maximum sentence. In Minnesota, Canada, and many European systems, release is relatively automatic at the two-thirds mark.<sup>8</sup> American systems vary greatly in degrees of indeterminacy. How are we to know best and worst practices?

In our view, release discretion in a well-designed indeterminate system should be no more than 25 to 33 percent of the maximum prison term for most cases. An example of a sentence that would satisfy a "25 percent rule" is a 4-year prison term with first release eligibility at 3 years. This benchmark is founded in our belief that judicial sentences should always impose minimum-maximum ranges that nest within the boundaries of proportionate punishment (see Recommendation 3). The broader the min-max range, however, the weaker the role of proportionality. The history of mass incarceration teaches that large min-max "gaps" can invite severity rather than leniency.<sup>9</sup> Policies driven too heavily by risk aversion have no built-in principles of restraint.<sup>10</sup> For a post-mass-incarceration era, we think proportionality limits must play a more decisive role than in the past—although fair latitude should remain for crime-reductive policies that are empirically grounded.<sup>11</sup> We therefore advocate a new balance between proportionality and utilitarianism, where utilitarianism is the minority partner. Under our 25 percent rule, releasing authorities hold discretion to increase the judge's minimum term by one-third based on utilitarian considerations. In a 33 percent scheme, the margin is 50 percent. Dividing judicial and paroling discretion by 3:1 or 2:1 is about as far as you can go without the tail wagging the dog.

The 25 to 33 rule breaks down for extremely long maximum terms, however. Here, our approach would mandate overlong prison stays before release eligibility. We therefore join the new Model Penal Code in calling for release eligibility for all prisoners at 15 years or sooner, no matter how long the maximum sentence.<sup>12</sup> This will increase the min-max gap well above 33 percent in some cases, but we see it

as a necessary compromise in a society that regularly employs extremely long prison sentences.

### **Recommendation 3. Grounds for Release Decisions**

*There should be a meaningful presumption of release at first eligibility, so that the majority of prisoners are released at that time. Parole boards should not be authorized to deny release on the ground that the prisoner has not served sufficient time for punishment purposes. Denial of release should be based on credible assessments of risk of serious criminal conduct and readiness for reentry.*

Rather than debating the purposes of incarceration, we will simply put our cards on the table: We want a system that honors values of justice and proportionality, but also seeks to reduce crime. This approach has been called "limiting retributivism" or "modified just deserts."<sup>13</sup> The new Model Penal Code calls it "utilitarianism within limits of proportionality."<sup>14</sup> In our view, prison sentences are justified only to incapacitate dangerous offenders and punish people who have committed such serious crimes that lesser sanctions would be disproportionately lenient.<sup>15</sup> Lengths of stay should reflect these twin goals.

Turning to the parole decision: In a model system, after a judge has imposed an indeterminate prison sentence, the date of first release eligibility should be taken to reflect a prison term that is not disproportionately lenient on grounds of punishment. The parole board should be bound by the judge's determination that the minimum sentence is long enough to serve retributive values—and *the parole board should have no power to deny release based on its belief that a longer sentence is necessary or better on retributive grounds.*

Rather than relitigate the sentencing judge's decision concerning proportionate punishment, the board should ask whether a prison stay beyond the date of first release eligibility is necessary to serve the goal of public protection. *The only ground for denial of release should be the board's finding, based on credible evidence, that the prisoner presents an unacceptable risk of reoffending if released.* We would rest the release determination on actuarial risk assessment (taking static risk factors into account) and in-prison behavior empirically associated with readiness for release (looking to dynamic factors such as program completion or the absence of disciplinary violations).

A clear view of the questions within the parole board's jurisdiction limits what factors the board should consider *and the purposes for which they are considered.* For example, we endorse the board's consideration of present and prior convictions for risk-assessment purposes—but not as indicia of whether the prisoner has received enough punishment.

Most parole boards make use of risk assessment instruments<sup>16</sup>—a practice we would seek to improve rather than disallow (see Recommendation 4). With respect to boards' weighing of just punishment, however, our proposal requires a rethinking of the board's role. In most

states today, parole boards have authority to reevaluate any and all aspects of the judge's original sentence, including how much time a prisoner *deserves* to spend in prison for his or her offense and his or her criminal record. We recommend repeal of all such authorizations.

#### **Recommendation 4. Risk Assessment**

*The use of risk assessment instruments for parole release should be fully examined but not eliminated. Paroling authorities should validate their instruments on their local offender populations and consider how actuarial predictions of recidivism are inexorably connected to race and social class. The risk assessment items and scoring should be transparent. As a first step, states should open their risk assessment tools to vigorous, public challenges of these tools' statistical underpinnings, as well as their applications to individual offenders.*

Early parole hearings were often haphazard, based primarily on brief interviews with each prisoner. Parole boards were guided by their experiences and gut-level instincts (referred to as "clinical" assessments). But studies of such methods revealed that statistical assessments outperformed clinical judgments in accuracy, and their use promoted uniformity and consistency among parole commissioners.

Today, recidivism prediction algorithms identify correlations between preexisting offender background factors (e.g., age, family background, criminal history) and recidivism not only for offenders generally but also for subgroups (e.g., sex offenders). These statistical correlations are transformed into risk assessment instruments that identify an offender's predicted probability of recidivism. Parole board members can then separate higher-risk from lower-risk offenders, enabling a more efficient use of prison resources.

Statistical risk assessment tools now enjoy widespread political and public support, and legislatures increasingly require them. Social scientists are also championing their use, and such tools are seen as foundational for evidence-based practices. Although we understand the appeal of prediction instruments, we share the concerns of critics who have raised questions about their expanded use. In his seminal book, *Against Prediction* (2007), Bernard Harcourt argues that in our enthusiasm to adopt such actuarial efficiencies, we have failed to see the social costs of profiling the poor and racial minorities. Harcourt concludes that justice demands that we be *against prediction*.

The solution espoused by most legal scholars is simply to limit the factors used in risk assessment tools solely to those that represent personal culpability, that is, prior criminal record. Although that solution appears fairer, it is problematic. Ideally, a risk assessment tool should predict future behavior based on past behavior. But the reality is that current risk assessments rely upon measures that are partly driven by individual behavior, and partly by where the justice system is looking for offenses and how it responds when it finds them. As Tonry explains, "Black men are

arrested at younger ages and more often than white men for reasons that have as much to do with racially differentiated exercises of police discretion as with racial differences in offending behavior."<sup>17</sup>

Criminologists have additional concerns. Studies find that reliability and inter-rater consistency can be low and that agencies too often adopt off-the-shelf instruments that fail to accurately predict the recidivism rates of their population. Reportedly, just 60 percent of the instruments being used by parole boards in 2008 had been validated on local populations.<sup>18</sup> Overprediction is also a serious problem. The LSI-Revised manual admits to a "high (approximately 30 percent) false positive rate. This means that a fairly larger percent of individuals identified by the LSI-R as 'high risk' will not actually present any problems."<sup>19</sup>

Most instruments also rely on criminals to tell the truth, though jurisdictions do not always check to make sure the answers are correct. And offenders, the public, and government officials are often prevented from seeing the exact questions and scoring in the instruments. As a recent Associated Press study concluded: The instruments are "clouded in secrecy . . . shielding government officials from being held accountable for decisions that affect public safety."<sup>20</sup> Given the great weight parole boards afford risk assessment tools in making release determinations and setting supervision conditions, it is highly concerning that individual offenders in these jurisdictions lack the ability to meaningfully challenge their own risk assessment scores.

Unfortunately, if agencies purchase packaged risk assessments tools, given the proprietary nature of the research, it is nearly impossible to find out where the instrument was validated, in what year, and on what specific subpopulation. Some of the validation studies were conducted decades ago, and may be time and generationally dependent. Being from a single-parent family might have been more predictive when the stigma and economic implications were much more important than today, when half of all children grow up in single-parent households. As the use of such instruments spreads, these methodological issues are concerning.

So how should parole boards use risk assessment tools? As a first step, states should open their risk assessment tools to vigorous, public challenges of the tools' statistical underpinnings, as well as their applications to individual offenders. We also recommend that each parole board scrutinize their risk assessment tool through the lens of race, identifying how each factor differentially impacts racial minorities. Researchers can then determine whether the removal of the race-tainted variables reduces predictive accuracy, and by how much. This bias reduction process might include selecting items with the smallest racial gaps or replacing potentially biased criteria with more race-neutral factors. With such data in hand, parole boards can then thoughtfully discuss whether the improved accuracy is worth the sacrificed fairness (the "equity versus accuracy" debate).

### **Recommendation 5. Decision-Making Tools**

*Decision-making tools should be structured, policy-driven, and transparent. Parole boards should adopt parole guidelines systems that govern the consideration of offenders for release. The guidelines should establish presumptive release dates tailored to the varying risk levels and readiness for reentry presented by offenders. Paroling authorities should develop capacities to promulgate, monitor, revise, and enforce compliance with the guidelines system.*

A majority of parole boards have adopted parole guidelines, decision tools, and/or risk assessment instruments designed to foster greater structure when deciding whether to grant or deny an offender's discretionary release.<sup>21</sup> However, the application of parole guidelines provides recommendations that are wholly advisory, carrying no legally binding effect, nor offering any provision for prisoners to appeal an adverse outcome.

Since 1980, a number of determinate sentencing states have enjoyed a significant measure of success through their reliance on judicial sentencing guidelines. Borrowing from the experience and best practices of state sentencing guidelines, a well-designed parole guidelines system could achieve comparable outcomes (and would be desirable in all states, with or without judicial sentencing guidelines).

*Decision-making tools should be structured, policy-driven, and transparent. Parole boards should adopt parole guidelines systems that incorporate two primary dimensions: a formal risk assessment, and a readiness for reentry or release.*

The nationwide adoption and implementation of well-designed, structured, policy-informed parole guidelines would, if properly administered, contribute to greater rationality, fairness, and consistency in release decision making. When governed by a commitment to presumptive parole release, parole guidelines provide a transparent system for effectively assessing offenders by risk levels. When combined with evidence-based tools for assessing offenders' readiness for reentry, parole guidelines foster a sensible and defensible approach to recidivism reduction and successful desistance.

*Parole guidelines should be "presumptive," not advisory. They should create an enforceable presumption of release for low-risk offenders; one that may extend to moderate-to-high risk offenders, absent substantial reasons for an override. This presumption should heighten for individual prisoners at each successive eligibility, with annual reviews established for most offenders.*

Establishing presumptive release dates at initial eligibility, requiring periodic reviews annually for most offenders, and heightening the presumption at each successive eligibility, serves to provide those in confinement with more certainty about when they will likely exit prison. Higher-risk offenders may be granted presumptive parole followed by a period of post-release supervision with services and linkages to community resources specified in their reentry plan upon exiting prison.

Honoring presumptive parole release in practice will require that prison systems across the country expand dramatically the opportunities for higher-risk prisoners to enroll in and complete prison-based programs responsive to their assessed criminogenic needs, given the goal of reducing their likelihood of reoffending post-release.

Defensible grounds must be established for deferring presumptive parole release dates in a manner that balances public safety concerns, prison officials' interest in maintaining order and control, and a commitment to fairness and transparency. The most salient reasons for rebutting such presumptions include statutory restrictions on certain crimes or categories of crimes that are delineated within jurisdictions, in-prison misconduct, and violent or aggressive behavior during confinement.

*Paroling authorities should develop an administrative unit or create an interagency partnership to promulgate, revise, and monitor ongoing compliance with the decision rules or standards embedded in the parole guidelines system.*

It is essential that presumptive release dates embedded within parole guidelines systems become normative and enforceable. The rules driving such systems must exercise a reasonably binding authority on parole board decision making, while lending justifiable reasons for overrides. It is vital that the decision rules are subject to meaningful review, monitoring, and corrective action. This can be accomplished through the creation of an administrative unit within the parole board, or one formed through a partnership with another agency, thereby establishing a capacity for oversight and accountability.

### **Recommendation 6. Process; Prisoners' Rights**

*Processes for parole release decisions should be improved to more closely resemble an original sentencing hearing. Prisoners' procedural rights should be given increasing weight if they are denied release on successive occasions. The adequacy of parole release procedures should be measured by: resources per decision, meaningfulness of hearing, ability of prisoner to prepare and present a case, rules for victim participation, quality controls on factfinding, administrable decision rules, and reviewability of decisions.*

*Resources per decision.* The number of prisoners considered for release by the average state parole board in 2006 was 8,355—about 35 cases for each working day, per parole board, and this comprises only one part of a board's responsibilities.<sup>22</sup> Studies of actual parole-release practices have found decision-making times of 3 to 20 minutes per case.<sup>23</sup> Almost certainly, parole agencies must grow in size and funding in order to give adequate attention to individual cases.

*Meaningfulness of hearing.* Parole-release "hearings" in existing American systems are often little more than interviews of the prisoner. Sometimes there is no hearing at all.<sup>24</sup> Our scheme would require a hearing in every case in

which six months or more of prison time is at stake, and prisoners would have the right to participate.

*Ability of prisoner to state a case.* Some states prohibit representation by counsel outright at parole hearings.<sup>25</sup> For prisoners who can afford attorneys, most states permit only limited representation, such as allowing counsel to submit written statements.<sup>26</sup> Also, some states refuse the prisoner access to the contents of his dossier.<sup>27</sup>

On principle, prisoners eligible for release should have the right to effective representation by a lawyer, as at judicial sentencing. Short of that, it would be a vast improvement if counsel were provided to prisoners for all subsequent hearings after an initial denial of release. Prisoners should see their dossiers ahead of time—and should have meaningful opportunity to contest any relevant facts, opinions, or recommendations. Crucially, prisoners must have access to any risk assessment scoring in their cases, and must have a meaningful opportunity to challenge errors, or the validity of the instrument itself.

*Victim participation.* In our model, victim participation is limited by principles of relevancy (see Recommendation 7).

*Quality controls on factfinding.* In many states, there is no formal burden of proof at parole proceedings. In Tennessee, release is permitted when the board is “of the opinion” the prisoner will not recidivate and release is compatible “with the welfare of society.”<sup>28</sup> Strikingly, there is no requirement that parole boards’ factfinding be consistent with facts established when the prisoner was convicted, or before the sentencing court. “Real-offense” decision making—that is, consideration of alleged crimes for which there has been no conviction—is the norm in American parole proceedings.<sup>29</sup>

In a model parole-release system, there should be an articulated burden of proof. Parole boards should be prohibited from considering alleged crimes different from, or in addition to, the prisoner’s actual convictions.

*Administrable decision rules.* Although some U.S. jurisdictions have adopted presumptive sentencing guidelines with a measure of enforceability,<sup>30</sup> parole guidelines are invariably advisory.<sup>31</sup> Standards for decision tend to be expressed as long lists of factors, with few or no rules of exclusion.

In our model system, states should create presumptive parole release guidelines comparable in spirit to the best presumptive sentencing guidelines, for example, those used in Minnesota, Washington, Kansas, and North Carolina.<sup>32</sup>

*Reviewability of decisions.* A meaningful review process is lacking in most or all current American parole systems.<sup>33</sup> Where administrative review is available, it seldom operates as a real check on the board’s discretion.<sup>34</sup>

Our model system would provide substantive review of departures from parole guidelines or improper application of guidelines—comparable to appellate sentence review in guidelines states like Minnesota, Washington, and Kansas.<sup>35</sup>

## **Recommendation 7. Victims’ Rights**

*Victims should have the right to submit impact statements or appear at parole hearings, but victim input should be limited to the future risk potential of the inmate and conditions of release. Victims should not make recommendations to grant or deny parole. To do otherwise violates the parole boards’ primary objectives and undermines the prisoner’s right to a fair hearing.*

Victim participation in criminal justice used to end with the imposition of sentence. Today, crime victims have a wide range of rights, including being notified of all public proceedings in criminal cases, and the right to participate in many of those proceedings, including parole.

It is now generally accepted that victim input can impact parole decision making. In fact, several studies have found that victim testimony is more influential at parole hearings than at sentencing hearings.<sup>36</sup> As a result, victim advocates continue to push for expanded legal rights at parole hearings, and with advances in video-conferencing and other technology, victim participation is likely to increase.

But legal scholars have raised a number of concerns about the influence of crime victims in prison-release decisions. States run the risk of violating an inmate’s due process rights or interests by treating inmates differently merely because a victim statement is present in one case and not in another. Moreover, in cases of serious violence, when the offender has been sentenced to a long period of custody, the victim and the offender have probably had no contact for years. The victim probably does not know of the programs the inmate has participated in. The parole board is supposed to judge the inmates’ future risk of violence, and on that calculation, the victims’ description of the past harm suffered is less relevant.

There are also serious concerns about due process. The inmate is not usually represented by an attorney, has no ability to discover statements made against their release, and has no ability to respond or challenge the validity of the victim statements. To allow the victim, in essence, to “retry” the case—without any of the procedural protections present in the original court proceedings—seems to violate principles of procedural fairness.

These and other concerns lead us to recommend a limited role for victims at parole hearings. We believe that victim testimony should *not* include a recommendation for denial or release on parole, but rather be limited to comments on the conditions that might be imposed if parole is granted. We recommend specifically:

1. Parole boards should encourage victim participation for felonies involving victim injury.
2. Each parole board should develop an information packet that clearly articulates the type of information the parole board is looking for. Victims should be told that the parole board is concerned with risk and rehabilitation and is not able to “re-sentence” the offender to reflect the victim’s suffering. A clear statement of the purpose of the hearing should benefit victims by making the process more

transparent and not raising expectations. Surely it must exacerbate victim frustration if they think their release recommendations were ignored.

3. Parole boards should standardize written impact statements by developing forms that victims are to remit to them. This is common practice around the world. Such standardization could help ensure that victim input occurs in virtually all cases, that no one victim impact statement inflames the minds of the paroling authorities, and that every parole case receives comparable review and consideration.

The question is not whether victims should be heard at parole hearings—they certainly should—but rather how to direct and consider their testimony. By focusing the victims' testimony on setting appropriate supervision conditions *if* released, rather than on the release decision itself, we hope to balance respect for victims with respect for offenders and the rule of law.

#### **Recommendation 8. Selective Use of Supervision**

*A period of parole or post-release supervision should be required for many, but not all, individuals leaving prison. Placement on supervision should be reserved mainly for those who present higher risks of reoffending, and those incarcerated for serious, violent, and/or predatory sexual crimes, regardless of risk level. It should also be made available to low-risk offenders, who should be given the choice of opting in or out of supervision altogether.*

The nation's incarceration rate has grown dramatically during the past forty years, albeit with a modest decline in recent years.<sup>37</sup> Often overlooked are two parallel developments: there has been a decades-long expansion in parole or "post-release" supervision populations and, simultaneously, an escalating growth in the number and proportion of offenders leaving prison unconditionally, having "maxed out" their terms.<sup>38</sup>

At yearend 2013, a total of 853,215 persons were on parole supervision, reflecting a rate of 350 per 100,000 adults. Conditional releases, inclusive of mandatory supervised releasees, grew to a high of 87 percent in 1990, declining to 75 percent leaving prison under conditional release in 2008, and fluctuating slightly since then. Conversely, the share of unconditional releases, prisoners who "max out" serving their entire term in confinement, has shown a pronounced increase for several decades, accounting for more than one in five releases in 2012.<sup>39</sup>

Yet, too many offenders continue to be placed on parole or post-release supervision in the absence of a defensible rationale for doing so. Their presence, especially low-risk offenders, exposes them to the "contingent liability" of future re-imprisonment,<sup>40</sup> a well-documented trend that has exacerbated the nation's reliance on mass incarceration.<sup>41</sup> At the same time, too many releasees who have maxed out present great needs for reentry services and supervision. The failure to address in a strategic manner which offenders are supervised strains and misaligns

limited supervision resources, obstructing parole's core mission to promote public safety and positive reentry outcomes.

*A period of parole or post-release supervision should be required mainly for individuals exiting prison who present moderate to high risks of reoffending, and those incarcerated for serious, violent, and/or predatory sexual crimes, regardless of risk level.*

Those released from prison display a variegated profile, not only in their current offenses and criminal histories, but where they fall on the continuum of risks and needs.<sup>42</sup> The use of parole supervision must be sensitive to this heterogeneity in a manner responsive first and foremost to their individual risk of reoffending.<sup>43</sup> Post-release supervision should be reserved for moderate- to high-risk individuals following release, with exceptions allowed for those who have been convicted of serious sexual or violent crimes, who pair a low statistical probability of recidivism with a demonstrated propensity to victimize other people in especially harmful ways.

*A period of parole or post-release supervision should be made available to low-risk offenders who should be given the choice of opting in or out of supervision altogether.*

Low-risk releasees should be allowed to opt in or opt out of an abbreviated period of supervision, giving them the opportunity to exit prison without further state control. A sizeable number of low-risk individuals require assistance during their transition from confinement, and should be able to access reentry services through the field services agency.<sup>44</sup> Those low-risk offenders who opt in should be held immune from revocation to prison for technical violations.

#### **Recommendation 9. Conditions of Supervision**

*Parole supervision conditions should be as few in number as necessary, given public safety concerns, and tailored to the specific needs and risks associated with the offender. Supervision conditions and resources should be concentrated for each person on the first few months after release, and supervision agents should have greater authority than they currently do to modify conditions to facilitate offender motivation. Parole supervision fees should be abolished or severely limited.*

When a prisoner is released and placed under the supervision of a parole agency, he or she must observe certain conditions of supervision. Even in determinate sentencing jurisdictions, where the parole board does not decide on the release date, paroling authorities still retain the primary role of setting conditions of post-release supervision.

Parole boards have broad discretion to set terms and conditions of release, although in many jurisdictions there are conditions that must be imposed because of the language in a statute or regulation (e.g., sex offender registration). As long as a condition can reasonably be said to contribute to either rehabilitation or the protection of society, the condition is likely to be held permissible unless it infringes on a parolee's basic constitutional rights.

Parole conditions vary throughout the country, although “standard” conditions—those routinely imposed on all parolees—typically include reporting to a parole officer, refraining from criminal activity, not possessing firearms, not traveling beyond a set distance, maintaining lawful employment and a residence, and refraining from drug and alcohol use. “Special” parole conditions—tailored to the offender’s specific needs and risks—often require the parolee to participate in substance abuse and recovery programs, perform community service, and pay restitution and a variety of fees. Parolees may also have “no contact orders” prohibiting their association with victims, and a growing number of parolees are now required to register with the police upon release. Importantly, all parolees must also agree to submit to searches of their residence, vehicle, or person at any given time by parole officers.

These and other conditions are often piled on top of one another and spelled out in a type of contract, which the parolee must sign stating that they understand and accept parole subject to all of the prescribed conditions. Failure to meet the imposed conditions can result in revocation of parole and a return to prison to serve out the remainder of their prison term. Many parolees are also now ordered to pay supervision fees as well as fees for drug and alcohol testing and community service.

Many in the field agree that conditions of release should be *realistic*—few in number and attainable; *relevant*—tailored to individual risks and needs; and *research based*—supported by evidence that they will change behavior and result in improved public safety and reintegration outcomes. Expanding on these basic principles, we recommend the following:

1. Standard conditions should be limited in number, perhaps only including prohibitions against “committing any new crime,” “reporting to the parole agent,” “agreeing to warrantless search conditions,” and “carrying a weapon.”
2. A case-by-case review should accompany the imposition of all other conditions, and target goals should be identified with a validated risk-need assessment tool. Low-risk offenders might be released without any formal parole conditions. Resources should focus on high- or moderate-risk offenders.
3. Services and surveillance should be “front-loaded” where the risk of recidivism and need is the highest (i.e., first 6 to 12 months after release).
4. Agencies should abolish the parole supervision fee outright in light of the inability of most parolees to afford it. As an alternative, agencies might implement a sliding scale fee tailored to individuals’ financial circumstances.
5. Parole authorities should allow parole field agents greater flexibility to modify certain conditions of release to incentivize parolees to change behavior. Incentives should include modification of the conditions of supervision, forgiveness of economic sanctions, and shortening of length of supervision.

#### **Recommendation 10. Length of Supervision Term**

*The length of supervision should be decoupled from the term of imprisonment. The maximum supervision period should be limited to no more than five years for higher risk levels, and for a period not to exceed twelve months for lower risk levels, except for those individuals convicted of serious, violent, and/or predatory sexual crimes for whom the longer five-year maximum applies, regardless of level of risk. Those subject to parole or post-release supervision should be able to earn an early discharge, and the courts should make frequent use of presumptive early termination.*

There is sizeable variation associated with how many years individuals are expected to spend under community supervision following their incarceration in prison. Periods of post-release supervision often extend far beyond the months and years spent prior to an offender’s release from confinement, in some states lasting for ten or more years, with lifetime supervision required for certain categories of offense.<sup>45</sup>

Though a number of states regard the period of post-release supervision as separate from the balance of the prison term that remains, most states require a period of supervision equal to the unserved balance of the prison sentence.<sup>46</sup> In several jurisdictions, mandatory periods of supervision are specified by the class of the original felony conviction.

*The length of supervision should be decoupled from the term of imprisonment, with the maximum period calibrated largely in accord with offenders’ risk levels.*

The American Law Institute<sup>47</sup> recommends that the length of supervision be decoupled from the original term of imprisonment that was imposed, served or unserved, and limited to a maximum of five years for moderate- to high-risk offenders. Directing offenders to remain under supervision for longer periods accomplishes very little of public policy value. For offenders returning home who are lower risk, opting in to no more than twelve months offers a sensible window of time to address transitional reentry needs for services and support.

Parole or post-release supervision serve clearly identifiable public safety and rehabilitative purposes. The policy choices reflected herein pertain to the majority of offenders that may be subject to a term of supervision. There are notable exceptions to our prescriptions relative to those individuals leaving prison, having been convicted of serious, violent, and/or predatory crimes, recognizing there are occasions where the gravity of the crime committed may not be reflected in the offender’s risk level.

Addressing supervision more strategically acknowledges the unique experiences associated with doing time and the difficulties offenders encounter in navigating the myriad barriers embedded in prisoner reentry transitions.<sup>48</sup> Acting in a manner that is responsive to the pronounced immediacy of offenders’ reentry needs at release

will require a significant rebalancing in most parole agencies given their prevailing commitment to a philosophy of supervision emphasizing monitoring, surveillance, and control.<sup>49</sup>

Yet, it is crucial that resources be aligned with a concentrated focus on those presenting the greatest risk of recidivism, and in the period of time when the likelihood of reoffending is at its greatest.<sup>50</sup> This is because the probability of reoffending occurs early during the period of parole or post-release supervision. The prevalence of recidivism shows diminishing increases associated with each successive year relative to offenders remaining under parole or post-release supervision.<sup>51</sup>

*Those subject to parole or post-release supervision should be able to earn an early discharge, and presumptive early termination.*

Opportunities should be provided to secure a shortened term of supervision.<sup>52</sup> The provisions of early discharge and presumptive early termination offer offenders an important incentive to comply, perhaps most significantly, over the course of the first year (or two) of supervision, when the likelihood of violating the conditions of supervision and/or recidivism is greatest.

## Conclusion

The last several decades were characterized by strong nationwide pressures toward prison growth—an unprecedented phenomenon for any society. In that historical environment, the better American sentencing systems were those that created mechanisms to inhibit, accurately project, and exert a measure of control on the runaway process of prison expansion. In the coming decades, the nation's most important criminal justice project may be one of mass de-incarceration. Such a changed landscape may call upon states to develop new or expanded release capacities to help unwind the punitive policies of the past. We hope that American paroling agencies will help rise to this challenge.

## Notes

- \* This article is drawn from *The Future of Parole Release: A Ten-Point Plan*, in *Reinventing American Criminal Justice Systems* (Michael Tonry ed., forthcoming 2016); draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2672033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2672033).
- <sup>1</sup> Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, in *The Oxford Handbook of Sentencing and Corrections* (Joan Petersilia & Kevin R. Reitz eds., 2012); Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003); Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority*, in *The Future of Imprisonment* 199 (Michael Tonry ed., 2004).
- <sup>2</sup> The number of board members excludes four states: Maine, Minnesota, Alabama, and Delaware. The number of discretionary entries includes releases reported to the Bureau of Justice Statistics for 2013: Erinn J. Herberman & Thomas P. Bonczar, *Probation and Parole in the United States, 2013*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 248029 (2014); Alexandra Lambert & Robert Weisberg, *Discretionary Parole Release in the United States* (2010); Mario

- A. Papparozi & Joel M. Caplan, *A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism*, 89 *The Prison Journal* 401 (2009).
- <sup>3</sup> Papparozi & Caplan, *supra* note 2; Kevin R. Reitz, *The "Traditional" Indeterminate Sentencing Model*, in *The Oxford University Handbook of Sentencing and Corrections* (Joan Petersilia & Kevin Reitz eds., 2012); Beth Schwartzapel, *Life Without Parole: Inside the secretive world of parole boards, where your freedom may depend politics and whim*, *The Marshall Project* (2015).
- <sup>4</sup> Such episodes have occurred in Pennsylvania, Massachusetts, and Connecticut.
- <sup>5</sup> T. Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 42 *Crime & Justice: A Review of Research* 299 (2013).
- <sup>6</sup> New Jersey State Parole Board, *the Parole Book: A Handbook On Parole Procedures For Adult and Young Adult Inmates* 35 (4th ed. 2010).
- <sup>7</sup> Colo. Rev. Stat. §§ 18-1.3-1004 and 18-1.3-401 (2011).
- <sup>8</sup> Richard S. Frase, *Sentencing Guidelines in Minnesota, 1980-2003*, 32 *Crime and Justice: A Review of Research* 131-219 (Michael Tonry ed., 2005); Anthony N. Doob & Cheryl Marie Webster, *American Imprisonment from a Canadian Perspective: Exceptionalism or Optimism? in American Exceptionalism in Crime and Punishment* (Kevin R. Reitz ed., forthcoming); Dirk van Zyl Smit & Alessandro Corda, *American Exceptionalism in Parole Release and Supervision*, in *American Exceptionalism in Crime and Punishment* (Kevin R. Reitz ed., forthcoming).
- <sup>9</sup> Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Has Been Driven by Other Forces*, 84 *Tex. L. Rev.* 1787 (2006).
- <sup>10</sup> Franklin E. Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime*, ch. 4 (1995).
- <sup>11</sup> American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 1*, Section 1.02(2) (2007).
- <sup>12</sup> American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 2*, Section 305.6 (2011).
- <sup>13</sup> Richard S. Frase, *Just Sentencing: Principles and Procedures For A Workable Sentencing System* (2013); John Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 *Int'l J.L. & Psychiatry* 103 (1982).
- <sup>14</sup> American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 1*, Section 1.02(2) (2007).
- <sup>15</sup> Martin F. Horn, *Rethinking Sentencing*, 5 *Corrections Mgmt. Q.* 4 (2001); American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 4*, Section 6.06 (2016).
- <sup>16</sup> Mariel Alper, Ebony Ruhland, Edward Rhine, Kevin Reitz, & Cecelia Klingele, *Increasing Use of Risk Assessment at Release*, Briefly on Releasing Authorities (2015), <http://www.robinainstitute.org/sentencing-law-policy/>.
- <sup>17</sup> Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 *Fed. Sent'g Rep.* 167, 167 (2014).
- <sup>18</sup> Susan C. Kinney & Joel M. Caplan, *Findings from the APAI International Survey of Releasing Authorities* 13, Center for Research on Youth and Social Policy, University of Pennsylvania (2008).
- <sup>19</sup> Don Andrews, James Bonta, & J. Stephen Wormith, *Level of Service/Case Management Inventory (LS/CMI): An Offender Assessment System: User's Manual* 47, Multi-Health Systems, Inc. (2004).
- <sup>20</sup> Eileen Sullivan & Ronnie Greene, *States predict inmates' future crimes with secretive surveys*, AP (Feb. 24, 2015), <http://bigstory.ap.org/article/027a00d70782476eb7cd07fbcca40fc2/states-predict-inmates-future-crimes-secretive-surveys>.
- <sup>21</sup> Peggy Burke, Linda Adams, Gerald Kaufman, & Becki Ney, *Structuring Parole Decisionmaking: Understanding the Past; Shaping the Future*, National Institute of Corrections (1987);



- Papparozi & Caplan, *supra* note 2; Lambert & Weisberg, *supra* note 2.
- <sup>22</sup> Kinnevy & Caplan, *supra* note 18, at 9.
- <sup>23</sup> David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* 164–65 (1980); Robert O. Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, Wash. U. L. Q. 243, 301 (1966); see also Schwartzapfel, *supra* note 3.
- <sup>24</sup> Neil P. Cohen, *The Law of Probation and Parole* 6-27 (2d ed. 1999); Fla. Stat. § 947.06; Vt. Stat. § 502(a); Mahaney v. State, 610 A.2d 738 (Me. 1992).
- <sup>25</sup> Code of N.M. Rules, R. 22.510.2.8(A)(3); Franciosi v. Mich. Parole Bd., 604 N.W.2d 675 (Mich. 2000); Holup v. Gates, 544 F.2d 82 (2d Cir. 1976).
- <sup>26</sup> Laws of R.I. § 13-8-26; Utah Admin. Code R. 671-303-1(2); Vt. Stat. § 502(d)).
- <sup>27</sup> Ga. Code § 42-9-53; Ky. Rev. Stat. § 439.510; S.D. Codified Laws § 24-15-1, some routinely permit it (Ind. Code § 11-13-3-3(i)(2); Md. Code, Art. 41, § 4-505), while most give the board discretion to disclose some or all of the file on a case-by-case basis (Cohen, *supra* note 24, vol. 1, at 6-23, 6-32 to 6-33). Tenn. Code § 40-28-117(a) (2013).
- <sup>28</sup> Dawson, *supra* note 23, at 259; Tonry, *supra* note 17; Hemphill v. Ohio Adult Parole Authority, 575 N.E.2d 148 (Ohio 1991); Wis. Admin. Code § DOC 331.08).
- <sup>30</sup> Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stan. L. Rev. 155 (2005).
- <sup>31</sup> Rhine, *supra* note 1.
- <sup>32</sup> Mark H. Bergstrom, Frank Dermondy, Steven L. Chanenson, & Jordan Hyatt, *The Next Era of Sentencing Reform . . . Revisited*, 21 Fed. Sent'g Rep. 203 (2004).
- <sup>33</sup> Utah Code § 77-27-5(3); Vt. Stat. § 454.
- <sup>34</sup> Tenn. Code § 40-28-105(11); Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 130 (1969).
- <sup>35</sup> Frase, *supra* note 8; Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 Wm. & Mary L. Rev. 2123 (2010); Reitz, *supra* note 9.
- <sup>36</sup> Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 Crime & Justice: A Review of Research. 347 (Michael Tonry ed., 2009).
- <sup>37</sup> Jeremy Travis & Bruce Western, *The Growth of Mass Incarceration in the United States: Exploring Causes and Consequences*, National Research Council (2014).
- <sup>38</sup> Though it is not a focus of this paper, the revocation of parole or post-release control (and probation) represents a third parallel development. Since the 1980s, a very high percentage of prison admissions, more than half in some states, has been based on parole and probation revocations. See Alper et al., *supra* note 16; Rhine, *supra* note 1; Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (2005).
- <sup>39</sup> The Pew Charitable Trusts, *Max Out: The Rise in Prison Inmates Released Without Supervision* 1 (2014).
- <sup>40</sup> Alper et al., *supra* note 16 (citing Scott-Hayward, *infra* note 44).
- <sup>41</sup> Rhine, *supra* note 1.
- <sup>42</sup> Petersilia, *supra* note 1; Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 Crime and Justice: A Review of Research 207 (Michael Tonry ed., 2008); Daniel P. Mears & Joshua C. Cochran, *Prisoner Reentry in the Era of Mass Incarceration* (2015).
- <sup>43</sup> American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 3* (2014).
- <sup>44</sup> Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. Rev. 421 (2011); Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility, and Prospects*, 47 Crim. L. Bull. 177 (2011); Mears & Cochran, *supra* note 42.
- <sup>45</sup> Alper et al. *supra* note 16.
- <sup>46</sup> American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 3* (2014).
- <sup>47</sup> American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 3*, 91–92 (2014).
- <sup>48</sup> Mears & Cochran, *supra* note 42.
- <sup>49</sup> Scott-Hayward, *supra* note 44; Rhine, *supra* note 1.
- <sup>50</sup> Amy L. Solomon, Jenny W.L. Osborne, Laura Winterfield, Brian Elderbroom, Peggy Burke, Richard P. Stroker, Edward E. Rhine, & William D. Burrell, *Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes*, The Urban Institute (2008).
- <sup>51</sup> Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, U.S. Department of Justice, Bureau of Justice Statistics (2002); Travis, *supra* note 38.
- <sup>52</sup> Solomon et al., *supra* note 50; Petersilia, *supra* note 42; Scott-Hayward, *supra* note 44; American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 3* (2014); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. Crim. L. & Criminology 4, 1015–70 (2013).