

Restoring Local Control of Parole to the District of Columbia

December 2019

Prepared by: Justice Policy Institute

The District of Columbia Restoring Local Control of Parole Study was produced by JPI under grant #2019-PBS-01 awarded by the District of Columbia Office of Victim Services and Justice Grants, Executive Office of the Mayor, District of Columbia. The findings, conclusions, and recommendations expressed in this report are those of the Justice Policy Institute and do not necessarily reflect the views of the Office of Victim Services and Justice Grants or the Executive Office of the Mayor.

Table of Contents

<i>Acknowledgements</i>	4
<i>Executive Summary</i>	5
<i>A Brief History of Parole in Washington, D.C.</i>	18
D.C. Department of Corrections	20
D.C. Pretrial Services Agency	20
D.C. Court System	21
The National Capital Revitalization and Self-Government Improvement Act	21
U.S. Parole Commission	22
The Court Services and Offender Supervision Agency (CSOSA)	22
<i>Corrections in the District Today</i>	23
Incarceration	24
Parole Release	25
Community Supervision	26
Challenges and Concerns: Parole Release Decision-Making	30
Challenges and Concerns: Parole Supervision	34
USPC Reauthorization	35
<i>Best Practices in Parole: Lessons from Other Jurisdictions</i>	38
Comparing the Systems	38
<i>Recommendations for Release Decision-Making</i>	40
Recommendation 1: The parole board should use a structured decision-making approach that incorporates a validated risk and needs assessment tool.	40
Create guidelines to limit subjectivity	40
Use a validated risk and needs assessment tool	42
State examples	44
Recommendation 2: The parole board should operate under the presumption that the goals of punishment have been met at the time of initial parole eligibility, and parole release decision-making should be based solely on objective factors related to an individual’s future risk to the community.	45
Focus decision-making on risk	45
Administrative parole	46
Compassionate release	48
Recommendation 3: Supervision should be imposed selectively, with the length and conditions of supervision linked to risk. Conditions should be the least restrictive necessary	

to meet the goals of reentry and public safety, resources should be front-loaded, and people should have the opportunity to shorten their parole term through good behavior.	49
Length of supervision period	49
Early discharge	50
Conditions of supervision	52
Recommendation 4: The parole board should work closely with other criminal justice agencies, as well as support agencies, to ensure development of a parole release plan that supports a successful reentry.	53
Recommendation 5: The parole board should employ transparency in parole release decision-making protocol and practices. The applicant and victim should be fully informed of the process and be allowed to participate actively.	54
<i>Recommendations for Parole Supervision</i>	56
A New Vision for Community Corrections	57
Recommendation 6: A continuum of graduated sanctions should be used by the parole board to address infractions committed by people on supervision. Revocation to prison should be used as a last resort, and only for individuals who cannot be safely supervised and supported in the community.	57
Recommendation 7: The parole board should respond to repeated violations with swift, certain, and proportional sanctions that reflect the seriousness of the infractions.	59
Recommendation 8: Preparations for reentry should begin while individuals are in prison, and community support services should be strengthened to improve the prospects for post-incarceration success.	60
Recommendation 9: The parole board should be required to use risk and needs assessments and should adjust supervision and services accordingly.	60
Recommendation 10: Supervision intensity and support resources should be front-loaded to decrease an individual’s risk of reoffending or committing violations that result in a return to prison.	61
Recommendation 11: The parole board should adopt policies allowing for earned discharge from supervision.	61
Recommendation 12: The parole board should cap the amount of time that must be served in prison for parole revocations.	62
Recommendation 13: To improve outcomes, individuals on parole should be actively engaged in their own supervision process.	63
Recommendation 14: The District should expand and improve community-based treatment and services to support successful reentry.	63
Recommendation 15: Fines and fees imposed on justice-involved people should be reduced or eliminated.	64

<i>Operational Considerations</i>	66
Professionalizing Parole	66
Recommendation 16: Reasons for denial of parole must be made public, documented in writing, and appealable.	66
Recommendation 17: An applicant should have access to counsel and be provided all materials that the parole board will use to make its decision in advance of the hearing.	67
Recommendation 18: Establish standards for parole board member eligibility, including education and work/life experience.	67
Recommendation 19: A panel of experts should review parole board nominations and submit recommendations to the executive for review.	68
Recommendation 20: Parole board members should serve terms of between four and six years, staggered by the term of the executive, and the D.C. Council should establish rules for removal in statute.	68
Recommendation 21: The parole board must have transparent rules and procedures that reflect the input of all interested parties.	69
Recommendation 22: The parole board should adopt a robust set of performance measures that are publicly reported on a regular basis.	69
Staffing and Budgeting	70
<i>A “Second Look” Approach</i>	73
The Rationale for a Second Look	73
Second Look in the District	77
Release Decision-Making	78
Supervision and Revocations	79
<i>The Path Forward: A Hybrid System of Release Decision-Making and Supervision</i>	82
Legislative Enactment Recommendations	84
Hybrid System with Separate Bodies Responsible for Decisions Regarding Determinate and Indeterminate Sentences	86
District of Columbia Board of Parole	87
Superior Court and the Second Look Provision	89
<i>Conclusion</i>	95

Acknowledgements

The Justice Policy Institute (JPI) would like to thank the Office of Victim Services and Justice Grants of the District of Columbia for their support to produce this report. In addition, this report would not have been possible without the expert legal research conducted by the pro bono team assembled from Covington & Burling LLP: Jason Everett, Sanchi Khare, Michael Labson, Alexandra Langton, and Claire O'Brien.

JPI extends special thanks to Philip Fornaci, formerly of the Washington Lawyers' Committee for Civil Rights and Urban Affairs; Olinda Moyd, Katerina Semyonova, Jamie Argento Rodriguez, and Chiquisha Robinson of The Public Defender Service for the District of Columbia; Tammy Seltzer, University Legal Services; Louis Sawyer, D.C. Reentry Taskforce; Michelle Bonner, D.C. Corrections Information Council; and Adam Schlosser, Drinker Biddle & Reath LLP for their foundational work outlining the reasons why the District should restore local control of parole and catalyzing a call for a deeper examination.

JPI expresses its deepest gratitude to the individuals, organizations, and associations whose important work we relied on extensively to produce the recommendations in this report. Their generosity with their time to speak with us and their critical contributions to improve the field of parole release and supervision helped shape our internal deliberations about the final recommendations and are cited extensively throughout the report.

JPI thanks Jamie Argento Rodriguez, Olinda Moyd, and Chiquisha Robinson of The Public Defender Service for the District of Columbia for their feedback on the parole practices in the District section of the report. We also thank Emily Gunston and Stacey Litner of the Washington Lawyers' Committee for Civil Rights and Urban Affairs for their feedback on the local parole practice section of the draft as well as for connecting us with a number of individuals and family members in the District with parole experience.

We also thank representatives from the Executive Office of the Mayor, the D.C. Council, and the Superior Court who generously shared their time and insight as we developed the recommendations in this report. JPI also thanks the practitioners, attorneys, stakeholders, family members, and justice-involved individuals, including those currently and formerly incarcerated, in the District of Columbia whose experiences with parole and wisdom about challenges and solutions were invaluable to the shaping of this report.

JPI would also like to thank Jenifer Warren of Warren Communications for writing and editing support throughout this project.

Executive Summary

In January 2019, the District of Columbia’s Office of Victim Services and Justice Grants enlisted the Justice Policy Institute (JPI) to explore the feasibility of restoring local control of parole.¹ Transferring supervision responsibilities and parole decision-making back to the District would be an ambitious, complicated undertaking. Fortunately, the District’s leaders can draw on a wealth of data, evidence, and experience from other jurisdictions as they evaluate how best to move forward.

This document highlights the best available research and practice in the parole field, provides recommendations for parole decision-making and supervision, and outlines three options for restoring local control of release decision-making. JPI undertook a series of activities to produce this report. These included:

- Consulting with experts from multiple organizations that provide technical assistance to help states improve their parole practice, including attending the 2019 Association of Paroling Authorities International Chairs Meeting and Annual Training Conference in Baltimore, Maryland.
- Examining a broad array of research in academic peer-reviewed journals, technical white papers, and state agency reports.
- Interviewing District and federal officials to understand how the current system functions and how best to build upon its strengths.
- Speaking with attorneys who handle parole applications to the United States Parole Commission.
- Attending community speak-out events and local criminal justice coalition meetings to solicit input from a wide range of community and system stakeholders, including currently and formerly incarcerated people with experience in the District’s parole system.

JPI also drew upon lessons learned from successful policies and practices in other jurisdictions. Once an initial draft of this report was prepared, JPI asked experts with expertise with parole to review the document and provide feedback.

Background

On August 5, 1997, Congress enacted the National Capital Revitalization and Self-Government Improvement Act, commonly known as the D.C. Revitalization Act. Adopted at a time of financial crisis in the District, the law transferred control of most correctional responsibilities to the federal

¹ The District of Columbia Restoring Local Control of Parole Study was produced by JPI under grant #2019-PBS-01 awarded by the District of Columbia Office of Victim Services and Justice Grants, Executive Office of the Mayor, District of Columbia. The findings, conclusions, and recommendations expressed in this report are those of the Justice Policy Institute and do not necessarily reflect the views of the Office of Victim Services and Justice Grants or the Executive Office of the Mayor.

government. Under the Act, the Lorton Prison Complex in Lorton, Virginia, was closed and people housed there were transferred to the custody of the Bureau of Prisons (BOP), which operates 122 institutions from Maryland to California. The Act also abolished the D.C. Board of Parole and transferred its responsibilities to the United States Parole Commission (USPC), and it created the Court Services and Offender Supervision Agency (CSOSA). A federal agency, CSOSA is under the jurisdiction of the USPC, which has sole authority to grant parole to eligible individuals and has the power to enforce parole conditions and revoke parole in the event of violations.

Additionally, the Revitalization Act created the Truth-in-Sentencing Commission, which was directed to develop recommendations to the Council of the District of Columbia on amendments to the District of Columbia Code regarding sentences imposed for felonies committed on or after August 5, 2000. Under the law, individuals convicted prior to August 5, 2000, remain parole-eligible. Those convicted after August 5, 2000, are sentenced under a new guidelines system and are placed on supervised release after serving a minimum of 85 percent of their sentence. Unlike the rules governing the parole-eligible population, there is no exercise of discretion that can influence the release date for persons sentenced under the truth-in-sentencing system. They can earn up to 15 percent off of their sentence for participating in programming and earning good-time credits.

Corrections in the District Today

D.C. Criminal Code

Bureau of Prisons in 2018

- There were 4,126 individuals incarcerated, a 34 percent reduction since 2008
- There were 883 individuals *eligible for parole release*
- There were 2,395 individuals *eligible for supervised release*

D.C. Jail in 2017 / 2018

- There were 2,048 people held in D.C. Jail in 2017, a 33 percent decrease since 2008
- In 2018, 197 people (15 percent of the population) were being held awaiting a parole violation hearing

Community Supervision in 2018

- There were 950 people *under parole supervision*
- There were 2,382 people *under supervised release*
- On average, parole supervision lasts between 12 and 17.5 years and supervised release lasts 40 months

Revocations in 2018

- CSOSA reported 68 parole revocations (5.4 percent) to prison and another 567 supervised release revocation (15.9 percent) to prison

Challenges and Concerns About Parole in the District

Transferring responsibility for the incarceration, release, and supervision of Washington, D.C. residents from local officials to the federal government has created challenges and concerns on several fronts. These include the imprisonment of people far from home, reentry complicated by a lack of sufficient preparation and supportive housing, high rates of parole denial, and unusually high numbers of parole revocations.

JPI heard frequent complaints that the USPC systematically denies parole based on the severity of an individual's original offense, rather than on evidence of a person's progress toward rehabilitation. Critics argue that the USPC's practice erodes the authority of the court and produces unjust outcomes.

The mere process of preparing for parole is complex and fraught with challenges for those seeking consideration.

Attorneys also express frustration with the need to submit Freedom of Information Act requests for any information they require from the USPC and BOP in advance of the hearing. Requests for victim statements or witness statements are often ignored. Moreover, the USPC will only release documents that they create, so other meaningful information that a hearing examiner may consider, such as BOP reports or the pre-sentence investigation, must be requested separately.

At the hearing, an applicant is permitted only one person in the room, typically the counsel who has helped prepare the parole materials.

Another common complaint is that the USPC seldom identifies a path forward for those persons who are denied parole. Little guidance is given about what steps can be taken to mitigate the factors that led to the denial. In some cases, the USPC instructs the applicant to enroll in certain programs prior to returning for a subsequent review. But programming options in the BOP vary widely by facility, often based on security classification or whether a private provider manages the prison. Given that, it may be impossible for an individual to complete a recommended program before a subsequent parole review—a Catch 22 that can lead to yet another denial.

Of greatest concern is the USPC's record of revocations for technical violations, or those that represent a non-criminal act, such as missing an appointment with a supervising officer or failing a drug test.

Each year, hundreds of people on parole and supervised release in D.C. are returned to prison for violations, based on policy positions set by a federal panel currently comprised of two members, one from Maryland and one from Kentucky, who have no connection to the D.C. community or government and may be out-of-step with local priorities. In some cases, parole violations are connected to charges of a new criminal offense. But even when such charges are dismissed in court, the USPC often revokes parole, leading to incarceration.

Recommendations for Release Decision-Making

In recent years, a growing number of researchers have expressed support for a set of principles considered key to ensuring fairness in parole release decisions:

- There should be a presumption of release when a person in prison first becomes eligible for parole.
- Parole boards should not deny release because they believe an individual has not served sufficient time for a given crime.
- Parole denials should be based on a credible assessment of a person's risk of serious criminal conduct and preparation to reenter society.

JPI reviewed published resources and spoke with national experts who provide technical assistance to jurisdictions around the country on parole-related issues to identify best practices across the country in parole release decision-making and supervision. No single jurisdiction

reflected all of the best practices in release decision-making and supervision that are outlined below. In fact, many of the recommendations in this document are principles drawn from the experiences of practitioners and technical assistance experts and represent aspirational goals for a model system of parole. The recommendations below represent the most current thinking about how the District of Columbia should most effectively manage their parole release systems.

Recommendation 1: The parole board should use a structured decision-making approach that incorporates a validated risk and needs assessment tool.

Create guidelines to limit subjectivity

Over time, research has demonstrated the value of using a different approach to decision-making—one that is clear, structured, more professional, and reliant upon an evidence-based tool for gauging risk. The foundation of this approach is a set of policy-driven guidelines designed to increase objectivity, consistency, and transparency in the parole release process.

If applied correctly, guidelines should ensure that case factors are consistently given the same weight by parole boards, leading to greater fairness and uniformity in parole grants and denials. Guidelines also should specify presumptive release dates at initial eligibility for low-risk people in prison, and for moderate- and high-risk people unless risk assessments or in-prison behavior dictate otherwise.

Use a validated risk and needs assessment tool

To effectively govern parole decisions, guidelines must include the use of a validated risk and needs assessment tool. Research over the past 20 years has shown that such actuarially-based instruments can predict a person’s risk of future criminal behavior far better than the clinical judgment of individual parole board members.

To ensure confidence in risk assessments and their use in parole decisions, jurisdictions should make public the factors measured in such evaluations, how risk is calculated, and the risk scores. Researchers also advise that parole boards examine their risk assessments closely to identify any variables that may be influenced by race, and then determine how the removal of such variables would affect accuracy. This should include opportunities for input from experts in the field as well as the public.

Recommendation 2: The parole board should operate under the presumption that the goals of punishment have been met at the time of initial parole eligibility, and parole release decision-making should be based solely on objective factors related to an individual’s future risk to the community.

Focus decision-making on risk

Decisions to delay parole beyond the initial point of eligibility should be based only on a finding by the parole board that a person represents an unacceptable risk of reoffending upon release. More specifically, such findings should be anchored in credible factors—such as risk assessments and in-prison conduct—that research has linked with readiness for release.

In many states, parole boards use their discretion to essentially reexamine decisions of sentencing judges and determine whether further incarceration is needed to ensure what board members consider sufficient punishment for a given crime. Often, these decisions turn on the “too much crime” rule, meaning that the severity of the offense tends to overwhelm all other considerations.

Administrative parole

For low-risk cases, a small handful of states have adopted policies allowing “administrative parole” to avoid the need for board hearings. Models vary, but typically, people in prison who comply with preestablished criteria in their parole case plans, and who refrain from any serious misconduct for a specified period of time, are certified as prepared for release by corrections officials and freed without an evaluation by the parole board.

Recommendation 3: Supervision should be imposed selectively, with the length and conditions of supervision linked to risk. Conditions should be the least restrictive necessary to meet the goals of reentry and public safety, resources should be front-loaded, and people should have the opportunity to shorten their parole term through good behavior.

Length of supervision

The length of parole supervision should be disconnected from the incarceration term, and supervision should be the least restrictive necessary to serve public safety and support a successful reentry. Supervision also should be reserved primarily for people at higher risk of reoffending, along with those convicted of serious crimes.

Individuals on community supervision also should have the opportunity to accumulate “earned time” credits to shorten the duration of parole.

Early discharge

Early discharge from parole should be available for low-risk people and for others who maintain compliance with supervision conditions or other established criteria for a sustained period of time. Research consistently demonstrates that when guided by evidence-based practices, early discharge can promote good behavior while conserving government resources.

Conditions of supervision

Recommendations on best practices for setting conditions of parole include imposing as few as necessary; ensuring that special conditions reflect individual risk and needs, as identified by a validated assessment; placing minimal conditions, or possibly no conditions, on low-risk people; and frontloading conditions during the period immediately following release (i.e., the first six to 12 months), when the risk of violations and reoffending is highest.

Recommendation 4: The parole board should work closely with other criminal justice agencies, as well as support agencies, to ensure development of a parole release plan that supports a successful reentry.

Planning for this critical transition from prison should begin well before people reach their minimum parole eligibility date and should be guided by a carefully crafted parole plan involving corrections officials and the parole board.

To support a seamless and successful transition into the community, corrections and parole board officials should maintain partnerships with community agencies and organizations that offer relevant services and can provide support to individuals under supervision. These agencies include those that address mental health and substance use disorder treatment, housing, employment, education, and licensing.

Recommendation 5: The parole board should employ transparency in parole release decision-making protocol and practices. The applicant and victim should be fully informed of the process and be allowed to participate actively.

Individuals should be provided materials outlining expectations for their in-prison conduct and clearly detailing ways in which they can prepare themselves for release, thereby improving their chances of obtaining an earlier parole date.

During the hearing, applicants should be provided the ability to present a case, including submitting written information and calling witnesses. They should be given the opportunity to challenge assertions by correctional officials about their program participation or institutional conduct, if necessary. They also should be permitted to challenge their risk score, which forms the foundation of release decision-making, and to obtain help from an attorney or other advocate in preparing and presenting a case before the board.

For purposes of clarity and accountability, board members should be required to submit, in writing, their justification for decisions that depart from parole guidelines. The board also must be provided a clear, publicly available set of procedures governing “set-backs,” or parole denials.

Policies should clearly define the role of victims in parole proceedings, taking into consideration victims’ rights codified in statute. Before a hearing, victims should be notified that the board is

conducting a “forward-looking assessment” of an individual’s risk level and readiness for parole. Victims may offer an impact statement and appear at parole hearings, but the parole board should limit their consideration to an applicant’s future risk potential and conditions governing release and should not use a victim’s testimony to revisit the circumstances of the crime.

Recommendations for Parole Supervision

Parole should be more about promoting success and less about continued punishment. It also reflects the reality that rather than serving as an alternative to incarceration or pathway to stability after prison, parole too often fuels imprisonment, exacting a toll on individuals and communities and doing little to restore victims.

Recommendation 6: A continuum of graduated sanctions should be used by the parole board to address infractions committed by people on supervision. Revocation to prison should be used as a last resort, and only for individuals who cannot be safely supervised and supported in the community.

The parole board should establish a continuum of progressive sanctions authorities use in response to parole violations. The goal is to hold individuals accountable for their conduct but avoid the high costs—both fiscal and human—of a parole revocation and return to prison.

Recommendation 7: The parole board should respond to repeated violations with swift, certain, and proportional sanctions that reflect the seriousness of the infractions.

Along with using a matrix to determine the appropriate, proportional sanctions for rules violations, experts recommend that responses be imposed swiftly and certainly to have the maximum deterrent effect. New research supports a strategy that focuses on swift and certain sanctions without relying on the most severe response of using revocations to prison.

Recommendation 8: Preparations for reentry should begin while individuals are in prison, and community support services should be strengthened to improve the prospects for post-incarceration success.

Recommendation 9: The parole board should be required to use risk and needs assessments and should adjust supervision and services accordingly.

As with parole release decisions, there is a strong consensus backing the use of validated risk and needs assessments to set the intensity of supervision levels and the range of services and programs people on parole receive. The lowest risk individuals, for example, might be placed on administrative supervision, which typically requires a minimal amount of contact with authorities.

Recommendation 10: Supervision intensity and support resources should be front-loaded to decrease an individual's risk of reoffending or committing violations that result in a return to prison.

Studies have consistently shown that people are at greatest risk of reoffending or violating parole rules during the first weeks and months after their release. This timeframe also is when individuals are most in need of substance abuse treatment, mental health care, and help with housing, employment, and other issues related to reintegration.

Recommendation 11: The parole board should adopt policies allowing for earned discharge from supervision.

The District should allow individuals to earn time off of their parole term by participating in programs and/or complying with the terms of their supervision. This approach provides an incentive for people on parole to engage with programs that may be helpful to their success, and also encourages compliance with rules.

Recommendation 12: The parole board should cap the amount of time that must be served in prison for parole revocations.

The District should prioritize costly prison beds for people who commit more serious offenses and rely on effective violation responses that cause less damage to a person's community reintegration, employment, or development of positive family relationships. Such caps are particularly appropriate for violations stemming from behavior that would be legal if a person was not on parole.

Recommendation 13: To improve outcomes, individuals on parole should be actively engaged in their own supervision process.

While risk and needs assessments should highlight major elements of the plan, allowing and encouraging individuals under supervision to have input is valuable, enhancing feelings of accountability and resulting in improved public safety. Under this approach, parole officers adjust case plans in consultation with people on parole, help them with goal-setting, and maintain an open dialogue about conditions of supervision.

Recommendation 14: The District should expand and improve community-based treatment and services to support successful reentry.

Formerly incarcerated people face an obstacle course of challenges as they attempt to reintegrate into society, from limited access to housing and employment to challenges related to substance use and mental health disorders. As part of comprehensive criminal justice reform packages

adopted in recent years, many states have increased funding of community-based treatment and services to better support people transitioning through reentry.

Recommendation 15: Fines and fees imposed on justice-involved people should be reduced or eliminated.

Operational Considerations

Professionalizing Parole

Recommendation 16: Reasons for denial of parole must be made public, documented in writing, and appealable.

Recommendation 17: An applicant should have access to counsel and be provided all materials that the parole board will use to make its decision in advance of the hearing.

Recommendation 18: Establish standards for parole board member eligibility, including education and work/life experience.

Recommendation 19: A panel of experts should review parole board nominations and submit recommendations to the executive for review.

Recommendation 20: Parole board members should serve terms of between four and six years, staggered by the term of the executive, and the D.C. Council should establish rules for removal in statute.

Recommendation 21: The parole board must have transparent rules and procedures that reflect the input of all interested parties.

Recommendation 22: The parole board should adopt a robust set of performance measures that are publicly reported on a regular basis.

Staffing and Budgeting

Parole agency budgeting and staffing protocols vary widely among the states, typically reflecting different approaches each jurisdiction takes to managing parole. In most states, parole costs are not itemized, and instead are included in total corrections budgets. Such accounting creates challenges in determining and comparing levels of state spending on parole release and supervision, and also obscures staffing and other institutional priorities.

We anticipate that the annual budget of a local parole board in the District would be far less than the \$13 million currently spent by the USPC. A reasonable estimate is that the District would spend no more than **\$4 million annually on its board**, plus additional start-up costs such as hiring staff, securing office space, and so forth. Additional funding would likely be needed for costs associated with ongoing judicial training and evaluation.

A “Second Look” Approach

While reviewing documents and speaking with technical assistance experts and local stakeholders, the possibility of assigning release decision-making to the courts through a “second look” provision emerged. First, this approach makes sense due to the declining number of parole-eligible cases remaining in the BOP. Secondly, the District is already operating a similar system of judicial review for people who committed their crimes as juveniles (under 18 years of age) and had served at least 15 years in prison. Finally, the current chair of the USPC, Patricia Cushwa, has called for a court-centered review process in place of the USPC in a memo issued in March 2019. For these reasons, JPI decided to explore the possibility of a second look provision in the District.

Support for the general principle of a second look provision has been growing nationally among sentencing experts, fueled in part by the proliferation of extremely long criminal sentences during the U.S. incarceration boom. Many researchers believe the country’s use of lengthy sentences—sentences that are much longer than those in other Western democracies—merits the creation of a mechanism for their review by a court at some point in time.

Parole boards have proven to be risk-averse and amenable to political pressure, which contributes to why states with indeterminate sentencing have higher rates of incarceration. The American Law Institute also believes that parole boards have not been effective at accurately identifying risk of reoffending at release, erring by being too restrictive or too liberal. Many of the policies and practices we recommend are an acknowledgment of past weaknesses in parole practice and an effort to safeguard against those historic problems.

Under the second look model, the decision-making authority—a judge or panel of judges—would conduct a hearing to consider an application for sentence modification from qualifying individuals who have served a minimum of 15 years in prison. Hearings would involve a reevaluation of the sentence applying current standards of review, and would evaluate whether the purposes of the sentence could be better met with a modification. Reconsiderations could not lead to a lengthening of sentence, but could modify it in other ways, including an order that an individual be released with time served. Decisions would be shaped by guidelines designed to ensure fairness, proportionality, consistency, and transparency in the evaluation process.

Judicial sentence modification raises potential practical challenges. First, there may be problems with administrative capacity, as already over-burdened courts process sentence modification motions and hearings. Second, it is unclear that the case-by-case judicial modification mechanism will adequately address the prison cost and overcrowding concerns that partially motivate

interest in early release. Additionally, it is up for debate as to whether judges are best positioned to consider motions for sentence modification. It is unlikely that the same judge who sentenced an individual will consider the motion for sentence modification. In fact, judges in the D.C. Superior Court rotate through five different divisions. This will impact continuity on cases and poses an obstacle to judges obtaining the appropriate expertise in making release decisions.

The Path Forward: A Hybrid System of Release Decision-Making and Supervision

After extensive research and consultation with local and national experts, it is clear that simply reconstituting the Washington, D.C. Board of Parole would not fully meet the needs of the District's correctional population.

First, since August 5, 2000, the District has operated a determinate sentencing system. Those individuals are not subject to the discretionary release of a parole board. They must serve a minimum of 85 percent of their sentence in prison and a local parole board would not have the authority to provide relief for those persons serving long prison terms.

However, establishing a court-centered process for *all* District release decision-making would create a potentially significant additional burden on the courts. While the Superior Court may have the capacity to handle release decision-making for parole-eligible individuals as well as people who have served more than 15 years under the current determinate system, the additional daily responsibilities of managing parole supervision and revocation hearings will create substantial staffing, budgeting, and physical space challenges. This would include the cost of providing counsel to represent applicants in their second look hearing.

In addition, while parole has proven problematic in other jurisdictions, the field has evolved, and a strong set of best practices now provide a detailed framework for success. With the District's profound commitment to progressive justice practices in the executive, legislative, and judicial branches, JPI believes a local parole board could manage release decisions in a fair, effective, and transparent way.

Thus, JPI recommends that the District adopt a hybrid system with separate and coordinated bodies responsible for decisions regarding those sentenced under the current determinate system and the "old law" indeterminate system. Under this model, people subject to indeterminate sentences would have their parole release decided by an independent parole board, while people subject to determinate sentences would have the opportunity to seek judicial review and resentencing. All individuals, regardless of when their crime occurred, would have the option to apply for a second look judicial review after serving 15 years in prison. The new parole board would take over the responsibilities of the USPC with regard to parole supervision oversight, setting standards of practice for CSOSA for community supervision and revocation hearings.

District leadership in the Executive Office of the Mayor and the D.C. Council, in conjunction with stakeholders and the public, will determine which option makes the most sense for the

community. This public conversation should begin immediately, given that the USPC's authorization is set to expire on October 31, 2020. Regardless of which option is selected, significant work lies ahead. The USPC will likely need to be authorized for an additional period of time to facilitate an orderly transfer of responsibilities to local authorities, as occurred with the transfer of parole functions from the District to the USPC following passage of the National Capital Revitalization and Self-Government Improvement Act in 1997.

JPI recommends a phased shift of control during which the District assumes responsibility for certain elements of parole in stages until full capacity can be established. The District should also consider securing technical assistance in the near future to help shape and manage the creation and implementation of a system for local control of parole.

A Brief History of Parole in Washington, D.C.

Before Congress enacted the National Capital Revitalization and Self-Government Improvement Act (“Revitalization Act”) as part of the Balanced Budget Act of 1997,² parole decisions and supervision in the District were managed by the Washington, D.C. Board of Parole. The Board was authorized by D.C. Code § 24-201(a)³ and consisted of five members appointed by the Mayor of the District of Columbia, with the advice and consent of the Council for the District of Columbia.⁴ One member of the board was designated as chairperson by the Mayor.⁵ D.C. residency was required, and each member was selected “on the basis of his or her broad experience in the responsible positions in the fields of corrections, social services, rehabilitation, or law or education in related fields of behavioral science.”⁶

The Board of Parole was authorized to determine when release to the community was in the best interests of society and the individual and what conditions should govern parole release. The Board also was in charge of supervising people on parole and determining if and when to terminate parole or conditional release or to modify the terms or conditions of parole.⁷ Although D.C. Code § 24-201.2 stated that the D.C. Board of Parole “shall . . . determine the terms and conditions of parole or conditional release,” the Mayor was authorized to “promulgate proposed rules” to implement the provisions related to the D.C. Board of Parole, subject to lack of disapproval by the D.C. Council.⁸ Additionally, the D.C. Council was authorized to “promulgate rules and regulations under which the Board of Parole, in its discretion, may discharge a person on parole from supervision prior to the expiration of the maximum term or terms for which he was sentenced.”⁹

Within this framework, the D.C. Board of Parole issued a series of guidelines: the 1972 Guidelines, the 1987 Guidelines, the 1987 Guidelines (with supplemental 1991 Policy Guidance), the 1987 Guidelines (with subsequent 1995 Policy Guidance), and the 2000 Guidelines. The date of a person’s offense determined which guidelines were applied, as spelled out in the cases of *Daniel v. Fulwood*¹⁰ and *Sellman v. Reilly*.¹¹ Those rulings prohibit the retroactive application of revised, more restrictive parole guidelines to individuals whose offense occurred under a prior set of guidelines.

² Pub. L. No. 105-33, 111 Stat. 712 (1997).

³ Enacted by the “District of Columbia Board of Parole Amendment Act of 1987,” D.C. Law 7-103, 34 DCR 8279 (effective April 8, 1988), this law was passed by the Council of the District of Columbia pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198.

⁴ D.C. Code § 24-201.1 (Board of Parole—Creation; Term of members) (abolished); *see also* Washington Lawyers’ Committee, *Restoring Control of Parole to D.C.*, at 20 (Mar. 16, 2018) 9 hereinafter Restoring Control Report0.

⁵ D.C. Code § 24-201.1 (Board of Parole—Creation; Term of members) (abolished).

⁶ *Ibid.*

⁷ D.C. Code § 24-201.2 (Powers and duties of Board; Transfer of employees, official records, etc. from Board of Parole) (abolished). The portion of the D.C. Code dealing with Indeterminate Sentences and Paroles sits in Title 24, Prisoners and Their Treatment.

⁸ D.C. Code § 24-201.3 (Rulemaking) (abolished).

⁹ D.C. Code § 24-204 (Authorization of parole; custody; discharge).

¹⁰ 893 F. Supp. 2d 42 (D.D.C. 2012).

¹¹ 551 F. Supp. 2d 66 (D.D.C. 2008).

A History of D.C. Parole Guidelines

1972 Guidelines: Offenses committed on or before March 3, 1985

- Contained no numerical scoring system. Hearing examiner expected to make decision based on totality of factors listed below:
 - Current offense
 - Criminal history
 - Personal characteristics (family, education, employment)
 - Physical or mental health issues that may have contributed to the crime
 - Infractions while incarcerated
 - Participation in programming and/or treatment as well as other evidence of transformation while incarcerated
 - Release plan and community or family support

1987 Guidelines: Offenses committed between March 4, 1985, and December 15, 1991

- Created a numerical matrix scoring system, the Salient Factor Score
- The Salient Factor Score takes into consideration:
 - Risk of reoffending
 - Type of risk of reoffending (violence, weapons)
 - Infractions while incarcerated
 - Program participation or work experience while incarcerated

1987 Guidelines (1991 Policy Guidance): Offenses committed between December 16, 1991, and October 22, 1995

- Provided additional clarity on how to score certain institutional infractions based on severity of the underlying conduct
- Outlines specific program or work activities that should be assessed as a mitigating factor
- Identifies specific factors that may allow for departure from parole recommendation, such as extraordinary work experience (departing from parole denial) or exceptional cruelty to a victim (departing from parole release recommendation)

1987 Guidelines (1995 Policy Guidance): Offenses committed between October 23, 1995, and August 4, 1998

- Provided additional guidance on factors that support release or denial

2000 Guidelines: Offenses committed between August 5, 1998, and August 4, 2000

- Implemented when the United States Parole Commission (USPC) assumed authority over the District's parole process
- Adds a Total Guideline Range to the Salient Factor Score
 - Minimum sentence plus a range of additional time calculated by the USPC based on the circumstances of the crime plus any aggravating or mitigating factors during incarceration
 - The USPC creates its own presumed range of parole eligibility, which may or may not be consistent with what the sentencing judge had in mind

Source: Jessica Steinberg and Kathryn Ramsey, *Parole Practice Manual for the District of Columbia* (GW Law, 2018), 9 - 17, https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Parole_Manual_Final_Print.pdf.

D.C. Department of Corrections

The D.C. Department of Corrections (DOC) was created in 1946 by D.C. Code § 24-211.01. The Director of the DOC is appointed by the D.C. Mayor.¹² Under pre-Revitalization Act law, all people convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and acts of Congress, were “committed, for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all such persons shall be served.”¹³ People convicted for a felony were incarcerated in the Lorton Correctional Complex, which was located in Lorton, Virginia, and operated by the DOC.

The District also was entitled to reimbursement for housing people sentenced to federal prison,¹⁴ and received additional federal funding for rehabilitation services. Specifically, this funding covered “the performance of such services and production of such commodities as [would] contribute to the rehabilitation, knowledge, and skills in trades and occupations of inmates of the institutions in the Department of Corrections of the District of Columbia, thereby equipping them with a means of livelihood upon release.”¹⁵

As discussed further below, people sentenced to prison for a felony conviction today are transferred to the federal Bureau of Prisons (BOP) to be housed in federal BOP or contract facilities. Only 11 percent of the people in custody of the DOC are sentenced for a misdemeanor (e.g., individuals *not* awaiting transfer who are serving imposed sentences at D.C. DOC facilities).¹⁶

D.C. Pretrial Services Agency

The D.C. Pretrial Services Agency was started as part of the D.C. Bail Project of 1963. It was formalized as an agency under the Executive Office of the Mayor with the passage of the Bail Agency Act of 1967.¹⁷ In 1978, the agency received its current name.¹⁸ The Pretrial Services Agency for the District of Columbia is now an independent federal agency housed within the Court Services and Offender Supervision Agency.

¹² D.C. Code § 24-441 (Created).

¹³ D.C. Code § 24-425 (Place of imprisonment).

¹⁴ D.C. Code § 24-446 (noting that the cost of care and custody of prisoners convicted of offenses under any law not exclusively applicable to D.C. would be “charged against the department or agency of the United States primarily responsible for the case and custody of such persons in quarterly amount to be rendered by the Director of the Department of Finance and Revenue”).

¹⁵ D.C. Correctional Industries Fund, 78 Stat. 1000, 88 P.L. 622 (Oct. 3, 1964).

¹⁶ Washington Lawyers’ Committee, *D.C. Prisoners: Conditions of Confinement in the District of Columbia* (June 11, 2015), 7.

¹⁷ Pretrial Services Agency for the District of Columbia, *FY 2008 Annual Report* (2008).

¹⁸ *Ibid.*

D.C. Court System

Prior to the Revitalization Act, the Superior Court of D.C., the D.C. Court of Appeals, and the D.C. Court System were controlled by the District, which proposed allocations of its budget for various departments and agencies in its annual budget submission to Congress.¹⁹ The Revitalization Act arranged for direct funding by the federal government but called for the District's courts to remain self-managed given their successful track record.²⁰ However, the D.C. Council and Mayor lost their supervisory powers over the operation of the local court system.²¹ Court operations instead became subject to oversight by the United States Office of Management and Budget.²²

The National Capital Revitalization and Self-Government Improvement Act

On August 5, 1997, Congress enacted the National Capital Revitalization and Self-Government Improvement Act, commonly known as the D.C. Revitalization Act. Adopted at a time of financial crisis in the District, the law transferred control of most correctional responsibilities to the federal government. Under the Act, the Lorton Prison Complex in Lorton, Virginia, was closed and people housed there were transferred to the custody of the BOP, which operates 122 institutions from Maryland to California. As a result of this action, thousands of Washington, D.C., residents were, and continue to be, incarcerated hundreds and even thousands of miles from their homes, friends, and families.

At the time, many Congressional leaders supported passage of the Revitalization Act. On July 30, 1997, Congressman Thomas M. Davis (R-VA) noted on the House floor that he was grateful to Delegate Eleanor Holmes Norton for working with him on this issue.²³ On the Senate floor, Senator Orrin Hatch (R-UT) spoke in support of the Revitalization Act and stated that the legislation "will result in a criminal justice system for the District of Columbia that is fairer for the victims of crime, that appropriately punishes criminals, and that incarcerates criminals in a secure, appropriate environment."²⁴

The Revitalization Act made several substantial changes to the administration of justice in the District. It abolished the D.C. Board of Parole and transferred its responsibilities to the USPC, and it created the Court Services and Offender Supervision Agency (CSOSA) to supervise people on parole in the District and provide support and services.²⁵ A federal agency, CSOSA is under the jurisdiction of the USPC, which has sole authority to grant parole to eligible individuals and has

¹⁹ Cannon v. United States, 645 F.2d 1128, 1136-37 (D.C. Cir. 1981).

²⁰ DC Appleseed Center, *The D.C. Revitalization Act: History, Provisions and Promises: Appendix One*, <https://www.brookings.edu/wp-content/uploads/2016/07/appendix-1.pdf>.

²¹ See DC Bar, Court Funding Committee, <https://www.dcb.org/about-the-bar/reports/court-funding-committee/introduction.cfm>.

²² *Ibid.*

²³ 143 Cong. Rec. E1569 (1997).

²⁴ 143 Cong. Rec. S8388 (1997).

²⁵ Jessica Steinberg and Kathryn Ramsey, *Parole Practice Manual for the District of Columbia*, (2018).

the power to enforce parole conditions and revoke parole in the event of violations.²⁶ Additionally, the Revitalization Act created the Truth-in-Sentencing Commission, which was directed to develop recommendations to the Council of the District of Columbia on amendments to the District of Columbia Code regarding sentences imposed for felonies committed on or after August 5, 2000.²⁷ Under the law, individuals convicted prior to August 5, 2000, remain parole-eligible.²⁸ Those convicted after August 5, 2000, are sentenced under a new guidelines system and are placed on supervised release after serving a minimum of 85 percent of their sentence.²⁹ Unlike the rules governing the parole-eligible population, there is no exercise of discretion that can influence the release date for persons sentenced under the truth-in-sentencing system. They can earn up to 15 percent off of their sentence for participating in programming and earning good-time credits.³⁰

U.S. Parole Commission

The Revitalization Act abolished the D.C. Parole Board and directed the USPC to conduct parole hearings for people convicted under the D.C. felony Code.³¹ The USPC is currently comprised of two commissioners who are appointed by the President of the United States. It has sole authority for granting parole to these individuals serving parole-eligible “indeterminate” sentences (sentences for offenses committed prior to August 5, 2000).³² The USPC also determines who will be granted release on parole and when.³³ The USPC enforces conditions governing individuals serving parole or supervised release terms, and has the power to revoke parole and return parolees to prison for violations of parole rules.³⁴ For individuals serving periods of supervised release (those with offenses that occurred after August 4, 2000), the USPC can re-incarcerate them for violations of supervised release rules.³⁵ The USPC makes all parole grant and parole revocation decisions for people convicted under the D.C. Code, people on parole, and people serving time under supervised release and has evolved into the *de facto* D.C. Board of Parole.³⁶

The Court Services and Offender Supervision Agency (CSOSA)

As established by the Revitalization Act, CSOSA is responsible for the direct supervision of people convicted under the D.C. criminal Code and on parole, as well as individuals serving

²⁶ D.C. Revitalization Act § 11231(a)(2).

²⁷ District of Columbia Sentencing Commission, *History of the District of Columbia Sentencing and Criminal Code Revision Commission*, <https://scdc.dc.gov/page/history-district-columbia-sentencing-and-criminal-code-revision-commission>.

²⁸ Jessica Steinberg and Kathryn Ramsey, *Parole Practice Manual for the District of Columbia*, (2018).

²⁹ District of Columbia Sentencing Commission, *History of the District of Columbia Sentencing and Criminal Code Revision Commission*.

³⁰ *Ibid.*

³¹ Restoring Control Report, *supra* n.8 at 4.

³² D.C. Revitalization Act § 11231.

³³ *Ibid.*

³⁴ D.C. Revitalization Act § 11231(a)(2).

³⁵ *Ibid.*

³⁶ Restoring Control Report, *supra* n. 8 at 6.

periods of supervised release under D.C. law.³⁷ CSOSA also assumed the adult probation function from the D.C. Superior Court.³⁸ CSOSA gathers information about newly arrested defendants and prepares the recommendations considered by the court in deciding release options.³⁹ In addition, the Agency helps judicial officers in the Superior Court for the District of Columbia and the United States District Court for the District of Columbia formulate release recommendations and provide supervision and services to people awaiting trial.⁴⁰ The purpose of this assistance is to reasonably assure that those on conditional release return to court and do not engage in criminal activity.⁴¹ Previously, these functions were handled by the D.C. Board of Parole, the D.C. Superior Court, and the D.C. Pretrial Services Agency.⁴² In 2000, CSOSA was certified as an independent entity within the executive branch.⁴³

The criminal justice responsibilities for the District taken on by CSOSA and, more broadly, by the federal government, were key steps that helped the District return to more stable financial footing. As a report by D.C. Appleseed and Our Nation's Capital noted:

“Without the passage of the Revitalization Act in 1997, the District would not have fully recovered from fiscal insolvency. Although clearly not a complete remedy for the District's financial inequities, the Act nevertheless relieved the District of several large state functions that no other city had to bear, including courts, prisons, and a greater share of Medicaid.”⁴⁴

Corrections in the District Today

Washington, D.C., has one of the most complex criminal justice systems in the country, largely because its operations are influenced by a mix of local agencies (Metropolitan Police Department, Washington, D.C. Department of Corrections), federal agencies (United States Attorney's Office, United States Parole Commission, Federal Bureau of Prisons, Court Services and Offender Supervision Agency, Pretrial Services Agency, Public Defender Service for the District of Columbia (a federally-funded independent agency)), and a hybrid court system (Washington, D.C. Superior Court). This jurisdictional overlap makes data collection and the gathering of key system-level metrics challenging. Nevertheless, the data that are available paint a picture of an

³⁷ Id. supra n.7 at 4.

³⁸ CSOSA, “Who We Are: Our History,” <https://www.csosa.gov/our-history/>.

³⁹ See Pretrial Services Agency for the District of Columbia, “What PSA Does,” <https://www.psa.gov/>; see also D.C. Code § 23-1301.

⁴⁰ Pretrial Services Agency for the District of Columbia, “About,” <https://www.psa.gov/?q=about>.

⁴¹ Ibid.

⁴² Ibid.

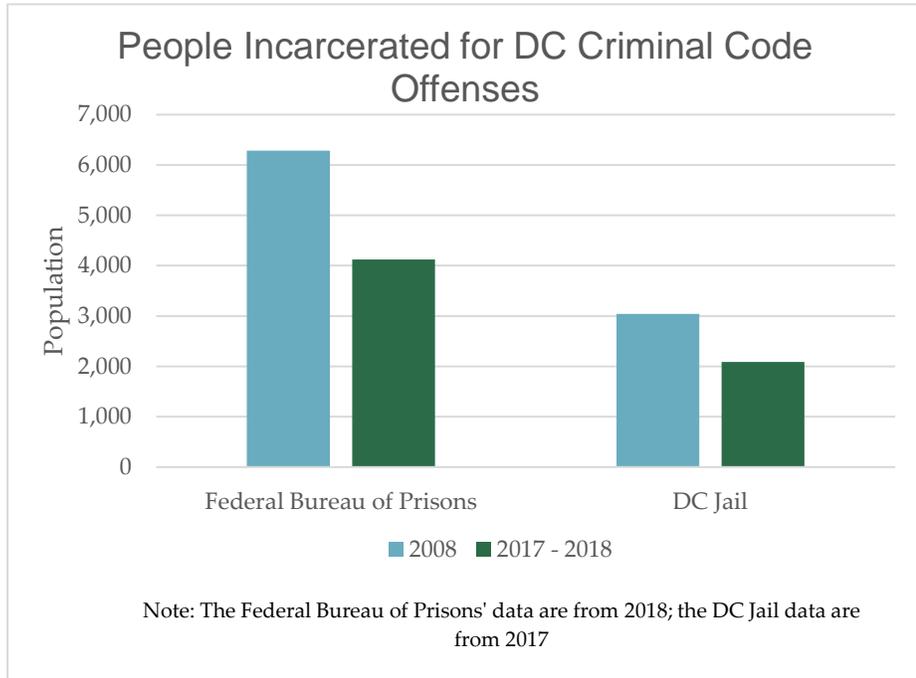
⁴³ Ibid.; see also Pretrial Services Agency for the District of Columbia, “PSA's History,” <https://www.psa.gov/?q=about/history>; see also U.S. Department of Justice, “New Federal Agency for D.C. Debuts,” (Aug. 5, 2000), <https://www.justice.gov/archive/opa/pr/2000/August/457dag.htm>.

⁴⁴ Alice Rivlin et al., *Building the Best Capital City in the World: A Report by DC Appleseed and Our Nation's Capital 100*, (Washington, DC: DC Appleseed, 2008), <http://www.dcappleseed.com/wp-content/uploads/2013/08/DC-Appleseed-Report-LR.-FINAL.pdf>.

expansive criminal justice system with numbers that are driven largely by revocations from community supervision.

Incarceration

As of 2018, there were 4,126 people held in BOP facilities for a conviction under the District of Columbia criminal Code.⁴⁵ This represents a decline of 34 percent since 2008, when the BOP held 6,283 individuals from the District.⁴⁶ More than two in five (43 percent) people in BOP facilities were convicted of non-violent offenses.⁴⁷ Most admissions to BOP facilities are for non-violent crimes or



violations of supervision. For example, in 2014 (the most recent year for which these data are available), four in 10 admissions to the BOP from the District of Columbia were for a drug or property crime.⁴⁸ More than half of admissions (55 percent) that year were for violations of supervision and not the commission of a new crime.⁴⁹ Nearly eight in 10 admissions for drug offenses involved violations of supervision and not new court commitments.⁵⁰

An additional 2,048 people were held in the D.C. Jail in 2017, a decline of 33 percent (3,045 people) since 2008.⁵¹ As of 2018, 197 people (15 percent of the total population) held in the D.C. Jail were there awaiting a parole violation hearing.⁵² This was the most common reason resulting in detention in the District's jail. Parole violations were the second most common reason for being booked into D.C. Jail in 2018, comprising one in 10 (714) bookings.⁵³ An additional 31 people were

⁴⁵ Court Services and Offender Supervision Agency (CSOSA), *Community Supervision Program, Congressional Budget Justification and Performance Plan/Report Fiscal Year 2020*, (March 18, 2019), 25.

⁴⁶ Criminal Justice Coordinating Council, *Ten-Year Estimate of Justice-Involved Individuals in the District of Columbia* (Washington, DC: Criminal Justice Coordinating Council, 2018), 12.

⁴⁷ *Blueprint for Smart Justice: The District of Columbia*, (Washington, DC: ACLU Smart Justice, 2019), 9.

⁴⁸ *Id.* at 8.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Criminal Justice Coordinating Council, *Ten-Year Estimate of Justice-Involved Individuals in the District of Columbia*, (Washington, DC: Criminal Justice Coordinating Council, 2018), 11.

⁵² "DC Jail Working Group," presentation, Vera Institute of Justice, April 2019.

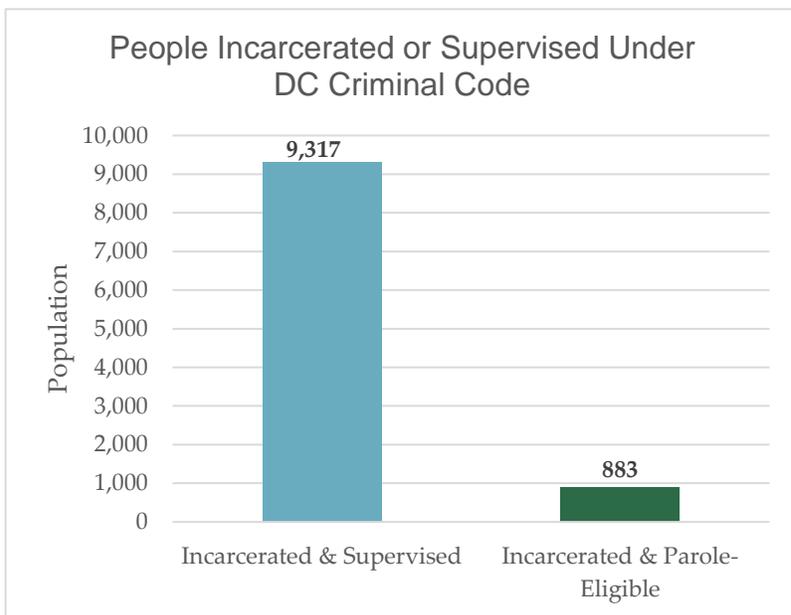
⁵³ *Ibid.*

booked into the jail for violations of supervised release in 2018.⁵⁴ A smaller number of individuals also are held in the custody of the United States Marshals Service, largely in regional jails in Virginia, awaiting return to the BOP for a hearing or revocation of parole.

These data underscore the key role that community supervision violations have played in driving incarceration rates within the District.

Parole Release

Because of changes initiated by the Revitalization Act, only people sentenced under the D.C. Code for crimes committed on or before August 4, 2000,⁵⁵ are eligible for parole. The USPC also has responsibility for all individuals sentenced in the federal system and eligible for parole, but with the abolition of federal parole in 1984, that population has dwindled. As a result, about 87 percent of the USPC's caseload in 2018, or 9,317 people, was comprised of the Washington, D.C., population in



prison or jail, on parole, or on supervised release under the D.C. Code.⁵⁶ As of 2018, there were 883 people held in the BOP who were convicted under the D.C. Code and eligible for parole release or currently held for a violation of parole supervision.⁵⁷ There were an additional 2,395 held in BOP eligible for supervised release.⁵⁸

Eligibility for parole is determined according to a statute in the D.C. Code as well as three sets of guidelines and two policy statements discussed above, which are tied to an individual's offense date. Under the statute, if "there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his or her release is not incompatible with the welfare of

⁵⁴ Email correspondence with Andrew Taylor, Research Analyst with the Sentencing and Corrections Center at the Vera Institute of Justice, September 17, 2019.

⁵⁵ *United States Parole Commission Rules and Procedures Manual*, (June 30, 2010), 182, "Because of a delay in signing the Sentencing Reform Emergency Amendment Act of 2000, some offenders who committed their crimes before 5:00 p.m., August 11, 2000, may also be eligible for parole. The judgment and commitment order should show whether the offender was sentenced under the indeterminate sentencing system or the new determinate sentencing laws."

⁵⁶ United States Department of Justice, United States Parole Commission, *FY 2020 Performance Budget Congressional Submission*, (February 2019), 14.

⁵⁷ Data from United States Parole Commission response to Freedom of Information Act Request, (July 15, 2019).

⁵⁸ *Ibid.*

society, and that he or she has served the minimum sentence imposed or the prescribed portion of his or her sentence,” the Commission may authorize release on parole.⁵⁹ The guidelines lay out additional factors commissioners use to weigh whether to grant or deny parole, and two other criteria, while not specified in regulations, also play a role in the USPC’s underlying assessment of the risk of reoffending. One is an individual’s acceptance of responsibility for the offense and expression of remorse for any pain caused to victims. The second is a release plan, which the USPC considers essential to a person’s ability to reenter society and complete parole successfully. Typically, commissioners expect a release plan to include potential housing, possible job leads, support letters from friends and family, and some indication of an individual’s prospects for financial stability in the community.

Parole hearings are conducted either in person or by video. A person seeking parole is permitted one representative at the hearing, often an attorney, relative, or case manager. Victims, or their immediate family members, also may attend parole hearings and submit written, oral, or recorded statements to the Commission. A hearing examiner conducts the review and makes a recommendation to the commissioners. Decisions, rendered as “notices of action,” are supposed to be issued within 21 business days⁶⁰ of a hearing’s completion, but some attorneys with whom we spoke report that this deadline is seldom met. The commissioners are not beholden to the recommendations of the hearing examiner. If parole is granted, the effective date set by the Commission may be up to nine months from the date of the hearing. Frequently, release dates are set near the end of the nine-month window as the USPC requires people to finalize release plans and ensure approval by the BOP and the applicable community supervision agency. (Note: Despite this additional time to prepare for release, some people released from the BOP have no living arrangements and become immediately homeless.) In some cases, the USPC opts to set a *presumptive* parole date, which can be at least 10 months, but not more than three years, after the hearing date. Both an *effective* parole date and a presumptive date are conditioned upon a continued record of good conduct and, in some instances, the completion of additional classes or programs in prison. Decisions by the Commission may not be appealed. If parole is denied, known as a “set off,” the duration between rehearings is contingent upon what guidelines apply. For example, the 1972 guidelines require one year “set offs” after denial. Guidelines adopted in 2000 mandate a rehearing within three years unless the offense resulted in a victim’s death.

Community Supervision

Those who return to the District are supervised by CSOSA, the agency created by the D.C. Revitalization Act. CSOSA provides oversight and support services in the District through its Community Supervision Program. While most of those supervised under the program are adults placed on probation by the Superior Court of Washington, D.C., a small subset—about eight percent—are people released on parole by the USPC.⁶¹ A person on parole who violates

⁵⁹ D.C. Code § 24-404 (Authorization of parole; custody; discharge).

⁶⁰ *United States Parole Commission Rules and Procedures Manual*, (June 30, 2010), 184.

⁶¹ CSOSA, “What We Do: Supervised Population,” <https://www.csosa.gov/supervised-population>.

supervision conditions becomes, once again, the responsibility of the USPC, which has the authority to revoke parole and return people to prison.

There are four types of release that are the responsibility of the USPC:

- Supervised release—individuals whose crime was committed after August 4, 2000, who have met the requirements of their sentence minus any credits
- Mandatory release—individuals who have met their maximum statutory release date
- Parole certificate—individuals who have been granted discretionary release by the USPC
- Detainer certificate—individuals who have been paroled by USPC in order to serve a period of incarceration in another jurisdiction

As of 2018, there were 3,332 people on parole and supervised release in the District.⁶² This included 950 people under parole supervision and 2,382 individuals on supervised release.⁶³ Data show that every year, the USPC sends hundreds of people back to prison for violating terms of their community supervision. In 2018, CSOSA reported 68 parole revocations (5.4 percent) to prison and another 567 (15.9 percent) revocations of people on supervised release to prison.⁶⁴ The percentage of parole revocations was considerably lower than in 2006, when 17 percent of people on parole were revoked and returned to prison.⁶⁵ Revocations to prison for people on supervised release has remained steady over that same period.

Some of these individuals are returned after committing new crimes. In 2018, 21 percent of people on parole were rearrested, with 15 percent of people on parole rearrested for a new charge.⁶⁶ That same year, 33 percent of people on supervised release were rearrested, with 24 percent of individuals on supervised release arrested for a new charge.⁶⁷ Those not rearrested for a new charge are typically picked up for “technical” violations, such as testing positive for drugs or failing to appear at a scheduled meeting with a supervising officer. If the violation involves new criminal conduct that results in a conviction, a person can serve a sentence for that offense before parole is revoked.

⁶² CSOSA, *Congressional Budget Justification and Performance Plan/Report Fiscal Year 2020* (2019), 49.

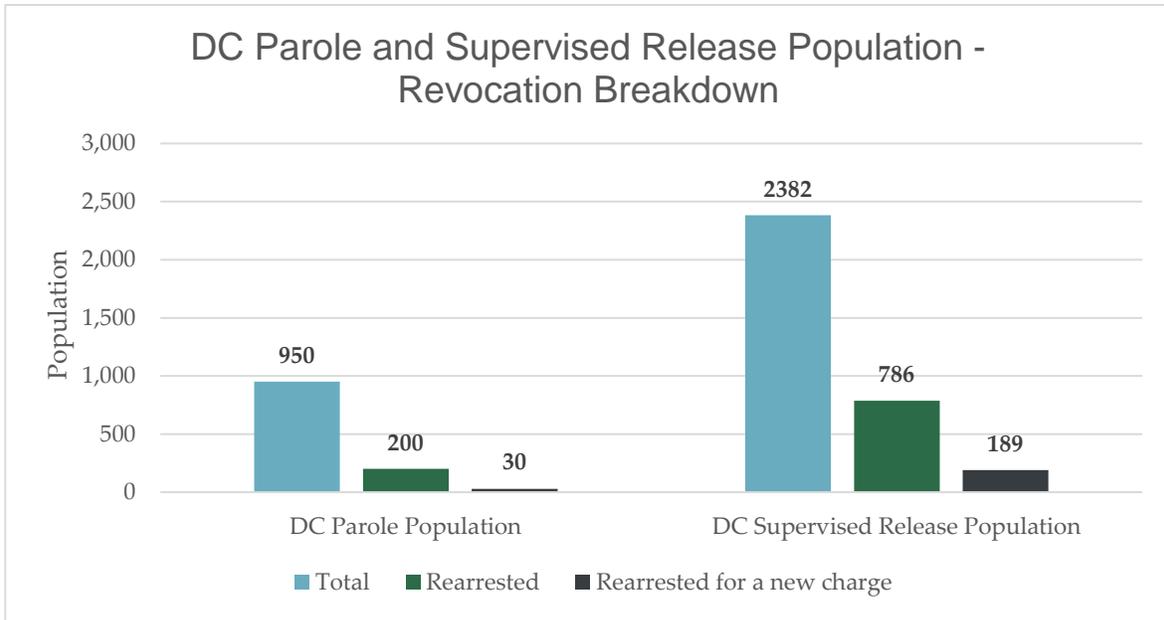
⁶³ *Id.* at 50.

⁶⁴ *Id.* at 25.

⁶⁵ *Ibid.*

⁶⁶ *Id.* at 29.

⁶⁷ *Ibid.*



In 2018, nearly 60 percent of people on parole completed their term of supervision successfully.⁶⁸ That figure was much lower for those on supervised release. Only four in 10 individuals on supervised release terminated their term of supervision successfully.⁶⁹ Overall, people supervised by CSOSA are expected to remain on parole between 12 and 17.5 years, while terms of supervised release are typically around 40 months.⁷⁰

⁶⁸ Id. at 28.

⁶⁹ Ibid.

⁷⁰ Id. at 5.

USPC Conditions of Parole

Conditions of parole may include:

- Regular reporting to a community supervision officer
- Remaining within certain geographic limits
- Refraining from any illegal activity
- Performing community service
- Avoiding contact with individuals with an arrest record, unless pre-approved
- Working
- Abstaining from alcohol or drugs, including medical marijuana that is legal in the District
- Paying court fees, restitution or other costs
- Submitting to drug screens
- Supervised parole with placement in a residential reentry center
- Supervised Parole with placement in a Halfway Back program

The Community Supervision Officer (CSO) at CSOSA has a range of responsibilities, which include:¹

- Acquainting people entering supervision with rules and procedures
- Using Motivational Interviewing to ensure that people on supervision remain engaged in efforts to accomplish behavior change
- Referring those on supervision to drug testing, drug treatment, mental health evaluation, employment opportunities, and educational opportunities
 - Treatment resources are limited, so the CSO must decide about how to most effectively allocate resources for each individual case
- Maintaining appropriate frequency and type of supervision contact based on CSOSA protocol
- Making field visits to people's place of employment and housing
- Providing notification of any change to a person's risk status
- Imposing graduated sanctions, as warranted
- Completing an Alleged Violation Report for people who have not complied with conditions of supervision or has been rearrested

A CSO's case management responsibilities include addressing violations, administering intermediate sanctions, testifying at violation hearings, and requesting warrants.¹ Violations include:

- Loss of contact – must be reported to USPC if contact not reestablished within 17 days
 - For those arrested, an alleged violation report must be filed with USPC within three business days of notification of incarceration or detention
 - People on parole who have been arrested can be detained on a five-day hold to determine whether a warrant should be issued
 - If contact is reestablished within 17 days, CSO shall employ sanctions
- Technical violations – can be handled by a CSO with graduated sanctions, but requires notification of USPC through an alleged violation report. Technical violations include failing to report to a CSO, leaving a restricted geographic area, or associating with individuals who have a prior arrest record. Alleged violation reports can include recommendations for changes to terms of supervision or other sanctions.

Source: CSOSA Community Supervision Service Operations Manual, Chapter II, 9–11; See also, CSOSA Community Supervision Service Operations Manual, Chapter VI.

A CSO may employ graduated sanctions in the event of a violation of the terms of supervision. Sanctions may include a requirement that an individual perform community service, submit to increased drug testing, abide by a more restrictive curfew, or undergo electronic monitoring or placement in a community treatment facility.⁷¹ If a CSO chooses to employ graduated sanctions and they fail to prompt a behavior change, and if a person represents a threat to public safety, a CSO can initiate a violation hearing. In such cases, and with approval of the USPC, a parole violations warrant is issued for the arrest and detention of the individual to appear at a parole hearing, and he or she is held in the D.C. Jail awaiting the hearing. The median length of stay in D.C. Jail for a parole violation is 44 days, but that period that can be longer.⁷²

For those who have not been convicted of a new crime, a USPC examiner first conducts a hearing within five days to determine whether there is probable cause to conclude that a violation occurred.⁷³ If probable cause is found, a final revocation hearing follows within 65 days of arrest.

The revocation hearing is similar to a court proceeding, where witnesses can be called and are subject to cross-examination. CSOs are questioned about the violation, and those accused are entitled to representation by private counsel or the D.C. Public Defender Service. If the USPC finds “by a preponderance of the evidence” that a violation has occurred, it can either restore and modify the conditions of supervision or revoke the individual’s supervision and return him or her to prison. The USPC determines the sanction and presumptive release date, which is contingent on institutional conduct. A person is entitled to appeal a revocation of parole to the National Appeals Board within 30 days of the issuance of the “notice of action” of revocation. It is important to point out that the “preponderance of the evidence” standard is a lower bar to clear than “beyond a reasonable doubt.” Thus, JPI learned of individuals who were either found not guilty of an offense or had their case thrown out, but still were revoked back to prison on a parole violation because the legal standard is less stringent.

Challenges and Concerns: Parole Release Decision-Making⁷⁴

Transferring responsibility for the incarceration, release, and supervision of Washington, D.C., residents from local officials to the federal government has created challenges and concerns on several fronts. These include the imprisonment of people far from home, reentry complicated by a lack of sufficient preparation and supportive housing, high rates of parole denial, and unusually high numbers of parole revocations.

Support for regaining local control over parole supervision and decision-making has been building for years and has been driven in part by concerns about the unfairness of the current

⁷¹ *CSOSA Community Supervision Service Operations Manual*, Chapter II, 10.

⁷² “DC Jail Working Group,” (2019).

⁷³ *United States Parole Commission Rules and Procedures Manual*, (June 30, 2010), 209.

⁷⁴ This section was primarily drawn from conversations with attorneys, stakeholders in the District who work on parole applications with the USPC, justice-involved individuals, and their families. In order to protect the privacy of the respondents, we are not using personal attributions in this section.

system. One troubling issue is the restrictive nature of the USPC parole granting process. Under the District's prior indeterminate sentencing structure, judges handed out sentences bookended by a minimum number of years, at which point an incarcerated person would become eligible for parole, and a maximum number of years, representing the end of a prison term. Assuming an individual worked toward rehabilitation while behind bars, he or she would expect to be paroled shortly after becoming eligible.⁷⁵ Instead, the USPC systematically denies parole based on the severity of an individual's original offense, rather than on evidence of a person's progress toward rehabilitation. Critics argue that the USPC's practice erodes the authority of the court and produces unjust outcomes. "This approach imposes the USPC as a sort of re-sentencing court, usurping control over sentencing from the sentencing judge and substituting its own judgment about how much time a prisoner should serve for a particular offense before he or she can be released on parole."⁷⁶

JPI heard multiple reports of frustration about the USPC from attorneys who represent people at parole hearings as well as family members with loved ones held in the BOP and awaiting release. First, the mere process of preparing for parole is complex and fraught with systemic challenges, including poor communication between the USPC and the BOP about parole eligibility, notification, and scheduling. The docket for hearing examiners is supposed to be posted up to a year in advance, but the 2019 docket has not been publicly released. Individuals must apply to get on the docket and may only get one to two weeks' notice of a scheduled hearing. In many cases, the applicant is not notified of the date of the hearing and must contact the USPC and BOP repeatedly to confirm. This presents substantial challenges for attorney and family travel, given the locations of hearings at institutions across the country.

Accessing information from the USPC and the BOP to prepare parole application materials is another source of aggravation. Attorneys expressed frustration in having to submit Freedom of Information Act (FOIA) requests for any information they need from the USPC and BOP in advance of the hearing. Requests for victim statements or witness statements are often ignored. Moreover, the USPC will only release documents that they create, so other meaningful information that a hearing examiner may consider like BOP reports or the pre-sentence investigation⁷⁷ need to be requested separately. These delays are a significant obstacle when preparing parole materials. While the USPC typically responds to FOIA requests in a timely manner and prioritizes applications based on the date of the hearing, it was reported that there is seldom sufficient time to submit and receive a response from the BOP.

JPI also heard repeated complaints of documents being submitted to the USPC in advance of a hearing and becoming lost, resulting in the need to resubmit; other reports said that documents are frequently lost if they are submitted too early, but that if they are submitted too close to the

⁷⁵ *Report on the Development of the Paroling Policy Guidelines for the District of Columbia Board of Parole for the D.C. Parole Board*, (1987), 3–4.

⁷⁶ Phillip Fornaci, *Restoring Control of Parole to DC: A presentation to the D.C. Council* (Washington, DC: Washington Lawyer's Committee for Civil Rights & Urban Affairs, 2018).

⁷⁷ The USPC will only release the pre-sentencing investigation report if the offense occurred before August 5, 1998. Otherwise, a request must be made to pre-trial services.

hearing, there is no guarantee that the hearing examiner will have time for a review. JPI also heard frequent complaints about lost letters of support and examiners holding review hearings despite not having reviewed all of the applicant's paperwork. Additionally, individuals are sometimes dropped from the docket for failing to submit paperwork, which can lead to a wait as long as six months before the next docket is scheduled.

At the hearing, an applicant is typically permitted one representative in the room, although that issue is up to the discretion of the hearing examiner. For those with legal representation, the sole representative is typically an attorney who has helped prepare the parole application materials. The attorney is not permitted to speak until the closing statement. Family or other supporting witnesses are not permitted to attend the hearing.

The nature of the underlying offense is frequently cited in the notice of action as the reason for denying parole, even for applicants with perfect records, rich program completion history, and clean disciplinary history. Explaining this approach to parole denials, the USPC says that its scoring system does not adequately account for the severity of the underlying offense. The original crime is given significant weight despite the presumption that the goal of punishment has been met at the time of initial parole eligibility as outlined in the USPC Rules and Procedures manual. For this reason, the spouse of one individual held in a federal prison referred to the parole process as "double jeopardy," whereby her husband is being punished a second time for the original crime by having his application denied despite a clean disciplinary record and recommendation for parole by the hearing examiner. It is not uncommon for the parole commissioners to overrule a recommendation for parole by the hearing examiner due to the nature of the offense.

Another common complaint is that the USPC seldom provides a pathway forward for those who are denied parole. Little guidance is given about what steps can be taken to mitigate the factors that led to the denial. In some cases, the USPC instructs the applicant to enroll in certain programs prior to returning for a subsequent review, but programming options in the BOP vary widely by facility, often based on security classification or whether it is managed by a private provider. Because of this, applicants face the difficult prospect of requesting a transfer to another prison, which is time consuming and not guaranteed, or even seeking to be moved to a higher security facility in order to access a program identified as necessary to win a grant of parole. The BOP is not obligated to grant such a transfer, and even if someone is willing to undergo this level of disruption and is successfully transferred to a facility with programming, there is no guarantee that the USPC will grant parole the next time around.

In fact, an applicant may get a different hearing examiner in a subsequent review who imposes completely distinct feedback in the notice of action. There is no guarantee of consistency and this is a significant gamble for any individual seeking parole. JPI also heard examples of the USPC ordering an applicant to participate in programs that no longer exist within the BOP. Finally, the length of time between parole hearings, known as the "set off," is not necessarily linked to the course of action prescribed in the notice of action. For example, a hearing can be "set off" for far

longer than the time necessary to complete necessary programming. Overall, the lack of coordination between the USPC and the BOP poses substantial challenges that will still need to be addressed when a local parole board replaces the USPC.

In addition to its record of denials, the Commission has come under scrutiny for habitually adding time to sentences under a set of guidelines it adopted in 2000. Under the guidelines, commissioners may extend the minimum time a person must serve before parole suitability based on the nature of the underlying offense and prison disciplinary record. This approach not only undermines the discretion exercised by the sentencing judge, but also runs counter to the USPC's own Rules and Procedures Manual, which states:

It is the policy of the Commission with respect to the District of Columbia Code offenders that the minimum term imposed by the sentencing court presumptively satisfies the need for punishment for the crime of which the prisoner has been convicted, and that the responsibility of the Commission is to account for the degree and the seriousness of the risk that the release of the prisoner would entail.

The 2000 guidelines also changed the “set off” from “ordinarily one year” to three years and allowed the USPC to add time to the term of incarceration for infractions that occurred in the distant past and for which the individual may already have been sanctioned by the BOP. The 2000 guidelines also modified the amount of credits one can earn for programming or work by only awarding it for “superior programming,” a vague and subjective measure.

In response to the USPC's practice of adding time to sentences, thereby delaying the possibility of release on parole, people in prison have filed legal challenges. In one case, *Sellmon v. Reilly*, a U.S. District Court in 2008 found that the Commission had inappropriately applied the more restrictive 2000 federal guidelines in its parole review process. Specifically, the court concluded that the practice violated the ex post facto clause of the U.S. Constitution, and that a separate set of rules in place at the time of sentencing should have governed USPC decision-making. Since then, in response to the threat of further litigation, the USPC modified its regulations to comply with *Sellmon*, but commissioners continue to place considerable weight on the underlying offense as they conduct parole evaluations.

A separate case, *Daniel v. Fulwood*, also highlighted the Commission's tendency to extend sentences beyond the point envisioned by the sentencing court. Under a legal settlement of the case adopted in 2016, the USPC agreed to use the D.C. Board of Parole's 1972 guidelines in deciding whether to grant or deny parole for most people in prison whose offenses occurred prior to March 4, 1985, many of whom are of an advanced age or disabled. Despite the settlement, the Commission contends that the nature of their crimes makes these people too great a risk for release—even though Superior Court judges initially issued sentences that included the possibility of parole.

“This approach imposes the USPC as a sort of re-sentencing’ court, usurping control over sentencing from the sentencing judge and substituting its own judgment about how much time a prisoner should serve for a particular offense before he or she can be released on parole.”

*Philip Fornaci, Washington Lawyers’ Committee for Civil Rights and Urban Affairs
March 16, 2018*

Challenges and Concerns: Parole Supervision⁷⁸

Another aspect of the Commission’s work—its record of revoking parole, and the unusual length of incarceration it imposes for violations—also has stirred criticism, in part because it is out of step with practices now used in many other jurisdictions. Of greatest concern is the USPC’s record of revocations for technical violations, or those that represent a non-criminal act, such as missing an appointment with a supervising officer or failing a drug test.

In 2018, a little more than five percent (68 people) of people on parole were revoked to incarceration.⁷⁹ This figure has been steadily dropping, with fewer people under parole supervision each year and a declining proportion being revoked. For people on supervised release, the story is a little different, with the proportion of people revoked growing over the last 10 years. In 2018, 16 percent of the people on supervised release, or 567 people, were revoked to incarceration. In addition, there has been an increase in the use of alleged violation reports in recent years. In 2014, 17 percent of people on parole and 34 percent of people on supervised release were the subject of at least one such report filed with the USPC.⁸⁰ Those figures increased to 23 percent and 39 percent, respectively, in 2018.⁸¹

Each year, hundreds of people on parole and supervised release in D.C. are returned to prison for violations, based on policy positions set by a federal panel currently comprised of two members, one from Maryland and one from Kentucky, who have no connection to the D.C. community or government and may be out-of-step with local priorities and national trends. In fact, JPI heard concerns from multiple sources that the new leadership at CSOSA has launched a more aggressive approach to dealing with violations of supervision. In some cases, parole and supervised release violations are connected to charges of a new criminal offense. But even when such charges are dismissed in court, the USPC often revokes parole or supervised release, leading to incarceration. In 2017, for example, a D.C. restaurant worker was acquitted for misdemeanor assault on a police officer but ordered back to prison by the USPC for 13 months. Such a sentence is routine for the USPC, which typically orders terms of between 12 and 16 months for technical

⁷⁸ This section was primarily drawn from conversations with attorneys, stakeholders in the District who work on parole supervision with the USPC and CSOSA, justice-involved individuals, and their families. In order to protect the privacy of the respondents, we are not using personal attributions in this section.

⁷⁹ CSOSA, Community Supervision Program, *Congressional Budget Justification and Performance Plan/Report Fiscal Year 2020*, March 18, 2019, p. 25.

⁸⁰ *Id.* at 27.

⁸¹ *Id.* at 27.

violations. That contrasts with changes adopted in many states, where revocation caps substantially limit prison time for people who commit violations of parole.

JPI also heard concerns about the USPC not allowing for the termination of parole in a timely manner. The USPC is required to review each case after two years to determine if the individual under supervision has demonstrated conduct consistent with early termination of parole.⁸² If parole supervision is not terminated at the initial review, there is a presumption of termination at five years barring any evidence of future criminal behavior.⁸³ Despite these rules, JPI heard examples of individuals remaining on supervision past five years despite no evidence of criminal conduct. In addition, there appears to be no system in place for the USPC to notify people of their right to pursue the early termination of parole. This has resulted in individuals staying on parole for extended periods of time.

USPC Reauthorization

In 1984, Congress repealed the statutory provisions that governed the USPC, with the intended effect of ending the federal parole system.⁸⁴ The legislation to repeal the USPC stated that the provisions of the statute related to the USPC would remain in effect for five years after November 1, 1987. Since then, the effective period for the repealed provisions has been extended eight times, six of which occurred after the passage of the Revitalization Act—and therefore, after the point at which D.C. cases became the responsibility of USPC:

- **1990:** 5-year extension from 5 to 10 years⁸⁵
- **1996:** 5-year extension from 10 to 15 years⁸⁶
- **2002:** 3-year extension from 15 to 18 years⁸⁷
- **2005:** 3-year extension from 18 to 21 years⁸⁸
- **2008:** 3-year extension from 21 to 24 years⁸⁹
- **2011:** 2-year extension from 24 to 26 years⁹⁰
- **2013:** 5-year extension from 26 to 31 years⁹¹
- **2018:** 2-year extension from 31 to 33 years, extending the effective period of the USPC until November 2020⁹²

⁸² Jessica Steinberg and Kathryn Ramsey, *Parole Practice Manual for the District of Columbia*, (2018).

⁸³ *Ibid.*

⁸⁴ H.J. Res 648, 98th Cong. § 216 (1984).

⁸⁵ Judicial Improvements Act of 1990, H.R. 5316, 101st Cong. § 316.

⁸⁶ Parole Commission Phaseout Act of 1996, S. 1507, 104th Cong.

⁸⁷ 21st Century Department of Justice Appropriations Authorization Act, H.R. 2215, 107th Cong. § 11017 (2002).

⁸⁸ United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, S. 1368, 109th Cong.

⁸⁹ United States Parole Commission Extension Act of 2008, S. 3294, 110th Cong.

⁹⁰ United States Parole Commission Extension Act of 2011, H.R. 2944, 112th Cong.

⁹¹ United States Parole Commission Extension Act of 2013, H.R. 3190, 113th Cong.

⁹² United States Parole Commission Extension Act of 2018, H.R. 6896, 115th Cong.

Generally, each extension has passed without controversy, with all of the stand-alone extension bills winning approval by unanimous consent in the Senate. As such, there is little legislative history underlying these extensions. For the most part, comments from members of Congress focused on the repercussions of congressional failure to extend the effective period. In 2005, Republican Rep. Jim Sensenbrenner of Wisconsin stated that enacting the 2005 extension bill was “necessary in order for the [USPC] to continue to carry on [its] important functions,” which includes “responsibility for supervising offenders in the District of Columbia.”⁹³ In support of the 2011 extension bill, co-sponsor Rep. Bobby Scott, a Democrat from Virginia, stated:

“The Sentencing Reform Act requires that release dates be set for all remaining offenders eligible for parole prior to the expiration of the Parole Commission. The Department of Justice is concerned that if the Commission’s current authority is allowed to expire, Federal offenders who were sentenced for offenses committed prior to November 1, 1987, will begin to file motions for release under the Sentencing Reform Act, since the act requires such offenders to be given release dates three to six months prior to the expiration of the commission. We are now beyond that period at this point and no release dates have been set.

For this reason, it is important that we extend the U.S. Parole Commission’s authority as soon as possible.”⁹⁴

Another co-sponsor of the 2011 bill, Republican Rep. Lamar Smith of Texas, noted the discrepancy between the declining number of people convicted in the federal system and falling under the USPC’s purview, compared to the steady number of people convicted under D.C. felony Code: “At some point in the future, no Federal offenders will remain under the Commission’s jurisdiction. At that time, Congress should assess the need to continue a Federal Parole Commission within the Justice Department.”⁹⁵

In 1996, there were approximately 6,700 parole-eligible individuals in the federal system,⁹⁶ but as of March 2019, there are fewer than 500 individuals in the federal system under USPC’s jurisdiction, half in custody and half on supervised release.⁹⁷ On the other hand, as of March 2019, there are thousands of D.C. cases under USPC’s authority.⁹⁸ Thus, the work of the USPC has increasingly come to be dominated by managing people convicted under the D.C. felony Code.

In March 2019, with the extended expiration date for the authority of the USPC approaching in November 2020, outgoing USPC Commissioner Patricia Cushwa wrote a letter encouraging the

⁹³ 151 Cong. Rec. H8171-02, at H8172 (2005).

⁹⁴ 157 Cong. Rec. H6243-03, at H6244 (2011).

⁹⁵ *Ibid.*

⁹⁶ H.R. Rep. 104-789, at 3 (1996).

⁹⁷ Cushwa, Patricia & Massarone, Charles, Memorandum, U.S. Parole Commission Transfer of Duties Plan, March 14, 2019.

⁹⁸ *Ibid.*

abolition of the USPC pursuant to Congress's intent. She outlined three steps to "sever" the federal duties and "resolve the lingering issue of federal parole cases:"

- Reassign non-federal cases to the originating agency
- Audit and reduce the existing federal caseload
- Execute a USPC shutdown plan⁹⁹

Among this activity, the most relevant commentary is Cushwa's suggestion to reassign responsibility for non-federal cases and her corresponding recommendation that D.C. cases be transferred to D.C. Superior Court and CSOSA. Specifically, Cushwa proposed that the USPC create a division within the agency to assist with the transfer over a 12-month period.¹⁰⁰ After the transition, CSOSA would be responsible for "supervision duties including recommending conditions of release, performing administrative hearings, and recommending warrants and revocation."¹⁰¹ D.C. Superior Court would review CSOSA's recommendations and make a final decision related to conditions for release, warrants, and revocation. Cushwa noted that transfer of D.C. cases to D.C. jurisdiction would require legislation similar to the legislative action in the Revitalization Act.¹⁰²

⁹⁹ Ibid.

¹⁰⁰ Id. at 3.

¹⁰¹ Id. at 4.

¹⁰² Ibid.

Best Practices in Parole: Lessons from Other Jurisdictions

Washington, D.C., is one of 17 jurisdictions that operate a determinate sentencing system. Under this structure, the number of years a person must serve in prison prior to release is set at the time of sentence, and typically is governed by guidelines established by a sentencing commission. Under determinate sentencing, individuals can accumulate “earned time” to shorten their length of stay in prison. But both the length of the original sentence and the maximum amount of time an individual can earn to reduce that term are tightly prescribed by sentencing guidelines.

The majority of states—34—use an indeterminate sentencing system, under which legislatures assign broad sentencing ranges to offenses.¹⁰³ Such a system leads to more individualized penalties and grants judges and parole boards considerable discretion in determining how long an individual will remain in prison or on supervision. Sentences dispensed by judges under this structure feature a range of time that is set by statute and specify a minimum number of years to be served before an individual is eligible for parole. Sentences also include a maximum amount of prison time required before release to the community, absent any parole support or supervision. Compared to the standardized approach inherent in determinate sentencing, the indeterminate system gives judges and parole commissioners more flexibility in weighing circumstances unique to each person and crime. In addition, indeterminate sentencing encourages incarcerated people to participate in programs and also rewards progress—two factors not in play under determinate sentencing systems.

In the waning decades of the 20th century, a growing number of states began abolishing parole or restricting discretionary release and adopting determinate sentencing systems. Between 1980 and 2011, the proportion of individuals released from prison due to discretionary release declined from 55 percent to 26 percent.¹⁰⁴ This move, supported by people on both ends of the political spectrum, was fueled by concerns that sentences were resulting in widely disparate time served in prison, that parole boards were allowing people out of prison too soon to sufficiently punish and deter, and that discretionary release was producing racially disparate outcomes. Determinate sentencing was proposed as a fix that would increase fairness, certainty, consistency, and transparency in the sentencing process.

Comparing the Systems

After state incarceration rates began to rise steeply in the 1990s, researchers sought to explain the increase and examine factors that drove growth. Because the shift toward more determinacy in sentencing coincided with the rapid rise in the use of incarceration, many theorized that the

¹⁰³ *Parole Boards within Indeterminate and Determinate Sentencing Structures* (Minneapolis, MN: University of Minnesota, Robina Institute 2018), <https://robinainstitute.umn.edu/news-views/parole-boards-within-indeterminate-and-determinate-sentencing-structures>

¹⁰⁴ *Max Out: The rise in prison inmates released without supervision*, (Washington, DC: Pew Charitable Trusts, 2014), <https://www.pewtrusts.org/en/research-and-analysis/reports/2014/06/04/max-out>.

abolition of parole and move toward guidelines sentencing was driving the growth. However, research has shown that states with determinate sentencing systems and presumptive guidelines experienced lower rates of incarceration and less prison population growth than other states.¹⁰⁵ Such findings suggest that, for multiple reasons, discretionary release through parole has not functioned as a mechanism for moderating prison populations.¹⁰⁶ One possible explanation for this difference is that a determinate system coupled with sentencing guidelines addresses both sentence length at the front end and the length of time to be served at the back end. A parole board in an indeterminate system, on the other hand, has no influence on the sentence length and, thus, cannot control the flow and population size on its own.¹⁰⁷ The most likely explanation is that parole boards became increasingly risk averse during the “tough on crime” era of the 1980s and 1990s and adopted far more restrictive release policies.¹⁰⁸ Because they are typically made up of appointed members, parole boards tend to be susceptible to outside pressure, be it from a governor, advocates, or the media. As a recent report on parole by the University of Minnesota’s Robina Institute of Criminal Law and Criminal Justice noted: “As a group, states with discretionary release experienced faster prison growth during the high growth years of 1980–2009 than other states and remain today the category of states with the highest prison rates (American Law Institute 2011).”

¹⁰⁵ Don Stemen, Andres Rengifo, and James Wilson, *Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975–2002*, (Washington, DC: U.S. Department of Justice, 2006), 11.

¹⁰⁶ American Law Institute, *Model Penal Code: Sentencing. Discussion Draft No. 2*, (April 8, 2009), 1–31.

¹⁰⁷ *Id.* at 29.

¹⁰⁸ *Id.* at 30.

Recommendations for Release Decision-Making¹⁰⁹

While many people misperceive parole as early release, it is, in fact, a mechanism built into sentences that allows some people to spend the final portion of their sentence under supervision in the community. People in prison become *eligible* for parole after serving a minimum number of years set by the sentencing court. But their *release on parole* depends on a finding of suitability determined by a parole board, which typically applies guidelines and other criteria in deciding whether to grant or deny parole. In recent years, a growing number of researchers have expressed support for a set of principles considered key to ensuring fairness in parole release decisions:

- There should be a presumption of release when a person in prison first becomes eligible for parole.
- Parole boards should not deny release because they believe an individual has not served sufficient time for a given crime.
- Parole denials should be based on a credible assessment of a person's risk of serious criminal conduct and preparation to reenter society.

JPI reviewed a number of published resources and spoke with technical assistance providers to identify best practices across the country in parole release decision-making. The recommendations below represent the most current thinking about how jurisdictions should most effectively manage their parole release systems.

Recommendation 1: The parole board should use a structured decision-making approach that incorporates a validated risk and needs assessment tool.

Create guidelines to limit subjectivity

State paroling authorities exert considerable power over the liberty of hundreds of thousands of people each year. Parole board members decide who gets released from prison, and when; establish terms of release that people on parole must fulfill in the community; oversee compliance with those supervision conditions; and impose penalties, including reincarceration, for parole violations. Until relatively recently, parole boards made release decisions largely based on the personal predispositions and instincts of their members. They consider a wide range of factors, including:

- Current offense
- Criminal history
- Sentence length
- Risk score

¹⁰⁹ The recommendations in this section were developed by JPI by synthesizing the research and conclusions of the work cited throughout the document. They largely mirror recommendations in other sources, but may have been modified slightly to fit the particular circumstances of the District.

- Input from victims
- Program participation
- Institutional conduct
- Reentry plans

Historically, the subjectivity of this approach to determining readiness led to parole rates that fluctuated with board turnover and raised troubling questions about fairness and consistency in decision-making. While one board member might have placed heavy weight on a person's record of program completion in prison, for instance, another might have based a decision largely on the nature of the person's offense. Differences in the personal methods used by board members to apply their discretion also varied widely, further exacerbating the lack of uniformity in the process.

This subjectivity is most acute when considering the circumstances of the underlying offense. For some parole board members, a hearing review is an opportunity to walk through the details of the crime. For those individuals who committed crimes that had particularly disturbing details or vulnerable victims (children, the elderly), the original offense often proves an insurmountable obstacle to release regardless of the person's in-prison conduct or suitability for release. The discretion left to parole board members and the lack of guidance about how to weigh various factors that bear on the release decision frequently results in decisions that lack consistency or predictability. This, in turn, frustrates those individuals who are looking for guidance from the board's prior rulings to make the most compelling case for release.

Over time, research has demonstrated the value of using a different approach to decision-making, one that is clear, structured, more professional, and reliant upon an evidence-based tool for gauging risk. The foundation of this approach is a set of policy-driven guidelines designed to increase objectivity, consistency, and transparency in the parole release process. Guidelines vary by state, but the most commonly used form is a decision-making matrix or grid that uses a combination of the severity of a person's offense, risk of reoffending, and time served. Another more recent variation is the use of a sequential decision tree model, which incorporates "specific factors to be considered in each case, and how these impact a 'guidelines recommendation' to grant or deny parole."¹¹⁰

If applied correctly, guidelines should ensure that case factors are consistently given the same weight by parole boards, leading to greater fairness and uniformity in parole grants and denials. Guidelines also should specify presumptive release dates at initial eligibility for low-risk people in prison, and for moderate- and high-risk people unless risk assessments or in-prison behavior dictate otherwise. This provides incarcerated people with greater certainty about when they will return to the community, creating incentive and hope. To ensure that paroling authorities are complying with guidelines, regular monitoring and evaluation of board decisions are essential. Deferring a person's presumptive parole date, for example, should require board findings related

¹¹⁰ Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a national survey* (Minneapolis, MN: University of Minnesota, 2016).

to statutory restrictions on specific crimes or an eligible person's misconduct or violent behavior in prison. Taking it a step further, Michigan requires that the parole board only depart from a recommendation of granting parole in the instance of 11 reasons that are spelled out in statute.¹¹¹ Any departure must be accompanied by a written explanation. Of the 34 states with parole boards, 20 of them rely on some form of parole guidelines, according to a 2019 study by the Robina Institute of Criminal Law and Criminal Justice.

Use a validated risk and needs assessment tool

To effectively govern parole decisions, guidelines must include the use of a validated risk and needs assessment tool. Research over the past 20 years has shown that such actuarially-based instruments can predict a person's risk of future criminal behavior far better than the clinical judgment of individual parole board members. In addition, data from a risk and needs assessment can provide some comfort to parole board members who would otherwise be unwilling to recommend release due to the perceived potential risk of reoffending.

To ensure confidence in risk assessments and their use in parole decisions, jurisdictions should make public the factors measured in such evaluations, how risk is calculated, and the risk scores. The National Institute of Justice recently released a report on the development and validation of its new risk and needs assessment tool mandated for all individuals in the BOP serving a federal sentence, as required by the First Step Act.¹¹² The report provided extensive discussion of the data used to develop the tool and the steps that were taken to ensure validity, address differences in risk and needs by gender, and control for the impact of race and ethnicity on risk measures. The tool also will be subject to a 45-day public study period during which additional feedback will be gathered before the tool is finalized. This is a model of transparency and inclusiveness that should be adopted by all jurisdictions that use risk and needs assessment tools.

Finally, risk and needs assessments should be used to identify individual characteristics that can be addressed through prison programs and other interventions, thereby improving the odds of a successful release to the community. The risk and needs assessment should be re-administered periodically in order to measure progress toward goals while in prison. This means that the tool must include static (fixed) and dynamic factors (subject to change over time). Typical risk tools rely on static factors such as age at first arrest, criminal history score, and whether violence was present in the current or prior offenses. These factors occurred in the past and, as such, cannot be changed. Risk tools that rely on static factors encourage parole boards to focus on the past, which typically means re-litigating the details of the crime. This practice discounts or outright ignores the work that an individual may have undertaken while in prison to transform his or her life and diminishes the likelihood that someone will be recommended for release.

¹¹¹ Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation* (Minneapolis, MN: University of Minnesota, 2019), 18.

¹¹² United States Department of Justice, Office of the Attorney General, *The First Step Act of 2018: Risk and Needs Assessment System*, (July 2019).

A risk and needs tool must include a range of dynamic factors that measure how an individual has changed during a period of incarceration. These include disciplinary infractions, program completion, educational and/or vocational training, and mentorship. These factors are forward-looking, unlike the static factors, and consider actions since entering prison that demonstrate personal transformation.

Researchers also advise that parole boards examine their risk assessments closely to identify any variables that may be influenced by race, and then determine how the removal of such variables would affect accuracy. The importance of this step was highlighted by a 2016 article in *ProPublica*, which documented the ways in which predictive algorithms that underlie risk assessment tools are biased against people of color.¹¹³ The bias occurs because many of the static factors that go into a risk tool, such as criminal history or age at first arrest, are strongly correlated with race and ethnicity. Well-documented racial disparities in arrest, prosecution, and sentencing further disadvantage people of color when included in a risk assessment tool. Some have argued that including more dynamic factors in the instrument, such as program completion, will mitigate the biases present in static factors. However, it remains unclear whether those same biases are present when it comes to program participation and completion.

Some researchers have concluded that it simply is not possible to meet the goals of fairness and accuracy with a single tool, no matter the steps taken to account for biases at other points in the system.¹¹⁴ This forces conversations about the goals of the risk assessment, which can help guide decision-makers about the trade-offs in accuracy and fairness. We strongly recommend that those conversations are held in a public and transparent fashion. This should include opportunities for input from experts in the field as well as the public. Risk assessment equations can easily be manipulated to add or reduce the weight of any given category, but that may come at the expense of accuracy. A conversation about goals and values that involves all interested stakeholders and impacted community members in a meaningful and transparent manner is essential.

Another important consideration is that risk assessment tools are one factor among many that a parole board should take into account when considering release. They are not singularly dispositive, but they do provide valuable information. In addition to thinking about the actual inputs in the tool, stakeholders may consider how the releasing authority uses the results of a risk tool. This could mean that a risk score is only considered in certain circumstances or for certain individuals.¹¹⁵ For instance, risk might be weighed as a factor only in those cases where individuals have committed a violent offense, or for people whose offenses or behavior classifies them in a “high” risk category. As with the earlier discussion about inputs on the tool, this

¹¹³ Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, “Machine Bias,” *ProPublica*, (May 23, 2016).

¹¹⁴ Richard Berk, Hoda Heidari, Shahin Jabbari, Michael Kearns, and Aaron Roth, “Fairness in Criminal Justice Risk Assessments: The State of the Art,” *Sociological Methods & Research*, (2018).

¹¹⁵ Sarah Picard, Matt Watkins, Michael Rempel, and Ashmini G. Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness* (New York, NY: Center for Court Innovation, 2019).

determination should be made following a public and transparent process that engages a broad range of stakeholders in the District.

Further discussion about increasing fairness in risk prediction is included in Recommendation 5.

In addition, risk assessments should be reviewed regularly, updated as needed, and validated on target prison populations to ensure the accuracy of risk prediction. Validations should be conducted separately on sub-populations that have statistically meaningful differences in reoffending patterns. More specifically, a risk and needs tool should not be developed for women using data that reflects male patterns in reoffending. The factors that contribute to reoffending and the needs of males and females are categorically different and the tools used to assess both should reflect that difference.

Studies show that the use of risk and needs assessment tools has been climbing steadily. In 1991, less than half of the states surveyed used a risk assessment instrument; by 2015, the most recent year of data collection, nine out of 10 responding states reported using an assessment tool of some type.¹¹⁶ A national survey showed that the most popular instrument used in comprehensive offender risk assessments is the Level of Service Inventory-Revised (LSI-R), although a substantial number of states reported that they had developed their own prediction tool. Researchers caution that despite the increasing reliance upon risk assessments, not all instruments are created equal, so rigorous quality controls are essential. In addition, buy-in from parole board members—many of whom remain skeptical of such tools—is critical, as are rules that isolate certain low-risk cases for administrative processing without a vote of the parole board. (See Recommendation 2 for more detail on this measure.)

State examples

Recognizing the increasing sophistication of tools useful in predicting risk and, thus, reducing recidivism, numerous states have adopted changes to their parole decision-making policies and practices. In January 2015, Idaho adopted new guidelines to bring greater structure to its parole review process. The change came with passage of legislation designed to improve parole outcomes and control prison population growth by increasing the “timely release” of people convicted of drug crimes and other non-violent offenses. Since adoption of the reforms, the number of people held beyond their parole eligibility date has declined by 36 percent, and the number of days people are held in prison after becoming eligible for parole also has decreased. In addition, data show that, with minor exceptions, the Parole Commission now typically grants parole in cases where it is recommended under the guidelines. “Since the Commission previously did not formally consider the criteria contained in the new guidelines, nor did it collect and report

¹¹⁶ Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a national survey*. (Minneapolis, MN: University of Minnesota, 2016).

such data, it is clear that Idaho’s parole guidelines have significantly increased transparency around parole decision-making.”¹¹⁷

Colorado has used its Parole Board Release Guideline Instrument to assess most parole eligible individuals since 2012.¹¹⁸ The tool uses a grid system to determine a person’s risk and readiness for release and to guide board decisions. A review shows that in 2013 to 2014, the parole board’s decisions aligned with the instrument’s recommendations 68 percent of the time. When deferral of parole was recommended by the instrument, the board agreed about 92 percent of the time; in cases where parole grants were recommended, agreement dropped to about 43 percent. Thus, the board members appeared less likely to follow the instrument when it recommended release. Perhaps this is justified based on the specific circumstances of each applicant. Only deeper research into the reason for less agreement between the board and the tool will answer important questions about implementation and potential adjustments moving forward. However, by simply collecting and tracking these data, Colorado is well-positioned to begin that exploration. This underscores the importance of tracking metrics of parole board decision-making, which we cover later in this report.

Overall, researchers say that while the adoption of guidelines based on validated risk assessments has increased the professionalism and rationality of parole decision-making, additional steps are needed to fully realize the benefit of such changes. To increase accountability and transparency, parole boards should be required by law to disclose their reasoning when their decisions conflict with governing guidelines. “Second, they should produce regular reports detailing their use of parole guidelines and the rates of and reasons for departure,”¹¹⁹ a report by the Robina Institute of Criminal Law and Criminal Justice stated.

Recommendation 2: The parole board should operate under the presumption that the goals of punishment have been met at the time of initial parole eligibility, and parole release decision-making should be based solely on objective factors related to an individual’s future risk to the community.

Focus decision-making on risk

In many states, parole boards use their discretion to essentially reexamine decisions of sentencing judges and determine whether further incarceration is needed to ensure what board members consider sufficient punishment for a given crime. Often, these decisions turn on the “too much crime” rule, meaning that the severity of the offense tends to overwhelm all other considerations. Numerous states use this backward-looking, retributive approach, which often is mandated by

¹¹⁷ Elizabeth Pelletier, Leigh Courtney, and Brian Elderbroom, *Justice Reinvestment Initiative: Assessing the impact of Idaho’s parole reforms* (Washington, DC: Urban Institute, 2018).

¹¹⁸ Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation* (Minneapolis, MN: University of Minnesota, 2019), 17.

¹¹⁹ Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation* (2019).

statute. In Alaska, Nebraska, and Tennessee, for example, state law requires parole boards to examine the presentencing investigation report or consider input from the sentencing court or prosecutor. In Utah, the Board of Pardons and Parole process takes a “particularly retributive perspective, considering multiple dimensions of the conviction offense including whether weapons were used in commission of the offense, whether the crime was committed for personal gain, and whether the individual was the lead organizer or simply a follower or minimal actor in commission of the crime.” While such evidence clearly was central to initial prosecutions years earlier, it should not be reexamined as a reliable source of information about a person’s risk level and readiness for parole in the present day.¹²⁰

Overall, this approach not only invites subjectivity into the decision-making process but also erodes the authority of the sentencing court and leads to haphazard parole evaluations that are based on emotion, rather than objective factors related to risk. There should be a presumption of release at the initial hearing. Once a judge has imposed an indeterminate prison sentence, the parole board should be required to acknowledge that the first date of parole eligibility marks a sufficient amount of time to fulfill punishment purposes. In short, parole decisions should not reflect the feelings of board members who may believe a person *deserves* more time in prison. Or, as one 2015 report on improving parole put it, “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.”¹²¹

Instead, decisions to delay parole beyond the initial point of eligibility should be based only on a finding that a person represents an unacceptable risk of reoffending upon release. More specifically, such findings should be anchored in credible factors—such as risk assessments and in-prison conduct—that research has linked with readiness for release. People who receive parole denials should be reconsidered by the board within one year, and release should be granted when there is reasonable likelihood that a person can safely be supervised in the community.

Administrative parole

For low-risk cases, a small handful of states have adopted policies allowing “administrative parole” to avoid the need for board hearings. Models vary, but typically, people in prison who comply with preestablished criteria in their parole case plans, and who refrain from any serious misconduct for a specified period of time, are certified as prepared for release by corrections officials and freed without an evaluation by the parole board. In some cases, people released under administrative parole agree to conditions of post-release supervision, and also may be required to prepare discharge plans that must be approved by parole boards. Under the administrative parole approach, parole discretion and government resources are prioritized for the most serious cases. The approach also brings more consistency and transparency to the parole release process.

¹²⁰ Id. at 15.

¹²¹ Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, “Improving Parole Release in America” *Federal Sentencing Report* 28, no. 2 (2015): 96–104.

According to a 2019 report by the Robina Institute on Criminal Law and Criminal Justice, at least three states—South Dakota, Maryland, and Mississippi—use an administrative parole mechanism for certain low-risk populations. In Mississippi, for example, people convicted of nonviolent crimes may qualify for administrative parole release by first serving 25 percent of their prison term. Maryland, too, sets the minimum incarceration point at one-quarter of the sentence, but limits this option to a smaller subset of people—those convicted of low-level drug and property offenses. In South Dakota, a presumptive parole date may be set as early as 25 percent into a person’s sentence, or as late as 75 percent, with the timing dependent upon conviction offense and prior history. In each state, eligible people who fail to comply with the requirements enumerated above instead appear before the parole board. If parole is denied, the case plan is updated with conditions that must be met by the next hearing, held annually from that point forward.

“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.”

Improving Parole Release in America

Edward E. Rhine, Joan Petersilia, Kevin R. Reitz, Federal Sentencing Reporter, December 2015

A few additional states lack statutorily established administrative parole but allow for presumptive parole once a person reaches the minimum eligibility date set by parole guidelines. In Hawaii, for instance, people who are assessed as low risk must be released at their earliest eligibility date unless good cause to deny it is shown. “Good cause not to release may be demonstrated where offenders are found to have an extensive criminal history record that indicates a likelihood of criminal behavior, despite the results of a risk assessment; institutional misconduct equivalent to a misdemeanor or felony within thirty-six months of the expiration of the minimum imprisonment term; pending felony charges in Hawaii; incarceration for sex offenses or child abuse; or, the absence of an approved parole plan (Haw. Rev. Stat. § 706-670).”¹²²

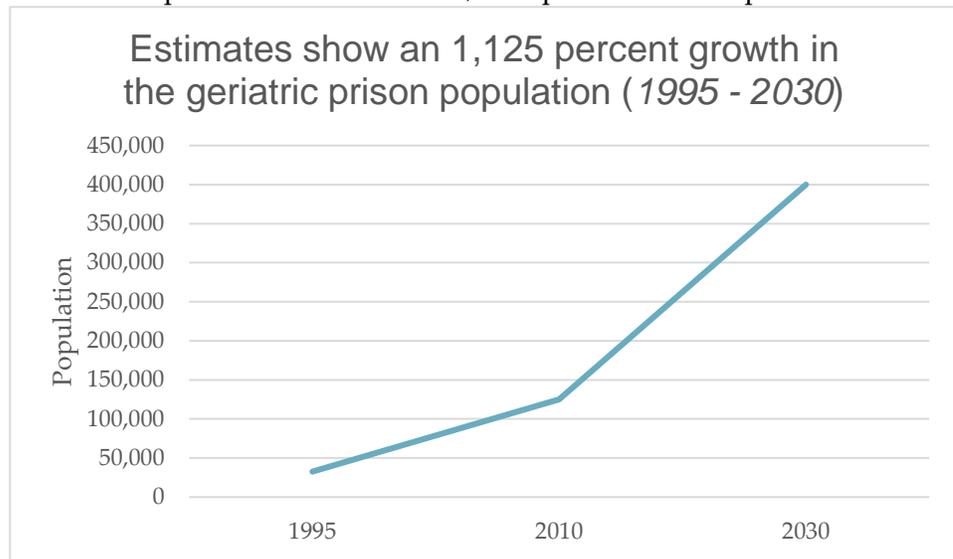
Michigan also has adopted a form of administrative parole. At the end of 2018, the state adopted a law establishing clearer guidelines for evaluating release suitability for people who are low risk. Under the new approach, called “objective parole,” the board may grant release without an interview if the person has a “high probability” of being paroled. To depart from that rule, board members must cite one of 11 reasons and document their reasoning in writing. State officials estimate that the legislation (HB 5377) will help them reduce the prison population by as many as 2,400 beds and save \$40 million annually over five years.¹²³

¹²² Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation* (2019), 17–18.

¹²³ *Id.* at 16.

Compassionate release

The aging, or graying, of state prison populations in recent decades has placed enormous strain on prisons and state resources. Between 1993 and 2013, the proportion of people in state prisons aged 55 and older jumped 400 percent. Estimates predict that by 2030, one in every three incarcerated individuals will be 55 years of age or older. Like older people outside prison, the incarcerated elderly require more medical care than the young, with costs running as much as nine times higher than expenses for younger people in prison. In addition, as people age, their risk of reoffending drops. Data from one study showed that 13 percent of people who were aged 65 or older when released from prison were rearrested, compared with 65 percent of those released prior to age 21. According to a 2018 report by Families Against Mandatory Minimums (FAMM), “As prisoners age or experience declining health, their threat to public safety lessens, as do some of the justifications for continuing to hold them behind bars.”¹²⁴



Except for Iowa, every state and the District has a mechanism for the “compassionate release” of people with terminal illness or severe medical conditions, the FAMM report found. Some states call it geriatric or medical parole, while others refer to it as a suspension of sentence, medical furlough, or executive clemency on medical grounds. States also vary in the conditions that may qualify a person for release. Most mandate that an individual’s condition be so grave that he or she could pose no threat to public safety. In California, for instance, a person only qualifies by being permanently medically incapacitated and unable to perform activities of daily living. A handful of states offer compassionate release to people who reach a certain age and have served a specified portion of their sentence. Twelve states offer compassionate parole to people meeting all three descriptions: geriatric, terminal illness, and serious medical conditions. Those states are Colorado, Connecticut, Georgia, Louisiana, Missouri, Mississippi, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming.

Despite the fact that such programs are common, only a small number of people are released through this mechanism annually. In Kansas, for example, seven people received compassionate release between 2009 and 2016, while New Jersey has granted medical parole no more than two

¹²⁴ Mary Price, *Everywhere and Nowhere: Compassionate release in the states* (Washington, DC: FAMM, 2018).

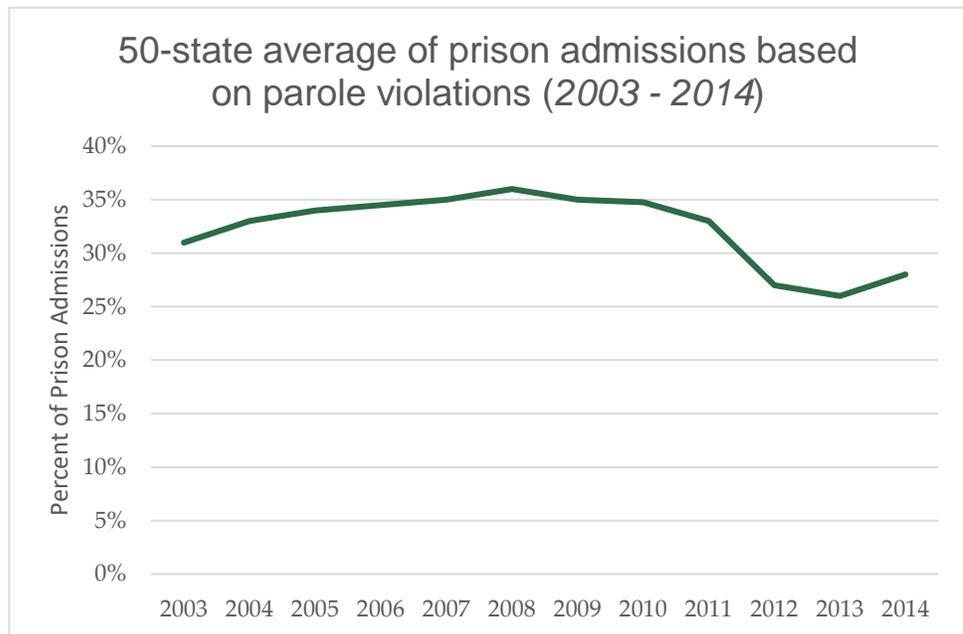
times a year since 2010.¹²⁵ Rhode Island adopted its medical parole law in 1991, and by 2015, only 66 applications had been forwarded to the parole board for consideration. Thirty-eight of them—or 1.8 per year—were approved.¹²⁶ In Texas, doctors have recommended thousands of older individuals for geriatric parole, but three out of four of those recommendations are denied.

FAMM’s extensive review of compassionate release included recommendations for best practices. These include eligibility criteria that allow all people in prison to qualify for consideration, regardless of their crime; clear timeframes that allow for expedited review in cases of terminal illness; the distribution of materials to raise awareness of compassionate release among the incarcerated; staff assistance with post-release planning, including applying for housing and benefits; the right to counsel and the right to appeal denials; and the public reporting of data describing approvals, denials, and revocations.

Recommendation 3: Supervision should be imposed selectively, with the length and conditions of supervision linked to risk. Conditions should be the least restrictive necessary to meet the goals of reentry and public safety, resources should be front-loaded, and people should have the opportunity to shorten their parole term through good behavior.

Length of supervision period

Although the trend received far less attention than the growth in prison populations, the number of people on probation and parole surged beginning in the late 1990s and stood at 4.5 million people in 2016—a 239 percent increase since 1980. That meant that one in 55 U.S. adults was under correctional control in the



¹²⁵ Ibid.

¹²⁶ Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation* (2019), 21.

community.¹²⁷ That growth, in turn, has become a consistent driver of prison populations, with violations of parole and probation accounting for a large proportion of prison admissions in many states. Against this backdrop, research demonstrating effective evidence-based practices in parole supervision has led to a growing consensus about the appropriate length of supervision and the type and number of conditions that should be imposed on people on parole.

States vary significantly in the length of parole they require for people exiting prison. Some specify a distinct post-release term, but far more often the mandated length of supervision is equal to whatever time is left on the prison sentence at release. Increasingly, researchers recommend that the length of parole supervision should be disconnected from the incarceration term, and that supervision should be the least restrictive necessary to serve public safety goals and support a successful reentry.¹²⁸ Supervision also should be reserved primarily for people at higher risk of reoffending, along with those convicted of serious crimes. The American Law Institute, for example, recommends that for medium- and high-risk people, supervision should extend no longer than five years, and for low-risk people, parole should not exceed one year.

Individuals on community supervision also should have the opportunity to accumulate “earned time” credits to shorten the duration of parole. Historically, earned time and “good time,” has been most commonly used for correctional populations, incentivizing behavior by offering the opportunity for earlier release. A survey by the Robina Institute of Criminal Law and Criminal Justice found that 15 of 39 jurisdictions that responded used a similar system allowing people to shorten their parole supervision through earned time credits.¹²⁹ Researchers advocate expanding the practice, in part because such credits are an effective reward parole officers can use to help motivate individuals under their supervision.

Early discharge

Early discharge from parole is another key incentive supported by research, both for low-risk people and for others who maintain compliance with supervision conditions or other established criteria for a sustained period of time. Research consistently demonstrates that when guided by evidence-based practices, early discharge from parole can promote good behavior while conserving government resources. A training document by the National Institute of Corrections, for example, called for “early discharge of moderate-risk individuals and called for paroling authorities to develop formal policy to structure fair and consistent early discharge procedures.”¹³⁰ Another report noted that creating a system allowing people to earn early discharge not only serves as an incentive but also “can help manage parole officer workloads by

¹²⁷ Jake Horowitz, *1 in 55 U.S. adults is on probation or parole* (Washington, DC: Pew Charitable Trusts, 2018).

¹²⁸ Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation* (2019).

¹²⁹ Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a national survey*, (2016).

¹³⁰ Catherine C. McVey, Edward E. Rhine, and Carl V. Reynolds, *Modernizing Parole Statutes: Guidance from Evidence-Based Practice* (Minneapolis, MN: University of Minnesota, 2018).

requiring community resources to be targeted to those supervisees who are most at risk of reoffending.”¹³¹

Nearly two-thirds of states responding to the Robina Institute parole survey reported that they have authority to grant early release in statute. But “a significant number of states have not enacted policies to encourage the practice of early discharge, and even those boards that have the authority to permit early discharge are often reluctant to do so because they fear that someone they discharge early will reoffend.”¹³²

States that have adopted policies allowing for early termination of parole include:

Georgia¹³³

- The parole board can relieve parolees of supervision requirements if it is “in the best interest of both the parolee and society.” Early termination requires a written application and is intended for parolees who have made a “satisfactory adjustment to society.”
- The board also can consider early termination of parole for people who have committed non-violent offenses after two years; for first-degree arson, firearms offenses, or trafficking offenses after three years; and for violent offenses after five years.

Vermont¹³⁴

- The parole board may grant early termination following a hearing if there is sufficient good cause and a high probability of continued lawful behavior by the person on parole, as documented in the supervising parole officer’s request.
- As a general rule, the board may not allow hearings for early termination requests that are more than six months prior to a person’s maximum term of parole supervision.

Kentucky¹³⁵

- People who have committed non-violent offenses and fulfill their parole obligations may be released from supervision by the parole board upon recommendation by a parole officer.
- Typically, the switch to “inactive supervision” is recommended only after a minimum parole term has been served.
- An individual can be placed on active supervision again if violations occur.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Alexis Lee Watts, Julia Barlow, and Kevin R. Reitz, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Georgia* (Minneapolis, MN: University of Minnesota, 2018).

¹³⁴ Ibid.

¹³⁵ Ibid.

Conditions of supervision

Once a decision to grant parole is made, parole boards determine the conditions a person must meet while on community supervision. Such conditions are intended to minimize a person's risk of reoffending and support his or her reintegration to society. Violations of such conditions can lead to a variety of consequences, with revocation of parole and reincarceration the most serious. While some conditions may be specified in state statutes, parole boards generally have great discretion in setting the rules under which people must live in the community. "Standard" conditions, which apply to all people on parole, typically include refraining from substance use, remaining within a certain geographic area, not possessing firearms, and reporting regularly to a parole officer. In addition, parole boards impose "special" conditions focused on a person's specific risk or needs. These rules might include mandatory participation in substance use disorder treatment or other programming, payment of restitution or fees, attending vocational training, and the prohibition of contact with victims.

Researchers generally agree that in recent years, the volume of conditions imposed on people on parole has become excessive, creating a minefield for individuals reentering society. Even low-risk people often are saddled with multiple conditions that do not reflect their criminogenic risk and needs and do little to enhance reentry success. Brian Fischer, former commissioner of the New York Department of Corrections and Community Supervision, put it this way: "Most of us could not live under the rules of parole because there are too many of them."¹³⁶ Increasingly, scholars who study parole are advising states to rethink their use of conditions to reflect the latest research and improve outcomes. "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."¹³⁷

Recommendations on best practices for setting conditions of parole include imposing as few as necessary; ensuring that special conditions reflect individual risk and needs, as identified by a validated assessment; placing minimal conditions, or possibly no conditions, on low-risk people; and frontloading conditions during the period immediately following release (i.e., the first six to 12 months), when the risk of violations and reoffending is highest. In addition, "authorities should allow parole field agents greater flexibility to modify certain conditions of release to incentivize people on parole to change behavior. Incentives should include modification of the conditions of supervision, forgiveness of fines and fees, and shortening of length of supervision."¹³⁸

¹³⁶ Marc Levin, "Ten Tips for Policymakers for Improving Parole," *Right on Crime*, (May 17, 2019).

¹³⁷ Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, "Improving Parole Release in America," (2015).

¹³⁸ *Ibid.*

Recommendation 4: The parole board should work closely with other criminal justice agencies, as well as support agencies, to ensure development of a parole release plan that supports a successful reentry.

Beyond their authority to decide a person’s readiness for release, parole boards can exert considerable influence over an individual’s success upon reentry. Planning for this critical transition should begin well before people reach their minimum parole eligibility date and should be guided by a carefully crafted parole plan coordinated between BOP officials and the parole board.

For example, research shows that participation in prison programs is linked with lower levels of reoffending. A RAND review of 58 studies, for example, found that people who participated in correctional programming had a 43 percent lower likelihood of recidivism. Given such evidence, parole boards should set priorities for individuals’ in-prison programming to ensure preparation for release begins early. Program assignments should be guided by a person’s criminogenic risk and needs, as well as by mental health and substance use assessments. Programs also should be evidence-based, aligned with research about what works, and focused on risk reduction.

Studies consistently support the use of a supervision approach that blends surveillance and treatment, rather than relying upon monitoring and control alone. As one team of reentry experts put it, “Cognitive-behavioral interventions, and certain community-based drug treatment, and education and job assistance programs have been proven to contribute to lower recidivism rates and should be considered in the development of supervision plans.” Such plans also should “incorporate offender goals, enhance individual motivation, and consider the input of stakeholders such as corrections officials, law enforcement, victims, family members, and community-based service organizations.”¹³⁹

“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.”

Improving Parole Release in America

Edward E. Rhine, Joan Petersilia, Kevin R. Reitz, Federal Sentencing Reporter, December 2015

To support a seamless and successful transition into the community, corrections and parole board officials should maintain partnerships with community agencies and organizations that offer relevant services and can provide support to individuals under supervision. These agencies include those that address mental health and substance use disorder treatment, housing, employment, education, and licensing. Through information sharing and other mechanisms, parole officials can verify the availability of programs and ensure continuity of care for those who need it.

¹³⁹ Various Authors, *Putting Public Safety First: 13 strategies for successful supervision and reentry* (Washington, DC: Urban Institute & Pew Charitable Trust, 2008).

In the Robina Institute’s survey of releasing authorities, each of the responding parole board leaders agreed or strongly agreed that boards must coordinate policies and practices with corrections officials to smooth community transitions for people granted release. “They have a responsibility to mobilize interdisciplinary, collaborative leadership teams; engage in a rational planning process; integrate stages of offender processing through the corrections system; and involve non-correctional stakeholders in these efforts.”¹⁴⁰

Recommendation 5: The parole board should employ transparency in parole release decision-making protocol and practices. The applicant and victim should be fully informed of the process and be allowed to participate actively.

In eras past, parole hearings often were shrouded in mystery, with board operations, member deliberations, reasons underlying decisions to grant or deny parole, and even performance metrics cloaked in secrecy. Such secrecy often fueled perceptions that parole board decisions were arbitrary, and it made oversight difficult, if not impossible. In some jurisdictions, not much has changed. But some states have adopted reforms, and consensus has emerged on best practices to increase transparency and ensure greater accountability, fairness, and consistency.

Transparency should begin when a person enters prison. Individuals should be provided materials outlining expectations for their in-prison conduct and clearly detailing ways in which they can prepare themselves for release, thereby improving their chances of obtaining an earlier parole date. Applicants for parole also should be notified of their initial parole eligibility date and hearing date. As a hearing draws near, corrections or parole officials should automatically provide an individual with all documents related to his or her case file regardless of agency of origin. This should begin to address the problems in case preparation posed by a lack of effective communication between the paroling authority and the BOP. In addition, details about the process, including the factors used to determine readiness for parole, hearing protocols, and rules governing the submission of materials and victim participation should be provided to the applicant and/or counsel.

During the hearing, applicants should be provided the ability to present a case, including submitting written information and calling witnesses. They should be given the opportunity to challenge assertions by correctional officials about their program participation or institutional conduct, if necessary. They also should be permitted to challenge their risk score, which forms the foundation of release decision-making, and to obtain help from an attorney or other advocate in preparing and presenting a case before the board. For purposes of clarity and accountability, board members should be required to submit, in writing, their justification for decisions that depart from parole guidelines. The parole board also must have a clear, publicly available set of procedures governing “set-backs,” or parole denials. The parole board should use the hearing as

¹⁴⁰ Catherine C. McVey, Edward E. Rhine, and Carl V. Reynolds, *Modernizing Parole Statutes: Guidance from Evidence-Based Practice*, (2018).

an opportunity to either reward an individual for demonstrating transformative personal change or as a tool to motivate someone who needs to take additional action before being released. For those who are denied, any denial of release should be accompanied by an explicit set of actions that individual can take during the time between hearings in order to ensure suitability for release at a subsequent appearance before the board.

Policies should clearly define the role of victims in parole proceedings, taking into consideration victims' rights codified in statute. Before a hearing, victims should be notified that the board is conducting a "forward-looking assessment" of an individual's risk level and readiness for parole. Victims may offer an impact statement and appear at parole hearings, but the parole board should limit their consideration to an applicant's future risk potential and conditions governing release and should not use a victim's testimony to revisit the circumstances of the crime.¹⁴¹

Ohio is one state that recently reformed its parole board to increase transparency and better align its operation with best practices. The changes, initiated by Gov. Mike DeWine in May of 2019, were sparked by a board member who resigned and likened the panel to a secret society plagued by biased, racist, and arbitrary decision-making. Under the reforms, people seeking parole will be allowed to participate in hearings before the full board, and hearings will be livestreamed for the public. In addition, the Department of Corrections will create a program of volunteer "navigators" to assist people with the parole process.

¹⁴¹ Ideally, local justice system stakeholders should explore ways to incorporate restorative justice practices into their justice systems for those victims who are interested in pursuing this process. The goal is to ensure that there are available options for those who caused harm and people who have been harmed to engage in restorative and healing processes if they desire, particularly outside of the formal sentencing and parole processes.

Recommendations for Parole Supervision¹⁴²

Over the last decade, at least three dozen states have adopted bipartisan legislation to reform their criminal justice systems. Improving parole practices has been a centerpiece of many reforms, in part because parole revocations are a key—and costly—driver of prison populations.¹⁴³ In Michigan, for example, supervision violations accounted for nearly 60 percent of prison admissions, and other states have reported similar numbers.¹⁴⁴ Nationwide, about one in four state prison admissions result from technical violations of probation or parole, infractions as minor as missing an appointment with a parole officer or failing a drug test.¹⁴⁵ In addition to such concerns, a sizeable body of research has demonstrated the importance of categorizing people according to risk and need, and tailoring supervision and interventions accordingly. “Research has consistently shown that oversupervising low-risk individuals can do more harm than good by disrupting supportive elements of their lives, such as family, education, and employment, and mixing them in with people who are higher-risk. On the other hand, prioritizing resources and attention for high-risk individuals and those in need of treatment has been demonstrated to yield the greatest reductions in reoffending.”¹⁴⁶

Underlying this movement is an effort to shift the way governments think about parole supervision—a reset of the principles that govern the way supervision works. At its core, this shift is driven by the premise that parole should be more about promoting success and less about continued punishment. It also reflects the reality that rather than serving as an alternative to incarceration or pathway to stability after prison, parole too often fuels imprisonment, exacting a toll on individuals and communities and doing little to restore victims. In 2017, the Harvard University Kennedy School of Government’s Executive Session on Community Corrections released a document outlining aspirations and actions needed for a paradigm shift: “Community corrections should be geared toward facilitating individuals’ success and effective integration into community life and helping them repair any harm caused to their fellow citizens. Doing so restores human agency and dignity, a sense of control over one’s destiny, and helps individuals promote the sustained well-being of their families and communities, over time and across generations.”¹⁴⁷ (See boxed sidebar for more details.)

¹⁴² The recommendations in this section were developed by JPI by synthesizing the research and conclusions of the work cited throughout the document. They largely mirror recommendations in other sources, but may have been modified slightly to fit the particular circumstances of the District.

¹⁴³ *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, (Washington, DC: Pew Charitable Trusts, 2018).

¹⁴⁴ Samantha Harvell et al., *Reforming Sentencing and Corrections Policy: The experience of justice reinvestment initiative states*, (Washington, DC: Urban Institute, 2016).

¹⁴⁵ Megan Quattlebum and Julienne James, “As candidates search for criminal justice talking points, parole and probation reform should top list,” *USA Today*, (July 3, 2019)

¹⁴⁶ *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, (2018).

¹⁴⁷ *Towards an Approach to Community Corrections for the 21st Century: Consensus documents of the executive session on community corrections* (Cambridge, MA: Harvard University: Kennedy School, 2017).

A New Vision for Community Corrections

Over the past four decades, the practice of community corrections shapeshifted considerably as the U.S. passed through a “tough on crime” era that drove dramatic increases in prison and supervision populations and caused a cascade of devastating collateral consequences for families and communities. At one time, probation and parole were focused on supervising people in the community while helping them acquire the tools and treatment needed to enhance their odds of success. The more recent period, however, has been defined by a “trail ‘em, nail ‘em, and jail ‘em” mindset that “destabilizes communities, undermines the legitimacy of correctional agencies, erodes trust between communities and authorities, and increases recidivism among those under supervision.”

Increasingly, leading parole and probation officials, along with researchers, are calling for a new approach. They are pushing for a national shift away from a model of perpetual punishment toward one that emphasizes behavior change and promotes success through incentives and other evidence-based strategies. While calls for a new direction have come from many quarters, a key set of principles and recommendations emerged from an Executive Session on Community Corrections coordinated by Harvard University’s Kennedy School of Government. After three years of research and discussion, members of the session released a 2017 consensus document summarizing their work and vision for community corrections going forward.

Recommendations include:

- Shift from punishment model to one that promotes success and rewards progress.
- Roll back mass supervision.
- Shorten supervision periods and focus on achieving goals and positive outcomes rather than mere rule compliance.
- Use rational, proportional guidelines and a “swift and certain” approach to govern sanctions and rewards.
- Develop a system that is more responsive to the needs of the victim.
- Include family members in the development of case plans and social integration.
- Develop an integrated approach that engages other organizations and community members in supporting people under supervision, and make probation and parole practice more visible.

Recommendation 6: A continuum of graduated sanctions should be used by the parole board to address infractions committed by people on supervision. Revocation to prison should be used as a last resort, and only for individuals who cannot be safely supervised and supported in the community.

While holistic reform on the scale recommended by the Harvard session remains a work in progress, many states are taking incremental steps in the right direction. Researchers recommend

that in determining how best to manage parole violations, states should develop policy-driven, evidence-informed responses that incorporate considerations of risk, criminogenic need, and severity; assure proportional treatment of people who commit violations; and utilize resources wisely. The most common change initiated by states that have adopted reforms is the establishment of a continuum of progressive sanctions authorities use in response to parole violations. The goal is to hold individuals accountable for their conduct but avoid the high costs—both fiscal and human—of a parole revocation and return to prison. “This approach is consistent with research on effectively promoting prosocial behavioral change and shifts the goal of supervision from surveillance, monitoring, and control to behavioral change and recidivism reduction.”¹⁴⁸

On the light end of the sanctions spectrum, a response to a violation might be a verbal reprimand, increased contact with a supervising officer, a curfew, or a requirement to participate in an Alcoholics Anonymous or Narcotics Anonymous program or other classes addressing behavior linked to a person’s violation or past criminal behavior. More serious infractions might lead to electronic monitoring, mandatory appearances at a day reporting center, or a short, swiftly imposed jail stay, sometimes called “flash incarceration.” One national survey of releasing authorities found that 78 percent used a sanctions grid or guidelines to respond to violations.¹⁴⁹ This is part of a broader movement to develop administrative responses to parole violations that do not require the supervising officer to go before the court or undertake a formal revocation hearing. For example, if the violation is related to a documented need, such as failing a drug screen, the officer should have the flexibility to seek community-based options rather than pursuing a more formal hearing and placement. Pennsylvania and Texas established community centers, like day reporting facilities, that have support, programming, and treatment.¹⁵⁰ These are viable options that address the cause of the violation without returning that person to prison. An evaluation of South Carolina’s administrative response policies adopted in 2010 found declines in recidivism, even when controlling for relevant factors such as type of crime.¹⁵¹

As a companion to that approach, many states also use a structured decision-making matrix that provides parole officers with guidelines that identify which sanctions are appropriate for which type of conduct. Twenty-six states reported using such a matrix to guide the selection of violation responses. Utah, for example, uses a matrix that defines whether an intervention will come from a parole officer, an officer acting with the approval of a supervisor, or the parole board. Whatever the case, authorities use a Response Magnitude Form to determine the proper sanction. This decision is based on the severity of the violation, the person’s risk and needs, and the violation’s relationship to the individual’s risk. The penalty imposed can range from a verbal warning to a 180-day term of incarceration. While the six-month custody stay applies only to a third or

¹⁴⁸ Catherine C. McVey, Edward E. Rhine, and Carl V. Reynolds, *Modernizing Parole Statutes: Guidance from Evidence-Based Practice*, (Minneapolis, MN: University of Minnesota, Robina Institute 2018), 14.

¹⁴⁹ Robina Institute, *National Parole Survey Report*, 43

¹⁵⁰ *To safely cut incarceration, states rethink responses to supervision violations*, (Washington, DC: The Pew Charitable Trusts, 2019).

¹⁵¹ Elizabeth Pelletier, Bryce Peterson, and Ryan King, *Assessing the Impact of South Carolina’s Parole and Probation Reforms*, (Washington DC: Urban Institute, April 2017).

successive parole violation, more than three violations in Utah may result in revocation and imprisonment up to the maximum term of the sentence.

Recommendation 7: The parole board should respond to repeated violations with swift, certain, and proportional sanctions that reflect the seriousness of the infractions.

Along with using a matrix to determine the appropriate, proportional sanctions for rules violations, experts recommend that responses be imposed swiftly and certainly to have the maximum deterrent effect. Community supervision practice has typically been defined by officers using their immense discretion to employ a range of sanctions in response to violations of parole.¹⁵² The deployment of sanctions can vary widely from violation to violation and person to person. This leads to unpredictability for the individual under supervision and, research has shown, undermines the deterrent goals of the conditions of supervision. By deploying a seemingly random set of sanctions, often temporally removed from the infraction by weeks or months, there is no clear set of rules of conduct for an individual under supervision to follow. Moreover, in the event that the series of graduated, community-based sanctions fail, the officer then will typically move to initiate a revocation hearing that may result in a person returning to prison. This is the most severe violation response that an officer can deploy and may feel disproportionate to an individual who has been receiving modest sanctions for prior conduct. For the person under supervision, sanctions are frequently slow to take effect, uncertain (in terms of what conduct leads to what sanction), and severe (jumping quickly from graduated sanctions to incarceration).

New research supports a strategy that focuses on swift and certain sanctions without relying on the most severe response of using revocations to prison. Hawaii's HOPE (Hawaii Opportunity Probation with Enforcement) program relied on immediate, short stays in jail (typically a weekend) for violations of supervision.¹⁵³ The program was found to reduce rearrests, positive drug tests, revocations to prison, and overall bed days in prison. These results provide encouraging support for a swift, certain, and fair strategy to supervision. There are currently similar pilot programs testing this approach in 40 jurisdictions across 18 states.¹⁵⁴ An evaluation of Washington State's swift and certain policy found results comparable to Hawaii's among a more varied and higher risk population.¹⁵⁵ These outcomes included fewer felony convictions, fewer revocations to prison, and greater program participation.

¹⁵² Zachary Hamilton et al., *Evaluation of Washington State Department of Corrections (WADOC) Swift and Certain (SAC) Policy Process, Outcome and Cost-Benefit Evaluation*, (Pullman, WA: Washington State University, 2015), 15.

¹⁵³ A. Hawken, "Behavioral Triage: A New Model for Identifying and Treating Substance-Abusing Offenders," *Journal of Drug Policy Analysis* 3, no.1 (2010); see also, A. Hawken, and M. A. R. Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*, (Washington DC: National Institute of Justice, 2005).

¹⁵⁴ Zachary Hamilton et al., *Evaluation of Washington State Department of Corrections (WADOC) Swift and Certain (SAC) Policy Process, Outcome and Cost-Benefit Evaluation*, (2015), 52.

¹⁵⁵ *Ibid.*

Recommendation 8: Preparations for reentry should begin while individuals are in prison, and community support services should be strengthened to improve the prospects for post-incarceration success.

While the research is mixed, there is some evidence that individuals on community supervision after incarceration are less likely to reoffend than people who “max out,” or spend their entire sentence in prison. Reflecting such findings, states like Kentucky have begun to require community supervision to ensure oversight during the critical transition from prison. “Kentucky requires that people who are not paroled [max out] either be released to supervision six months before the end of their sentence or serve an additional year of post-release supervision, depending on the nature of their crime and other factors.”¹⁵⁶ An analysis of the policy by the Pew Charitable Trusts found that it reduced recidivism and generated significant cost savings. In Nebraska, legislation mandated post-release supervision and recommended at least nine months of parole supervision for people convicted of the most serious felonies.¹⁵⁷

“Research has consistently shown that oversupervising low-risk individuals can do more harm than good by disrupting supportive elements of their lives, such as family, education, and employment, and mixing them in with people who are higher-risk. On the other hand, prioritizing resources and attention for high-risk individuals and those in need of treatment has been demonstrated to yield the greatest reductions in reoffending.”

*The Pew Charitable Trusts
September 25, 2018*

Recommendation 9: The parole board should be required to use risk and needs assessments and should adjust supervision and services accordingly.

As with parole release decisions, there is a strong consensus backing the use of validated risk and needs assessments to set the intensity of supervision levels and the range of services and programs people on parole receive. In addition, by discerning which people merit higher levels of supervision and which need less oversight, assessment tools can prioritize the use of government resources. The lowest risk individuals, for example, might be placed on administrative supervision, which typically requires a minimal amount of contact with authorities. Kentucky is one state in which people who have completed case plan requirements, and who have committed low-level offenses, can qualify for presumptive administrative supervision.¹⁵⁸

¹⁵⁶ Samantha Harvell et al., *Reforming Sentencing and Corrections Policy: The experience of justice reinvestment initiative states* (Washington, DC: Urban Institute, 2016), 49.

¹⁵⁷ *Probation and Parole Systems Marked by High Stakes, Missed Opportunities* (Washington, DC: Pew Charitable Trusts, 2018),

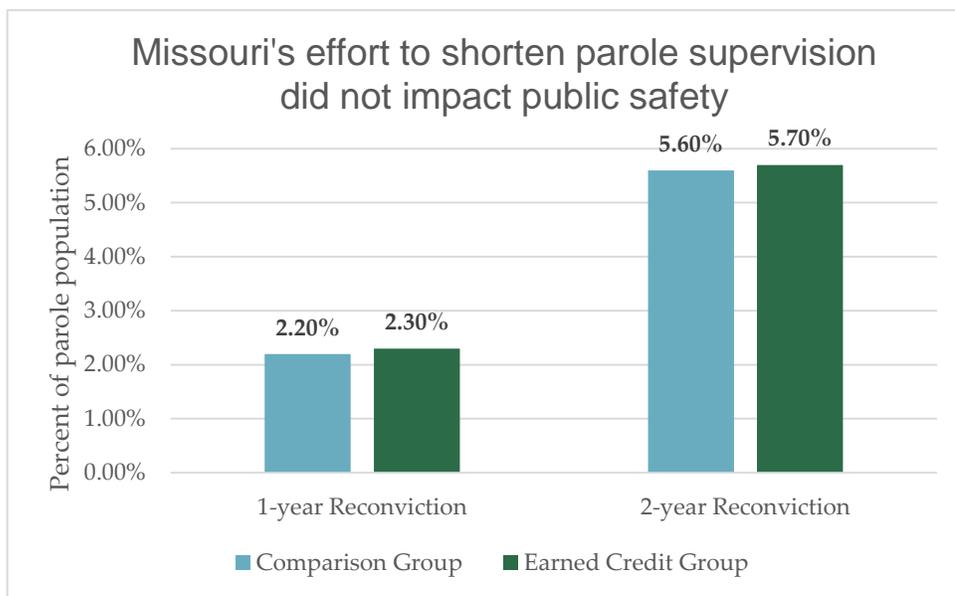
¹⁵⁸ Various Authors, *Putting Public Safety First: 13 strategies for successful supervision and reentry*, (Washington, DC: Urban Institute & Pew Charitable Trust, 2008), 2.

Recommendation 10: Supervision intensity and support resources should be front-loaded to decrease an individual’s risk of reoffending or committing violations that result in a return to prison.

Studies have consistently shown that people are at greatest risk of reoffending or violating parole rules during the first weeks and months after their release.¹⁵⁹ This timeframe also is when individuals are most in need of substance abuse treatment, mental health care, and help with housing, employment, and other issues related to reintegration. Given such dynamics, best practices for supervision require concentrating support in the earliest days and weeks following release, as well as during the final period of incarceration.¹⁶⁰

Recommendation 11: The parole board should adopt policies allowing for earned discharge from supervision.

At least 18 states allow individuals to earn time off of their parole term by participating in programs and/or complying with the terms of their supervision. This approach provides an incentive for people on parole to engage with programs that may be helpful to their success, and also encourages



compliance with rules.¹⁶¹ States that have used this mechanism include Georgia, where a Performance Incentive Credits Program allows people to earn up to 12 months of credit by completing education or vocational programs. In Oregon, the adoption of legislation known as HB 3194 enabled people on probation to reduce their period of supervision by half through compliance with specified conditions and by participating in programming. Other states granting earned time to people complying with specific requirements include Mississippi, Arkansas, and Missouri. A 2016 study found that more than 36,000 people on community supervision in

¹⁵⁹ *Parole, Desistance from Crime, and Community Integration*, (The National Academies Press, Washington, DC, 2008).

¹⁶⁰ *Ibid.*

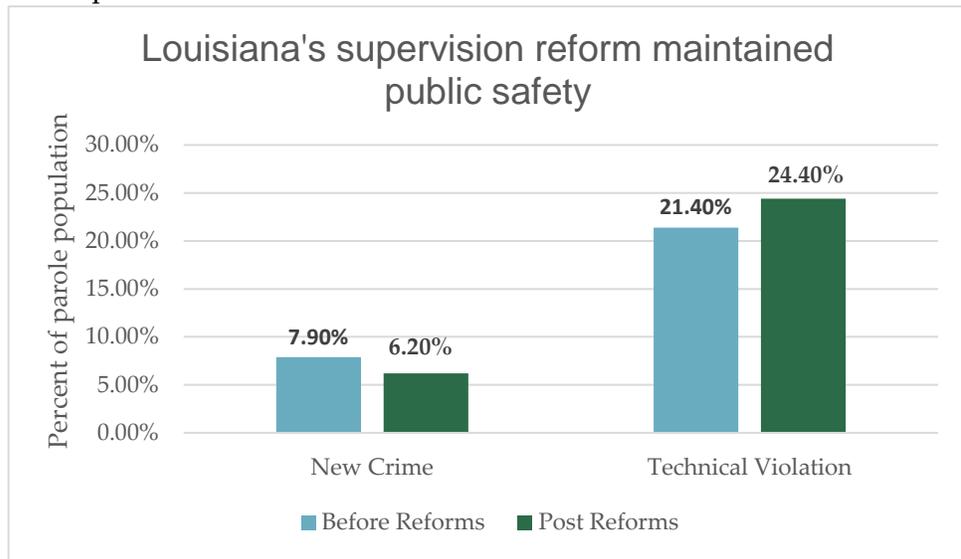
¹⁶¹ Samantha Harvell et al., *Reforming Sentencing and Corrections Policy: The experience of justice reinvestment initiative states*, (2016).

Missouri reduced their probation or parole terms by an average of 14 months in the first three years the program was offered. There was no negative effect on public safety.¹⁶²

Recommendation 12: The parole board should cap the amount of time that must be served in prison for parole revocations.

For individuals who are returned to prison after a revocation, states increasingly are adopting caps that limit the amount of time that must be served for a violation. The goals of this policy include prioritizing costly prison beds for people who commit more serious offenses and using more effective violation responses that cause less damage to a person’s community reintegration, employment, or development of positive family relationships. Such caps are particularly appropriate for violations stemming from behavior that would be legal if a person was not on parole.

In 2014, Mississippi passed legislation establishing a 90-day incarceration cap for the first technical revocation, a 120-day limit for the second, and a 180-day limit for the third.¹⁶³ Similar caps were adopted in Idaho, Oklahoma, and Alaska, with the latter state setting the shortest limit—three days for the first technical revocation, five days for the next, and ten days for a third technical revocation. Louisiana adopted legislation establishing a 90-day incarceration cap for people whose probation or parole was revoked for first-time rule violations. An evaluation of the policy, adopted in 2007, found that it had shortened the average length of incarceration for first-time technical revocations by nine months; maintained public safety; and saved taxpayers an average of \$17.6 million in annual corrections costs.¹⁶⁴



Another important reform targets some states’ practice of mandating that people forfeit all of their time served on the parole in the event of a revocation. Instead, researchers recommend that

¹⁶² *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, (Pew Charitable Trusts, Washington, DC, 2019).

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

individuals should lose only the amount of time served on supervision for the period between the time of the violation—or warrant, in the case of a new crime—and the revocation decision.

Recommendation 13: To improve outcomes, individuals on parole should be actively engaged in their own supervision process.

Research indicates that outcomes improve when individuals are actively engaged as participants in the development and ongoing review of their parole case plan. While risk and needs assessments should highlight major elements of the plan, allowing and encouraging individuals under supervision to have input is valuable, enhancing feelings of accountability and resulting in improved public safety. Under this approach, parole officers adjust case plans in consultation with people on parole, help them with goal setting, and maintain an open dialogue about conditions of supervision.¹⁶⁵

Recommendation 14: The District should expand and improve community-based treatment and services to support successful reentry.

Formerly incarcerated people face an obstacle course of challenges as they attempt to reintegrate into society, from limited access to housing and employment to challenges related to substance use and mental health disorders. As part of comprehensive criminal justice reform packages adopted in recent years, many states have increased funding of community-based treatment and services to better support people transitioning through reentry.¹⁶⁶ This approach recognizes that continuing to invest dollars in criminal justice agencies and programs, even those proven to effectively save money and protect public safety, is only part of the solution. Individuals who have been affected by mass incarceration and the expansion of supervision, along with their families, friends, and neighbors, should play a central role in reimagining public safety strategies. This community investment approach empowers impacted communities by redirecting resources to the programs and supports that help prevent crime, heal the trauma of crime victims, and repair past harm through a racial justice framework.

Some examples of community investment strategies include:

- Colorado WAGEES (Work and Gain Education and Employment Skills): Reinvests money from parole into grants for community-based reentry organizations to support employment and successful integration.¹⁶⁷

¹⁶⁵ *Putting Public Safety First: 13 strategies for successful supervision and reentry* (2008), 4.

¹⁶⁶ Leah Sakala, Samantha Harvell, and Chelsea Thomson, *Public Investment in Community-Driven Safety Initiatives*, (Washington, DC: Urban Institute, 2018).

¹⁶⁷ Chelsea Thomson, Leah Sakala, Ryan King, and Samantha Harvell, *Investing Justice Resources to Address Community Needs: Lessons Learned from Colorado's Work and Gain Education and Employment Skills (WAGEES) Program*, (Washington, DC: Urban Institute, 2018).

- Colorado Transforming Safety: Reinvests savings from parole reform into two communities that have identified locally-derived public safety strategies through an in-depth planning process.¹⁶⁸
- Oakland, California, Measure Y and Measure Z: Uses taxes and parking fees to fund community-based organizations that prevent violence.¹⁶⁹
- Washington, DC, Credible Messengers: Reinvests savings from a reduction in out-of-home placements for youth to support mentors with criminal justice system experience for at-risk youth.¹⁷⁰

Recommendation 15: Fines and fees imposed on justice-involved people should be reduced or eliminated.

The growth of both the incarcerated and supervision populations in the U.S. has been accompanied by astonishing increases in costs. To help finance their vast and expanding criminal justice operations, states have imposed a variety of new fines, fees, and other financial obligations on justice-involved people, increased the amounts of such costs, and become more aggressive about collecting payment.¹⁷¹ California is a compelling case in point. Through 16 statutes, the state specifies 269 separate court fees, fines, forfeitures, and other financial costs that may be collected.¹⁷² In Texas, 15 standard fees combine with 18 discretionary costs, such as fees for being admitted to or released from jail, and Florida has added 20 new categories of financial assessments since 1997.¹⁷³ Overall, “more than 85 percent of people on probation and parole are now required to pay supervision fees, fines, court costs, or restitution to victims to remain free from further sanctions.”¹⁷⁴ The financial impact of this increase in financial punitiveness is that roughly 10 million people owe more than \$50 billion because of their contact with the criminal justice system.

Criminal justice debt can create a web of damaging consequences for people recently released from prison, exacerbating the challenges of reentry in multiple ways. People carrying legal debt have more trouble obtaining driver’s licenses; securing housing, transportation, and employment; and even paying child support. Most significantly, failure to pay fines and fees can lead to reincarceration, either through willful refusal to pay or when missed payments lead to a parole revocation. When fees and fines seem excessive and are administered unfairly or

¹⁶⁸ Leah Sakala, Samantha Harvell, and Chelsea Thomson, *Public Investment in Community-Driven Safety Initiatives*, (2018).

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Karin D. Martin, Sandra Susan Smith, and Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, Executive Session on Community Corrections, Harvard Kennedy School of Government, (2017).

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Jeremy Travis and Joan Petersilia, “Reentry reconsidered: A new look at an old question,” *Crime and delinquency* 47, (2001): 291–313.

disproportionately, the practice undermines trust in the system and can be demoralizing, both for formerly incarcerated people and officers put in the position of serving as debt collectors.

Researchers have identified a handful of reforms to minimize the damage such financial penalties can cause. They include:

- Adjusting the number of fines and fees according to a person's ability to pay, an approach used in parts of Europe.
- Establishing safeguards to prevent financial costs—such as delinquent charges and fees to apply for payment plans—that penalize low-income individuals for not having the financial resources others have.
- Offering community service or other alternatives for people unable to afford fees.
- Considering amnesty for those who already hold debt.
- Reserving any fees collected in a trust account to be used only for direct rehabilitation services for the supervised population.
- Creating an independent commission to determine the causes and consequences of increasing fines, fees, and other criminal justice assessments.
- Ensuring parole officers focus on public safety issues, not debt collection.

Operational Considerations

Professionalizing Parole

The parole board is housed in the executive branch in almost every state, with more than half reporting that the board is either independent or independent with an administrative attachment to the department of corrections.¹⁷⁵ States vary widely in terms of the structure of their parole boards (e.g., how many members), the means of appointment (typically by the governor), the length of terms, and the qualifications required of members. In some cases, little beyond the need to be “of good character and temperament” is required in terms of member qualifications. As a result, some parole boards have been plagued by accusations of cronyism and release decision-making that is guided by politics, not research and evidence. Poor training and lack of appropriate qualifications also have been blamed for low grant rates.

In recent years, some states have pushed back on the practices that led to an unqualified parole board, seeking to professionalize operations by targeting board make-up and member qualifications. Changes have included the addition of educational requirements, relevant employment history (corrections, behavioral health, social work, etc.), annual training, and continuous certification on the best practices for releasing authorities. The improvements have also come in the form of policy and practice reform to standardize how the parole board functions. Because boards have enormous discretion, it is important to maintain a balance in eligibility standards, appointments, removals, transparency, and accountability, as well as the function of appeal.

Recommendations from field research are included below.

Recommendation 16: Reasons for denial of parole must be made public, documented in writing, and appealable.

Only 24 states require a written rationale for a parole denial to be shared with the individual, while 23 states make public information concerning the denial.¹⁷⁶ Only 18 states require in statute a written statement concerning denial, while others require it by agency policy or informally. To ensure such notification occurs, jurisdictions should codify the requirement in statute.

A written explanation of parole denial is critical to ensure that individuals understand the shortcomings identified by the parole board and, ideally, will be able to work with prison officials to develop a case plan that addresses those issues. In addition, a written rationale facilitates an appeal process for applicants who believe their denial was based on an incorrect understanding of facts or an incorrect application of rules. Eleven states do not permit any appeal of a denial of

¹⁷⁵ Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a national survey* (2016), 17.

¹⁷⁶ Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities*, 33.

parole.¹⁷⁷ The others permit some type of appeal, although only eight of those states include that protection in statute. The remainder permit appeal by administrative rule or agency policy.

Recommendation 17: An applicant should have access to counsel and be provided all materials that the parole board will use to make its decision in advance of the hearing.

Despite the powerful implications of a parole hearing, the right to counsel during the parole process is not protected by the U.S. Constitution. Many states (24) permit counsel to be present and speak on behalf of the applicant during the hearing, but only 10 states guarantee counsel if the individual is indigent.¹⁷⁸ Four states permit counsel to be present and observe, but not to speak. Nine states prohibit the presence of counsel at the hearing in any capacity.¹⁷⁹

Allowing meaningful legal representation at initial hearings and appeal hearings increases transparency and helps legitimize the outcome in the eyes of the applicant and the community.¹⁸⁰ An applicant and counsel should have access well in advance of the hearing to all of the materials the parole board will use to make its decision. This allows for an applicant to contest information such as risk score, program participation outcomes, or disciplinary record, and assist with calling potential witnesses.¹⁸¹

Recommendation 18: Establish standards for parole board member eligibility, including education and work/life experience.

States should establish educational and work/life experience requirements that ensure a qualified, well-trained, diverse, and representative parole board membership. For example, Kentucky has changed practice to strengthen the background of its parole board and insulate it from partisanship. Members must have at least five years of experience in the field of penology, corrections, law enforcement, sociology, law, education, or some combination. Additionally, no more than six of the nine board members may be from the same political party. For continuing guidance on best practices, members must complete 40 hours of annual training and education.¹⁸²

Members of a paroling authority should have a college degree in criminology, corrections, sociology, related sciences (developmental psychology or behavioral psychology), or law.¹⁸³ They also should possess at least five years of work in the field of corrections or reentry, have a record as a strong community leader in areas most impacted by the criminal justice system, and/or have

¹⁷⁷ Ibid.

¹⁷⁸ Id. at 29.

¹⁷⁹ Ibid.

¹⁸⁰ Catherine C. McVey, Edward E. Rhine, and Carl V. Reynolds, *Modernizing Parole Statutes: Guidance from Evidence-Based Practice* (2018), 9.

¹⁸¹ Ibid.

¹⁸² Alexis Lee Watts, Julia Barlow, and Kevin R. Reitz, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Kentucky*, (Minneapolis, MN: University of Minnesota, 2018).

¹⁸³ Edward E. Rhine et al., *The Future of Parole Release*, (2017), 285–289; see also, Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, “Improving Parole Release in America,” (2015).

been personally impacted by the criminal justice system. Guidelines should be flexible enough to ensure that a qualified candidate who meets service criteria in one category but is short in another, such as educational requirements, would still be eligible for appointment if they possess a unique set of work or life experiences. Ohio’s governor recently appointed three new members—a defense attorney, a prosecutor, and a lawmaker—in order to diversify the board membership.¹⁸⁴ This is an important goal of any modern, successful parole board.

Recommendation 19: A panel of experts should review parole board nominations and submit recommendations to the executive for review.

Most systems rely on direct political appointees for their board member composition. A survey showed that in most states, the governor appoints members (37), the legislative body approves (31), and the chairperson is selected by the governor (31).

By contrast, best practice suggests that an independent panel of experts should review parole board nominations and submit recommendations to the executive for review. This creates an element of oversight beyond a direct appointment by the executive. The panel should be sensitive to the current makeup of the parole board and ensure membership is representative of different branches of government, different elements of the criminal justice system, impacted communities, and political ideology. In Utah for example, the Commission on Criminal and Juvenile Justice considers all applicants and recommends them to the governor with the Senate’s consent.¹⁸⁵

Recommendation 20: Parole board members should serve terms of between four and six years, staggered by the term of the executive, and the D.C. Council should establish rules for removal in statute.

Nationally, board members typically serve terms of between four and six years, with six years being the most common tenure provided in a recent national survey.¹⁸⁶ Most states report staggering the term of the governor with parole board members to create some insulation from partisanship. Every state permits a member to apply for reappointment, while a few report term limits.

The process of removing an individual from the parole board should follow protocols that are established by law. The removal should be depoliticized by creating an independent panel authority under the executive branch. Most states have some mechanism for removal for malfeasance (23), criminal conduct (18), ethical violations (15), or other reasons—including electing a new governor (7). In Pennsylvania, removal of a parole board member is difficult; it not

¹⁸⁴ Laura A. Bischoff, “Gov. DeWine Calls for Reform of Ohio Parole Board After DDN Story,” *Dayton Daily News*, (May 1, 2019).

¹⁸⁵ Alexis Lee Watts, Julia Barlow, and Kevin R. Reitz, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Utah*, (Minneapolis, MN: University of Minnesota, 2018).

¹⁸⁶ Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a national survey* (2016), 19.

only requires gubernatorial action, but consent of two-thirds of the Senate. In Georgia, the Board of Pardons and Paroles is comprised of five members, appointed to seven-year terms by the governor with the confirmation of the Senate.¹⁸⁷ A board member can only be removed “for cause by the concurrent action of the Governor, Lieutenant Governor, and Attorney General.”¹⁸⁸

Recommendation 21: The parole board must have transparent rules and procedures that reflect the input of all interested parties.

An effective parole board is staffed by qualified and trained professionals with relevant educational backgrounds that are informed by a diverse set of work and life experiences. Appointing and training the right individuals, however, does not equate to true accountability. Real accountability in a parole board can only be achieved by putting in place transparent rules and procedures that reflect the input of all interested parties (the parole board, the applicant, victims, the public). These rules and procedures should guide all elements of parole board staffing, operation, management, release decision-making, and supervision practices. There should be a periodic review of these rules and procedures and a process in place for revisions and amendments.

Recommendation 22: The parole board should adopt a robust set of performance measures that are publicly reported on a regular basis.

An effective parole board must adopt a set of robust performance measures in order to assess compliance with all of its rules and procedures. Typically, parole boards publicly report grant rates and little else. True parole board accountability demands a set of context-specific measures that account for the unique circumstances of each application. For example, rather than merely reporting grant rates, a parole board should capture grant rates disaggregated by factors that describe the applicant pool. These include:¹⁸⁹

- Risk level
- Underlying offense
- Sentence length
- Time served
- Program participation
- Race/ethnicity
- Gender
- Age

¹⁸⁷ Rules and Regulations of the State of Georgia, Chapter 475-1-.01.

¹⁸⁸ Ibid.

¹⁸⁹ Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, *Levers of Change in Parole Release and Revocation*, (2018).

Regular reporting of these measures informs future decision-making and allows for deeper insight into the population applying for and receiving parole grants. States also should report rates of compliance with the structured decision-making instrument. This includes collecting written reasons why the board departed from the recommendation of the tool and reporting overall rates of departure and reasons for departure.¹⁹⁰ The parole board also should appear before an oversight board or legislative committee to discuss implications of these performance measures on their operation. This helps the parole board stay on track with continuous improvement. The parole board should review these performance measures along with their agency-level goals and objectives on an annual basis.

The National Parole Resource Center provides guidance on strengthening internal management policy and external performance measures to ensure a forward-thinking parole process. While establishing appointment requirements and performance measures is helpful to maintain a committed board, the board's fairness and effectiveness is dependent on the practice. It is crucial that the board is familiar with the populations it serves. For example, understanding the behavioral health needs of the District's justice-involved population through the framework of the Risk Needs Responsivity Model (RNR Model) can promote fair and effective alternatives.¹⁹¹ The framework helps guide decision-making toward targeting institutional and community treatment options that allow those with medium- or higher-risk profiles to be served in the community. The RNR framework provides insight into existing programs and policies and how to improve their output depending on the profile of the current population. Embracing a foundation like the RNR model commits the parole board to becoming a learning organization, rather than one that relies on older, stale practices.¹⁹²

Staffing and Budgeting

Parole agency budgeting and staffing protocols vary widely among the states, typically reflecting different approaches each jurisdiction takes to managing parole. In most states, parole costs are not itemized, and instead are included in total corrections budgets. Such accounting creates challenges in determining and comparing levels of state spending on parole release and supervision, and also obscures staffing and other institutional priorities.

To collect data on staffing and budgeting, JPI examined available public documents covering the past three years of operations.¹⁹³ The analysis focused on eight states that were identified by some

¹⁹⁰ Id. at 9.

¹⁹¹ Center for Advancing Correctional Excellence, "Risk-Needs-Responsivity (RNR) Simulation Tool," George Mason University, www.gmuace.org/research_rnr.html

¹⁹² National Parole Resource Center, "The Ten Practice Targets for Paroling Authorities," <https://nationalparoleresourcecenter.org/resource-package-mental-illness-substance-abuse-disorders/ten-practice-targets.htm>

¹⁹³ Office of Planning and Budget, *The Governor's Budget Report*, (Atlanta, GA, 2019); Office of State Budget Director, 2018 – 2020, *Budget of the Commonwealth*, (Frankfort, KY, 2018); Pennsylvania Board of Probation and Parole, *Annual Statistical Report*, (Harrisburg, PA 2016); Office of the Governor, Budget Division and the Legislative Budget Board, *Operating Budget for the Fiscal Year 2018*, (Austin, TX, 2017); Office of the Governor,

technical assistance experts as systems that were employing some of the best practices highlighted in this document: Georgia, Idaho, Kentucky, Pennsylvania, Texas, Utah, Vermont, and Wyoming. These states also provide diversity in terms of their supervised population size, types of practices, and geography. Materials examined by JPI included expenditures on the parole board (release decision-making), expenditures on parole supervision, parole board staffing levels, parole board case review levels, parole supervision staffing levels, and parole supervision caseload.

Of the states examined by JPI, only Texas itemized its parole board and community supervision operating budgets, while others only shared their total expenditures. This lack of transparency is surprising given results from a national survey revealing that 65 percent of the respondent parole systems have an independent budget.

State	Budget Year	Parole Board Expenditure	Parole Board Members	Community Supervision Expenditure
Washington, D.C.	2018–2019	\$12,672,000	3	\$177,247,000
Georgia	2017–2018	\$17,604,724	5	\$31,844,763
Idaho	2020–2021	\$3,497,400	6	\$36,933,900
Kentucky	2019–2020	\$1,202,500	9	\$51,894,541
Pennsylvania	2018–2019	\$12,325,000	9	\$148,259,000
Texas	2017–2018	\$ 4,671,471	6	\$ 118,363,620
Utah	2018–2019	\$5,493,000	5	--
Vermont	2018–2019	\$340,081	5	\$27,238,508
Wyoming	2018–2019	\$1,649,689	7	--

The total expenditure creates challenges in understanding the budget breakdown for six of the states reviewed. But, while every state’s parole system differs, the budget figures from Texas provide some meaningful insights. One key takeaway is that salaries for the parole system, a category that includes the paroling authority and community supervision, account for about 80 percent of annual expenditures.

Budget Recommendations, (Salt Lake City, UT, 2019); Vermont Department of Corrections, *FY 2019 Budget Presentation*, (Montpelier, VT, 2019); Wyoming Board of Parole, *Annual Report*, Cheyenne, WY, 2017).

2018 Parole Operating Budget: Texas		
	Board of Parole and Pardons	Parole System
Salaries	\$3,796,464	\$88,267,428
Other Personnel Costs	\$184,989	\$2,703,010
Professional Fees and Services	\$5,017	\$282,071
Consumable Supplies	\$15,331	\$751,474
Utilities	\$37,160	\$6,543,640
Travel	\$57,346	\$51,220
Rent–Building	\$252,442	\$8,804,805
Rent–Machine and others	\$39,708	\$382,365
Other Operating Expenses	\$198,552	\$9,478,843
Capital Expenditures	\$84,430	--
Client Services	--	\$1,098
Total Budget	\$4,671,471	\$118,363,620

The USPC currently functions with 56 employees and a budget of roughly \$13 million, which is rather large compared to states with a similar population make-up.¹⁹⁴ For example, Idaho conducted 4,893 parole hearings and an additional 1,154 revocation hearings in 2018.¹⁹⁵ That represents nearly three times as many parole hearings and a similar number of revocation hearings as the District. Idaho maintains a fully staffed Commission of 40 employees, including the six parole commissioners, with a budget of \$3,497,400. In Alaska, the parole board conducted 953 release hearings and 920 revocation hearings in 2018. These are slightly lower numbers than the District likely would see, but Alaska handled that caseload with 11 office positions and five parole board members, for an annual budget of roughly \$2 million.¹⁹⁶ Based on these and other figures, JPI anticipates that the annual budget of a District parole board would be no more than \$4 million, far less than the \$13 million spent by the USPC. Additional start-up costs would be incurred for the hiring of staff, office space, and other needs.

¹⁹⁴ U.S. Parole Commission, *FY 2019 Budget Request*, (Washington, DC: 2019).

¹⁹⁵ “Statistical Information,” *Idaho Commission of Pardons and Parole*, <https://parole.idaho.gov/statistics.html>; see also, “Budget and Payroll Management, *Idaho Department of Corrections – Legislative Fiscal Report*, https://www.idoc.idaho.gov/content/management_services/budget_management.

¹⁹⁶ “Parole Board,” *Alaska Department of Corrections*, <http://www.correct.state.ak.us/parole-board>.

A “Second Look” Approach

The Office of Victim Services and Justice Grants requested that JPI “assess the legal and structural framework required for the reestablishment of local control over the District of Columbia Parole Board.”¹⁹⁷ As such, JPI began its exploration into best practices in release decision-making and supervision with a narrow focus on empowering the District with the most current information on parole. However, while reviewing documents and speaking with technical assistance experts and local stakeholders, the possibility of assigning release decision-making to the courts through a “second look” provision began to emerge. Practically, it makes sense due to the declining number of parole-eligible cases remaining in the BOP. Secondly, the District is already operating a similar system of judicial review for people who committed their crimes as juveniles (under 18 years of age) and have served at least 15 years in prison. Finally, the current chairperson of the USPC, Patricia Cushwa, has called for a court-centered review process in place of the USPC in a memo issued in March 2019.¹⁹⁸ For these reasons, JPI decided to explore the strengths and weaknesses of a second look provision in the District.

The Rationale for a Second Look

Support for the general principle of a second look provision has been growing nationally among sentencing experts, fueled in part by the proliferation of extremely long criminal sentences during the U.S. incarceration boom. One study estimated that the number of people serving life sentences in the U.S. increased from 34,000 in 1984 to 140,610 in 2008.¹⁹⁹ “The fact that American prison rates remain high after nearly two decades of falling crime rates is due in part to the nation’s exceptional use of long confinement terms that make no allowance for changes in the crime policy environment,”²⁰⁰ the study explained. Many researchers believe the country’s use of lengthy sentences—sentences that are much longer than those in other Western democracies—merits the creation of a mechanism for their review by a court at some point in time.

The American Law Institute (ALI),²⁰¹ as part of a nearly 10-year-long review of sentencing to revise the Model Penal Code, noted that, “[w]henver a legal system imposes the heaviest of incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities for the correction of errors and injustices.”²⁰² The ALI was particularly focused on determinate sentencing systems, where no relief from long prison terms is available. While someone sentenced to 50 years in an indeterminate system may have the option to apply for release from a parole

¹⁹⁷ Government of the District of Columbia, Executive Office of the Mayor, Office of Victim Services and Justice Grants, *DC Parole Board Local Control Study Request for Applications (RFA)*, (November 2018).

¹⁹⁸ Cushwa, Patricia & Massarone, Charles, Memorandum, U.S. Parole Commission Transfer of Duties Plan, March 14, 2019.

¹⁹⁹ American Law Institute, *Model Penal Code: Sentencing, Proposed Final Draft*, (April 2017), 15.

²⁰⁰ *Id.* at 568.

²⁰¹ The American Law Institute, founded in 1923, is a membership organization comprised of practicing attorneys, judges, and law professors. Among other responsibilities, the American Law Institute issues models of law intended to guide policy and practice.

²⁰² American Law Institute, *Model Penal Code: Sentencing, Proposed Final Draft*, (April 2017), 569.

board decades in advance of serving a full term, an individual in a determinate system typically can earn no more than 15 percent off of the full sentence and has no other option to apply for meaningful review of that sentence. This can lead to prison terms that are egregiously disproportionate to the underlying conduct and a system that is powerless to provide any relief. The lack of any potential early review of sentences also removed any incentive for an individual to participate in programming or comply with the rules of the institution because any hope to earn early release was absent. A growing frustration with the lack of any meaningful review for people serving long prison terms in a determinate system triggered an exploration into a second look provision. A second look mechanism, the ALI said, is intended to ensure that long sentences “remain intelligible and justifiable at a point in time far distant from their original imposition.”²⁰³

Before exploring the second look provision, it makes sense to review the ALI’s discussion about parole release decision-making. The ALI comes down in support of a determinate system, which is a departure from its historic support of indeterminate sentencing. There are a few key factors that shaped their decision:²⁰⁴

- Determinate systems are more “visible, regulated, and accountable forums for the exercise of sentencing discretion.”
- The length of a prison term should be determined by the judge at the time of sentencing with only modest opportunities to earn time off.
- Parole boards have historically been of “low quality.”

Parole boards have proven to be risk-averse and amenable to political pressure, which contributes to why states with indeterminate sentencing have higher rates of incarceration.²⁰⁵ They also lack transparency, leaving their internal decision-making protocol a mystery to applicants as well as policymakers and the general public.²⁰⁶ The ALI also believes that parole boards have not been effective at accurately identifying risk of reoffending at release, erring by being too restrictive or too liberal. They are similarly poorly positioned to determine whether the goals of rehabilitation have been met. Some of this is a function of the *pro forma* way in which parole hearings are held. The formal rules and procedures of a courtroom are seen as a desirable alternative. There are also poor protections in place for an applicant at a parole hearing—lack of counsel, lack of appeal process, lack of clear rules of evidence—which would be much stronger in a courtroom setting.

The ALI also points to concerns about staffing, appointment processes, lack of training, and an absence of true neutrality in parole boards.²⁰⁷ All of these factors have contributed to a lack of confidence in the parole process in many states, which, in turn, encourages a more risk averse parole board. It should be noted that much of this document has been focused on best practices

²⁰³ Id. at 568.

²⁰⁴ American Law Institute, *Model Penal Code: Sentencing, Tentative Draft #2*, (March 2011), 122–123.

²⁰⁵ Id. at 128.

²⁰⁶ For more on the problems with current practice in parole, see Beth Schwartzapfel, “Life Without Parole: Inside the Secretive World of Parole Boards, Where Your Freedoms May Depend on Politics and Whim,” *The Marshall Project*, (July 10, 2015).

²⁰⁷ American Law Institute, *Model Penal Code: Sentencing, Tentative Draft #2*, (March 2011), 140–141.

in parole release decision-making and parole supervision that have been put forth to restore confidence and establish transparency. Many of the policies and practices JPI recommends are an acknowledgment of past weaknesses in parole practice and an effort to safeguard against those historic problems. However, the ALI states that past efforts to improve parole have failed and the success of future efforts is dubious.²⁰⁸

For these reasons and others, the ALI adopted a strong preference for a determinate sentencing system that relies upon a second look provision for people serving the longest prison terms. The ALI's recommendation includes:²⁰⁹

- A judicial decision-maker or judicial panel will rule upon applications for a sentence modification from any individual who has served a minimum of 15 years in prison. These 15 years can be the result of time served for a single sentence or consecutive sentences.
- This sentence modification is “analogous to a resentencing in light of present circumstances.”
- The judicial decision-maker or judicial panel should have the authority to modify any element of the original sentence, regardless of whether a mandatory minimum was part of the original sentence.
- Sentences cannot be modified to make the term of imprisonment longer.
- The sentencing commission is instructed to develop guidelines for considering release and should also explore the process of implementing retroactive application of this provision.
- Appointed counsel can be provided for those in need.
- The original victim impact statement can be considered and victims should be afforded the opportunity to submit testimony reflecting anything that has changed since sentencing.

These are “principles for legislation” that were developed over the course of a nearly decade-long consensus-based process comprised of feedback from legal scholars, judges, prosecutors, defense attorneys, and others. They do not reflect specific statutory language, but offer a blueprint for how a jurisdiction might adopt a second look provision. Importantly, the ALI sees determinate systems as preferable to indeterminate sentencing that relies on a parole board, as discussed above. However, the second look provision is not merely a judicial alternative to parole. It moves beyond considering rehabilitation of the applicant to also account for changes in how society thinks about certain crimes and punishment.²¹⁰ The ALI correctly notes that this country's rates of incarceration have remained stubbornly high despite two decades of declining crime rates because of long prison terms and systems that “make no allowance for changes in the crime policy environment.”²¹¹

²⁰⁸ Id. at 123.

²⁰⁹ American Law Institute, *Model Penal Code: Sentencing, Proposed Final Draft*, (2017), 565–566.

²¹⁰ Id. at 568.

²¹¹ Ibid.

Excerpt from:

American Law Institute: Model Penal Code

The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue.

Judicial sentence modification also raises potential practical challenges. First, there may be problems with administrative capacity, as already over-burdened courts process sentence modification motions and hearings. The drafters of the Model Penal Code's ("MPC") second look provision acknowledge such "substantial costs" due in part to increased state expenditures on prosecutors and appointed defense counsel.²¹² The D.C. Superior Court is currently down 11 judges and has faced budget pressure in recent years that has led to a cut in staffing and services. The challenges of getting judges appointed to the D.C. Superior Court due to political obstacles in Congress also adds to the pressure that would be exacerbated by a second look provision. There are also physical resource limitations, as the D.C. Superior Court lacks the necessary courtroom and office space to accommodate second look hearings and the accompanying staff necessary to handle the caseload.

Second, it is unclear that the case-by-case judicial modification mechanism will adequately address the prison cost and overcrowding concerns that partially motivate interest in early release. This is especially true because individuals will be entitled to representation at their sentence modification hearings, and those counsel will likely be court-appointed. Moreover, moving these cases into a court setting will necessarily warrant the involvement of the United States Attorney's Office of the District of Columbia (USAODC). The USAODC has opposed nearly every Incarceration Reduction Amendment Act (IRAA) petition and it can be assumed

²¹² Model Penal Code: Sentencing, § 305.6 cmt. a (Proposed Final Draft, 2017)

they will do the same for any second look resentencing hearings. The adversarial nature of a court-centered review will result in a longer process and consume significantly more resources.

Additionally, it is up for debate as to whether judges are best positioned to consider motions for sentence modification. The ALI commentary acknowledges the political pressures that may be placed upon the judicial decision-maker, as “[d]ecisions to release prisoners short of their maximum available confinement terms are often unpopular, and even one instance of serious reoffending by a releasee can focus overwhelming negative attention upon the releasing authority.”²¹³ Moreover, it is unlikely that the same judge who sentenced an individual will consider the motion for sentence modification. In fact, judges in the D.C Superior Court rotate through five different divisions. This will impact continuity on cases and poses an obstacle to judges obtaining the appropriate expertise in making release decisions. And it is unclear whether judges are sufficiently familiar with correctional treatment programs and disciplinary infractions to reach an informed conclusion about whether a particular person’s sentence should be modified.

Finally, judicial sentence modification could exacerbate disparities between applicants. For example, some judges may be more willing to modify sentences than others. This could lead to inequitable outcomes between similarly situated applicants.²¹⁴

Second Look in the District

Establishing a new, fully staffed and trained parole board to handle the District’s needs would be a costly and complicated endeavor. And, as noted above, the number of people whose sentences make them eligible for parole is small and finite. As such, a new D.C. parole board would have a limited number of cases—slightly less than 900—over which it has release decision-making authority. Many of these individuals are eligible for resentencing by a court because their crimes were committed as juveniles. Under the District’s IRAA, people who were sentenced before age 18 and who have served 15 years or more in prison are eligible for resentencing. The IRAA was enacted to ensure District compliance with the U.S. Supreme Court ruling outlawing juvenile life without parole. As of September 2019, 21 people have been released under the Act, and many more likely will be freed via resentencing by the court.

Given the small and shrinking number of parole-eligible people from the District—many of whom likely will seek release under the IRAA—the prospect of creating a fully-staffed and funded parole board with a temporary, finite mission may seem ill-advised, and unnecessarily costly.²¹⁵ However, the new parole board would also presumably assume the supervision

²¹³ Ibid.

²¹⁴ For further discussion of the constitutional and practical challenges, see Cecelia Klingele, “Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release,” *William and Mary Law Review* 52, no. 465, (2010): 521–536.

²¹⁵ As of September 30, 2019, the D.C. Council is currently considering expanding IRAA to all individuals whose crimes occurred prior to their 25th birthday. Should this Second Look Act be passed, we believe the majority of parole-eligible individuals remaining in the BOP will be eligible to apply. The second look provision outlined here

authority of the USPC, which includes people in the community on supervised release. This caseload, while declining in recent years, is still significant and would comprise the majority of the parole board's workload in the future.

There are multiple reasons, in addition to those outlined by the ALI, to favor a court-based system for release decisions. First among these is the fact that the parole board approach is bifurcated, involving a hearing examiner who conducts the case review and a decision-maker—the parole commissioner—who issues grants or denials. That separation can create gaps in understanding about a person's readiness for release and risk and needs profile, potentially influencing decisions. Perhaps more importantly, judges are trained to understand the intricacies of sentencing statutes and are equipped to make potentially controversial decisions, including those involving people in prison whose history includes serious, violent crimes. Judges also are accustomed to weathering criticism for sentences they impose and are better insulated from consequences if a serious crime is committed by someone who has been released. In addition, given the greater transparency of court processes, community members are likely to have more trust in the second look approach than in the often mysterious processes of parole boards.

Other relevant and no less important concerns include the fact that logistically, adopting a second look provision is much easier and more affordable than creating a parole board, finding space for its staff, and determining which agency should house it. Second look hearings likely would be handled by judges on the D.C. Superior Court, which is funded by the federal government, and the USPC's \$12 million annual budget could be allocated to pay for additional judges as needed. This approach also eliminates a potentially daunting legal challenge—the District-operated parole board occupying a position of authority over a federal agency, CSOSA.

Release Decision-Making

If the District adopts a second look provision to handle parole release decision-making, it may choose an approach that supplements the IRAA review system already in place. As mentioned earlier in this section, people who were sentenced before age 18 and who have served 15 years or more in prison qualify for resentencing under the IRAA. The option of judicial resentencing provided by IRAA exists in parallel with the USPC review process. In other words, those individuals who are denied release by a judicial decision-maker are still eligible to apply for parole through the traditional USPC process.

A second look provision can build upon the success of the IRAA by simply removing the age restriction that limits eligibility to those who were under 18 at the time of the crime. Instead, all individuals would be eligible to apply for a resentencing hearing after having served 15 years. Because of the volume of cases, JPI would expect that the court and either the District of Columbia Sentencing Commission or the D.C. Council would adopt a screening process and

would simply remove the age limit and make resentencing an option for all individuals serving an indeterminate sentence. However, we believe it will add minimal additional burden should the Second Look Act be passed.

criteria to guide court staff assigned to review paper applications. Only those individuals who meet these criteria, which would likely include time served, clean disciplinary record, and program completion, would actually be granted a hearing before a judge or judicial panel.

Under the second look model, the decision-making authority—a judge or panel of judges—would conduct a hearing to consider an application for sentence modification from qualifying individuals who have served a minimum of 15 years in prison. Hearings would involve a reevaluation of the sentence applying current standards of review and would evaluate whether the purposes of the sentence could be better met with a modification. Reconsiderations could not lead to a lengthening of sentence, but could modify it in other ways, including an order that an individual be released with time served. Decisions would be shaped by guidelines designed to ensure fairness, proportionality, consistency, and transparency in the evaluation process.

Specifically, the second look panel should be required to base decisions regarding sentence modifications on an individual's likelihood to pose a risk to the community if released. That finding, in turn, should be shaped by results of recent, validated risk and needs assessments. If an individual is not approved for sentence modification at an initial second look hearing, the timeframe before a second reconsideration should be no longer than 10 years, and ideally between one and two years, depending on the reasons underlying the decision. The time between second look hearings assumes that the District also will establish a local parole board to function alongside the Superior Court's review in the same way that IRAA offers the option to petition the Superior Court while also reserving the option to apply for parole. Should the District choose not to establish a local parole board and rely solely on judicial review, the time between second look reviews should be closer to one to two years that is consistent with best practices in parole review.

We believe that any solution that the District adopts should include some element of judicial review of sentences for one key practical reason. Currently the District has a truth-in-sentencing system that requires individuals to spend a minimum of 85 percent of their sentence in prison before eligibility for release. This is precisely the type of sentencing system for which the ALI recommends a second look provision. Rather than carve out two separate release mechanisms, it is most sensible for the District to extend that second look option for all individuals. The outstanding question for the District is whether it wishes also to develop a parole board for those people whose arrest occurred on or before August 4, 2000, to function in parallel to the court review as with the IRAA.

Supervision and Revocations

As noted above, the USPC handles release decision-making for those individuals whose crimes occurred August 4, 2000, or prior. It also handles revocation hearings for all individuals currently on community supervision, regardless of whether they are on parole or supervised release. In the absence of the USPC, another entity will need to take control of revocation hearings. Were the District to choose to restore local control of its parole board function and establish a new Board of Parole, revocation hearings would naturally become one of the agency's core functions.

However, if the District were to choose a court-centered process, the revocation hearings would need to be assigned to the Superior Court. Under this model, releases would be governed by guidelines, supervision would be handled by CSOSA, and revocations would be managed by judges in Washington, D.C. Superior Court. This would apply to both those people on parole and those on supervised release. A hybrid model that retains parole review for those individuals whose arrest occurred on or before August 4, 2000, in addition to a second look provision, can assign the process of parole revocations to the newly constituted parole board.

Currently, the Washington, D.C. Superior Court handles revocation hearings for persons serving probation. The requirements and protections of probation revocation hearings are nearly identical to those of parole, so judges should already be familiar with the relevant rules and procedures and would require minimal new training.

One concern is the additional burden to the caseload of Superior Court justices. There were 6,337 people on probation and supervised by CSOSA in 2018.²¹⁶ An additional 950 people were on parole and 2,382 were on supervised release. Both the parole and supervised release figures reflect sharp declines over the last two years. There were more than 20 percent fewer persons on parole and supervised release in 2018 versus 2016.²¹⁷ This shrinking population may result from declining rates of crime and fewer revocations. Fewer than 2 percent of people under CSOSA supervision (includes probation) were arrested for a serious crime of violence in 2017.²¹⁸

The USPC estimates that about 1,500 warrants will be issued in 2020, and that approximately 1,400 parole hearings and 1,330 revocation hearings will be held.²¹⁹ The latter would be the domain of the Superior Court should it take over revocation proceedings from the USPC. The Superior Court does not publish data on the number of annual probation revocation hearings it handles, but other data sources provide some potential insight into the current flow of probation cases. The Bureau of Justice Statistics reports that 4,284 people exited probation supervision in 2016 (the most recent year for which there are published data) in the District of Columbia.²²⁰ Of those individuals, 3,345 terminated their supervision successfully. Another 725 were terminated and revoked to a term of incarceration.²²¹ This number is consistent with CSOSA figures showing that approximately 830 people were revoked to incarceration in 2016.²²² It also represents the minimum number of probation revocation hearings that the Superior Court handles in a given fiscal year, given that there is an unknown number of additional cases before the Court that do not result in a revocation to incarceration.

²¹⁶ CSOSA, Community Supervision Program, *Congressional Budget Justification and Performance Plan/Report Fiscal Year 2020*, (March 18, 2019), 50.

²¹⁷ *Ibid.*

²¹⁸ *Id.* at 2.

²¹⁹ United States Department of Justice, United States Parole Commission, *FY 2020 Performance Budget Congressional Submission*, (February 2019), 12.

²²⁰ Danielle Kaebler, *Probation and Parole in the United States, 2016*, United States Department of Justice, Bureau of Justice Statistics, 15.

²²¹ *Ibid.*

²²² *Congressional Budget Justification and Performance Plan/Report Fiscal Year 2020*, (2019), 25.

As such, we estimate that the Superior Court handles approximately 1,000 probation revocation hearings per fiscal year. Delegating parole and supervised revocation hearings to the Superior Court would add an additional 1,330 cases to its docket. This is a significant addition to the Court's responsibilities and would require an expansion of judicial staff to handle the increased workload.

In addition, judges are not experts in parole supervision and, as such, would need significant training to meet the standards of best practices outlined above. Any court-managed parole supervision would demand coordination between the Superior Court and CSOSA to ensure that standards of supervision are being met, appropriate graduated sanctions are being used to keep people safely in the community, and best practices as discussed above are being met so as to limit the need for court-based revocation hearings.

The Path Forward: A Hybrid System of Release Decision-Making and Supervision

There are three policy options that we considered for re-establishing release decision-making functions within the District government:

- Single D.C. parole system with jurisdiction over both determinate and indeterminate populations
- Putting release decision-making authority under the control of the D.C. courts (i.e., second look provision)
- Hybrid system with separate bodies responsible for decisions regarding determinate and indeterminate sentences

We discuss three options below and highlight the necessary legal steps to return release decision-making to local control. Regardless of which approach is considered, it will be subject to certain limitations imposed by the D.C. Home Rule Act and the Revitalization Act.

D.C. Home Rule Act

Through the D.C. Home Rule Act, Congress delegated certain legislative powers to the government of the District.²²³ Specifically, Section 302 of the Act extended the legislative power of the District to all rightful subjects of legislation within the District consistent with the Constitution of the United States.²²⁴ However, this extension of legislative power is limited by Sections 601, 602, and 603, concerning the reservation of Congressional authority. These authorities and limitations of the D.C. Home Rule Act set the overall legal framework within which to consider any new parole system for the District.

Section 601

Section 601 of the D.C. Home Rule Act provides that the “Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the D.C. Council, including legislation to amend or repeal any law in force in the District prior to or after the enactment of the Act and any act passed by the D.C. Council.”²²⁵ As a result of this broad reservation of power, Congress maintains authority to legislate on matters relating to parole in the District of Columbia.

²²³ See generally Pub. Law 93-198, 87 Stat. 774.

²²⁴ Id. § 302.

²²⁵ Id. § 601.

Section 602

Section 602(a) of the D.C. Home Rule Act limits the authority of the D.C. Council to pass any act contrary to the provisions of the D.C. Home Rule Act except as specifically provided in the Act, or to do any of the following:

- (3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District[.]²²⁶

As a result, the D.C. Council cannot legislate on matters contrary to the D.C. Home Rule Act except as specifically provided for in Section 602(c). Further, the D.C. Council is not authorized to “enact any act, or enact any act to amend or repeal any Act of Congress” concerning the “functions or property” of the United States or which is not restricted in its application “exclusively in . . . the District.” Certain enactments by the D.C. Council regarding parole could potentially trigger this provision on federal government functions or property, as discussed further below.

One special mechanism in the D.C. Home Rule Act for ensuring Congress has an opportunity to review and block District enactments is in Section 602(c)(2) of the Act. Section 602(c)(2) provides that “[i]n the case of any . . . act transmitted by the Chairman of the D.C. Council with respect to any act codified in Title 22, 23, or 24 of the D.C. Code [relating to crimes, criminal procedure, and treatment of prisoners], such act shall take effect at the end of the 60-day period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate unless, during such 60-day period, there has been enacted into law a joint resolution.”²²⁷ Therefore, any Member of Congress may introduce a joint resolution disapproving a law of the D.C. Council relating to crimes, criminal procedure, and treatment of prisoners at any time after the law has been submitted to Congress and before the expiration of the 60-day layover period.

Section 603

Section 603 requires the D.C. Council to enact a balanced budget for inclusion in the budget the president submits to the Congress. In order to meet this provision, the mayor and the D.C. Council will need to fund new D.C. parole reforms either by raising revenue or reallocating funds from other programs.

While Sections 302 and 602(c)(2) of the D.C. Home Rule Act permit the D.C. Council to legislate on certain matters relating to crimes, criminal procedure, and treatment of people in prison, Section 602(a)(3) provides that the D.C. Council does not have authority to enact any act to amend or repeal any Act of Congress that concerns the “functions or property” of the United States or is not restricted in its application “exclusively in . . . the District.” Because the USPC is not

²²⁶ Id. § 602(a)(3).

²²⁷ Id. § 602(c)(2).

“exclusively in . . . the District,” changes to the jurisdiction of the USPC will necessarily involve predicate action by the U.S. Congress.

Moreover, even to the extent that the D.C. Council properly enacts legislation under Titles 22, 23, and 24 of the D.C. Code, under Section 602(c)(2) the U.S. Congress retains authority to reverse the action of the D.C. Council through joint resolution within 60 days of the D.C. law’s submission to Congress. Section 601 of the D.C. Home Rule Act further broadly preserves the power of the U.S. Congress to enact legislation for the District of Columbia “on any subject, whether within or without the scope of legislative power granted to the D.C. Council” As a result, meaningful and enduring reform of the D.C. parole system arguably will require the involvement of the U.S. Congress. Congressional action would require the amendment of the Revitalization Act, the details of which are described below.

Restoring local control of release decision-making also is limited by the provisions in the D.C. Revitalization Act and the D.C. Code that require concurrence of the U.S. Attorney General for changes to the law concerning parole. As part of the Revitalization Act, Congress included an additional mechanism for control over parole for the District by prohibiting the D.C. government from changing its own laws concerning parole without the “concurrence of the U.S. Attorney General.” Section 11231(c) of the D.C. Revitalization Act states:

The Parole Commission shall exercise the authority vested in it by this section pursuant to the parole laws and regulations of the District of Columbia, except that the Council of the District of Columbia and the Board of Parole of the District of Columbia may not revise any such laws or regulations (as in effect on the date of the enactment of this Act) without concurrence of the Attorney General.

It is unclear whether this requirement prohibiting the D.C. government from changing its own laws concerning parole without the “concurrence of the U.S. Attorney General” is applied in practice. Our research indicates that it is rarely applied and has been applied only once in recent years.²²⁸ In addition, this section of the Revitalization Act raises constitutional questions as discussed below. Even though this concurrence provision does not seem to be applied in practice, it provides an additional reason to enact federal legislation to restore local authority over parole to the District.

Legislative Enactment Recommendations

The sections that follow discuss the portions of the U.S. and D.C. codes that would require amendment in order to restore local release decision-making to the District. We have discussed the strengths and weaknesses of each approach in the prior sections of this report. The District requested a report to help guide a process of restoring local control of parole. However, during

²²⁸ Equitable Street Time Credit Amendment Act of 2008, D.C. Law 17-389. Former Attorney General Mukasey concurred in the legislation, and the Mayor of the District of Columbia signed the legislation in January 2009.

our research and after hours of conversations with local and national experts, it became clear that simply reconstituting the Washington, D.C. Board of Parole would be insufficient to meet the needs of the District's correctional population.

First, as of August 5, 2000, the District is operating a determinate sentencing system. Those individuals are not subject to the discretionary release of a parole board. They must serve a minimum of 85 percent of their sentence in prison and a local parole board would not have the authority to provide relief for those persons serving long prison terms. The ALI developed a second look provision precisely for jurisdictions that have determinate sentencing systems like the District. This provides strong justification for a judicial review of cases for the purposes of determining release.

However, simply establishing a court-centered process for release decision-making ignores the potential burden on the courts to handle revocation hearings for persons on parole and supervised release. While we believe the Superior Court has the capacity to handle release decision-making for both parole-eligible individuals as well as those persons who have served more than 15 years under the current determinate system, the daily responsibilities of managing parole supervision and revocation hearings will create staffing, budgeting, and physical space challenges. This provides support for the reestablishment of a local parole board, at least to handle supervision.

We acknowledge that parole boards have drawn widespread criticism across the country for a lack of transparency and consistency in decision-making as well as being too risk-averse and focusing on the circumstances of the original crime. In fact, as we have documented extensively in this report, there is substantial criticism of the USPC that has led some to call for a court-based release decision-making process as a preferable alternative. The last thing we would like to see is the District replacing the USPC with a local parole board and simply replicating the failings described in this report.

While parole has proven problematic in other jurisdictions, we believe there is an evolution of best practices in the field, which we have outlined in our recommendations in this report. There are no jurisdictions that reflect all of these principles of best practice, but there are lessons to be learned from other states. In addition, we believe that the District is unique due to the extensive commitment to progressive justice practices in the executive, legislative, and judicial branches. Thus, there is reason for optimism that the District will adopt and implement the recommendations outlined in this report with appropriate fidelity. The oversight of leadership and the engagement of stakeholders and the broader public are necessary ingredients to keep the District on track.

Thus, JPI recommends that the District adopt a hybrid system with separate and coordinated bodies responsible for decisions regarding those sentenced under the current determinate system and the "old law" indeterminate system.

Ultimately, it is up to District leadership in the Executive Office of the Mayor and the D.C. Council in conjunction with stakeholders and the public to engage in dialogue to consider each option in order to determine what makes the most sense for the community. This public conversation needs to begin immediately in light of the fact that the USPC's authorization is set to expire on October 31, 2020. With the amount of work that needs to be accomplished no matter the option selected, it appears inevitable that the USPC will need to be authorized for some additional period of time in order to facilitate an orderly transfer of responsibilities to local control, similar to the period that occurred when the parole functions were transferred from the District to the USPC. This would allow for a phased transfer where the District takes on local control of certain elements of parole in stages until full capacity can be established.

The District may also consider accessing technical assistance beginning as soon as possible to manage the process of building and implementing a system of local control of parole. This would include managing the development of a structured decision-making tool, adopting a risk and needs instrument that incorporates the feedback of stakeholders and the public, and helping establish and train practitioners on release, supervision, and revocation practices.

One final note concerning the recommendations for release decision-making and community supervision outlined above: While these principles and practices are drawn from experiences in states that have operating parole boards, they are equally applicable regardless of what policy option is selected. The standards of release can be applied by a newly constituted D.C. Parole Board or incorporated into the standards that guide a second look review by a judicial decision-maker. In addition, the best practices that apply to parole supervision should be formalized by the District in order to guide the practices of CSOSA. As with release decision-making, these recommendations apply regardless of the authority in charge of handling parole supervision and revocation practices.

Hybrid System with Separate Bodies Responsible for Decisions Regarding Determinate and Indeterminate Sentences

Our recommendation is the adoption of a hybrid system with different bodies responsible for release and revocation decisions for populations with determinate and indeterminate sentences. For example, in order to avoid potential constitutional concerns for people with indeterminate sentences whose sentences are modified by the courts, people subject to indeterminate sentences would have their parole release decided by an independent parole board, while people subject to determinate sentences could have their parole decided by a judge. All individuals, regardless of when their crime occurred, would also have the option to apply for a second look judicial review after serving 15 years in prison. The parole board would take over the responsibilities of the USPC with regard to parole supervision oversight, setting of standards of practice for CSOSA for community supervision, and revocation hearings.

Whether more than one body of a local D.C. parole system is responsible for the administration of parole and release decisions for each population is a policy decision that generally does not

change the legal analysis, except to the extent that the reform is limited by Sections 602(a)(3) or 602(a)(4) of the Home Rule Act. Because the hybrid system would likely involve changing the jurisdiction of the USPC or the jurisdiction of the D.C. courts, these changes would need to occur through an act by the U.S. Congress.

District of Columbia Board of Parole

The USPC currently has parole authority over people convicted under the D.C. Code and serving either an indeterminate sentence (i.e., sentenced before August 5, 2000, and eligible for parole) or determinate sentence (i.e., sentenced after August 4, 2000, and eligible for supervised release after serving at least 85 percent of their sentence). In this section, we consider transferring parole authority to a local board of parole, similar to the USPC's current scope of authority.

U.S. Code

The D.C. Council may make changes to Title 24 of the D.C. Code regarding the treatment of people in prison under the procedures set forth in Section 602(c)(2) of the Home Rule Act. Absent a joint resolution of disapproval from Congress, any law impacting Title 24 would take effect at the end of a 60-day period.²²⁹ However, Section 602(a)(3) of the Home Rule Act limits the ability of the D.C. Council to unilaterally revoke the USPC's jurisdiction over the District of Columbia. As a result, creating a new, local D.C. parole board with authority over both determinate and indeterminate populations through Title 24 will have limited effectiveness without predicate congressional action revoking the USPC's jurisdiction over the District.

Further, Congress's power to reject the D.C. Council's revisions or enact superseding legislation necessitates congressional action to ensure that any changes enacted by the D.C. Council endure.²³⁰ Finally, to the extent that reform involves changes in the obligations or jurisdiction of the D.C. Court system, the D.C. Council is specifically prohibited by Section 602(a)(4) from legislating on Title 11 of the D.C. Code, concerning matters relating to the courts' organization and jurisdiction.

The specific changes to consider for federal legislation will depend on the particular policy option selected for restoring local control over parole to the District. That said, in broad terms, new federal legislation should include the following:

- Amend Section 11231(a) of the Revitalization Act, which required the USPC to "assume the jurisdiction and authority" of the D.C. Board of Parole.²³¹

²²⁹ Equitable Street Time Credit Amendment Act of 2008, D.C. Law 17-389. Former Attorney General Mukasey concurred in the legislation, and the Mayor of the District of Columbia signed the legislation in January 2009.

²³⁰ D.C. Home Rule Act § 602(a).

²³¹ Pub. L. 105-33, § 11231, 111 Stat. 745 (1997). Section 11231(b) abolished the D.C. Board of Parole. However, because the creation of a new board of parole can be done regardless of the Revitalization Act's abolishment language, we do not think any amendments to this provision are necessary at this time.

- Amend Section 11233 of the Revitalization Act, which established CSOSA, to remove reference to the USPC, and likely replace it with references to the new governing body.

In addition, Congress could amend Section 11231(c), which requires that the Attorney General concur in any changes to D.C. laws or regulations concerning parole. But, as discussed below, the Attorney General concurrence is rarely used, is subject to constitutional concerns, and is likely not a necessity in order to enact a transfer of parole authority to a new body.

Congress also would need to repeal or amend two federal regulations to revoke USPC's jurisdiction, Sections 2.200 and 2.70 of Title 28 of the Code of Federal Regulations.²³²

D.C. Code

Assuming that Congress revokes the USPC's jurisdiction over the District of Columbia, the logical place for the legal creation of a new stand-alone D.C. Board of Parole is in Title 24 of the D.C. Code, a section entitled "Prisoners and Their Treatment." As explained above, Title 24 contained the authorizing statute for D.C.'s pre-Revitalization Act parole board.²³³ In this sense, making changes to Title 24 pursuant to the procedures in Section 602(c)(2) of the Home Rule Act would be a vehicle for the D.C. Council to change the parole system, but only to the extent that the U.S. Congress revokes the jurisdiction of the USPC over D.C. and does not otherwise object to the changes through joint resolution.

Currently, D.C. Code § 24-131 places the parole adjudication function under the USPC and gives the D.C. Superior Court parole adjudication authority for misdemeanors. New legislation could amend Title 24 to create a D.C. Board of Parole to exist as an independent agency within the D.C. government. The legislation could set out qualifications for membership as outlined above and identify the powers and responsibilities of the new board. The legislation should specify the scope of the board's authority (e.g., whether the board would adjudicate parole issues for felonies, misdemeanors, or both). Sections 24-133, 24-404, and 24-406 of the D.C. Code also would require amending to replace references to the USPC with references to the new Board of Parole.

The legislation also could expressly require the Board of Parole, once instituted, to adopt guidelines within a certain time by which to determine parole eligibility. This directive would be consistent with pre-Revitalization Act D.C. Code § 24-201.2, which authorized the D.C. Board of Parole to determine the timing and conditions of parole release.²³⁴ It would also avoid the

²³² 28 C.F.R. §§ 2.70, 2.200.

²³³ Part II, *supra*. Our initial review leads us to believe that it would not be necessary to amend D.C. Code titles other than Title 24. If, however, changes to the powers and responsibilities of the D.C. Council and Mayor were necessary, the relevant sections of the D.C. Code would be Sections 1-204.04 and 1-204.22, respectively.

²³⁴ Specifically, D.C. Code § 24-201.2 stated that the Board "shall . . . determine the terms and conditions of parole or conditional release." (emphasis added). As explained above, the Mayor was authorized to "promulgate proposed rules" to implement the provisions related to the D.C. Board of Parole, subject to lack of disapproval by the D.C. Council. See D.C. Code § 24-201.3. Additionally, the D.C. Council was authorized to "promulgate rules and

possibility that the new board would adopt the parole guidelines of the USPC. Any new guidelines created by the parole board would have to be no more restrictive than those that existed at the time of sentencing.²³⁵

Additionally, going forward, the D.C. Mayor would need to allocate funds in the District's annual budget for the new D.C. Board of Parole. All budget considerations must be taken in light of Section 603 of the D.C. Home Rule Act, which requires the District to enact a "balanced budget" (i.e., a budget which would result in expenditures greater than available resources). The budget must identify any tax increases required to balance the budget as submitted.

Superior Court and the Second Look Provision

For those individuals sentenced under the determinate system, consideration should be given to adopting a second look provision. In a second look system, a judicial decision-maker is empowered to review a case after a set period of incarceration and impose a reduced sentence or release. The Superior Courts' power to modify sentences is expressly authorized by statute.²³⁶ However, utilizing a second look framework to allow D.C. Superior Court judges to review sentences of certain individuals could implicate some constitutional issues. With appropriate consideration of these issues, however, we do not anticipate they will cause significant barriers to implementing a second look system.

U.S. Code

As discussed above, any changes to Title 24 of the D.C. Code would be subject to Section 602(a)(3) of the Home Rule Act, which limits the ability of the D.C. Council to unilaterally revoke the USPC's jurisdiction over the District.²³⁷ Congress would need to pass legislation to remove USPC's jurisdiction by amending Sections 11231 and 11233 of the Revitalization Act and Sections 2.200 and 2.70 of Title 28 of the Code of Federal Regulations, as discussed above.²³⁸

We believe that adopting a second look provision can be done entirely through Title 24. However, to the extent that this policy pathway requires changes to Title 11 of the D.C. Code, related to the organization and jurisdiction of the courts, Congressional action would be necessary. Section 602(a)(4) of the D.C. Home Rule Act specifically provides that the D.C. Council shall have no authority to "enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia [Official] Code (relating to organization and jurisdiction of the District of Columbia courts)."²³⁹

regulations under which the Board of Parole, in its discretion, may discharge a parolee from supervision prior to the expiration of the maximum term or terms for which he was sentenced." See D.C. Code § 24-204.

²³⁵ Sellmon v. Reilly, 561 F. Supp. 2d 46 (2008).

²³⁶ D.C. Home Rule Act § 602(a).

²³⁷ Ibid.

²³⁸ Pub. L. 105-33, § 11231, 111 Stat. 745 (1997); 28 C.F.R. §§ 2.200, 2.70.

²³⁹ D.C. Home Rule Act § 602(a)(4).

D.C. Code

As discussed above, Section 24-131 of Title 24 of the D.C. Code defines the parole jurisdiction for people convicted under D.C. law. The language of Section 24-131 empowers the D.C. Superior Court “to grant, deny, and revoke parole, and to impose and modify conditions of parole, with respect to misdemeanants.”²⁴⁰ This section could be amended to remove reference to the USPC and add language related to people in the group over which D.C. Superior Court has authority. Further amendment to Title 24, as detailed above, could help to implement a process for establishing parole guidelines and remove references to the USPC.

Although the jurisdiction of the D.C. Superior Court is defined in Title 11, that title only discusses the D.C. Superior Court’s jurisdiction over civil and criminal trials.²⁴¹ It does not reference parole in any capacity, in contrast to the language in Title 24, which grants the D.C. Superior Court parole authority over misdemeanants. As a result, there is a credible argument to be made that shifting parole grant and revocation authority could be accomplished through Title 24, without amendment of Title 11.

Legal Considerations for Judicial Resentencing

First, the Fifth and Sixth Amendment rights to due process and trial by jury could be implicated by a second look system. The Supreme Court has explained that “a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later to seek to impose,” such that “a finding of fact [that] alters the legally prescribed punishment so as to aggravate it . . . must be made by a jury.”²⁴² Under this precedent, if a judge found new facts during a second look proceeding that resulted in an increase of the defendant’s sentence, the defendant would have a strong claim under the Fifth and Sixth Amendments.

Second, a second look provision could arguably implicate the Fifth Amendment’s guarantee against double jeopardy or the Constitution’s *Ex Post Facto* Clause’s prohibition against the retroactive application of a new or different penalty. Under current case law, a change to parole regulations, guidelines, or policy applied retroactively “may violate the *Ex Post Facto* Clause if there is ‘a significant risk’ of ‘a longer period of incarceration than under the earlier rule.’”²⁴³ In *Sellmon v. Reilly*, Judge Huvelle explained that “plaintiffs must demonstrate that as applied to their individual cases, the ‘practical effect’ of the application of the [new parole standards is] a ‘substantial risk’ of lengthier incarceration.”²⁴⁴

²⁴⁰ D.C. Code § 24-131.

²⁴¹ D.C. Code §§ 11-921 et seq.

²⁴² *United States v. Haymond*, 139 S. Ct. 2369, 2376, 2378 (2019) (plurality opinion) (internal quotations omitted).

²⁴³ *Sellmon v. Reilly*, 551 F. Supp. 2d 66, 84 (2008) [citing *Garner v. Jones*, 529 U.S. 244, 255 (2000)]; see also *Peugh v. United States*, 569 U.S. 530 (2013).

²⁴⁴ *Ibid.*

We think it is unlikely that a second look regime would implicate the double jeopardy or *Ex Post Facto* prohibitions, because the second look would not necessarily put the individual in jeopardy a second time or involve applying new law retroactively to prior acts. However, to mitigate the concerns that these constitutional issues could raise, the second look system must be drafted to include statutory language that requires any sentence modification to result in a sentence that is *no more onerous or lengthy* than the current sentence.

Finally, allowing courts to modify an already-imposed sentence could be characterized as an impermissible intrusion on the executive powers of pardon and commutation, thus implicating the separation of powers doctrine. But we think such an argument is unlikely to succeed, as the Supreme Court addressed this question in the context of sentence modification more generally in *United States v. Benz*.²⁴⁵ In *Benz*, the defendant was sentenced to a term of imprisonment for 10 months, but he filed a petition requesting that the sentence be modified while he was serving his sentence and before the term of the federal court ended. The court then granted the motion and reduced the defendant's sentence to six months.²⁴⁶ The Supreme Court rejected the contention that reducing the sentence "was a usurpation of the pardoning power of the executive," stating: "To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment. To reduce a sentence by amendment alters the terms of the judgment itself, and is a judicial act as much as the imposition of the sentence in the first instance."²⁴⁷

Additionally, D.C. courts are not Article III courts, but are instead Article I courts (i.e., they are created by Congress).²⁴⁸ As a result, they are permitted to handle some issues and tasks that might be beyond the competence of an Article III court. This feature further mitigates the risk of a constitutional limit to D.C. courts' authority to follow a second look regime.

Other Considerations

CSOSA

As explained above, CSOSA is a federal agency responsible for direct supervision of people on probation and parole, as well as individuals serving periods of supervised release under D.C. law. In addition to the conditions of release imposed by the Superior Court for the District of

²⁴⁵ 282 U.S. 304 (1931).

²⁴⁶ 282 U.S. 306. (1931).

²⁴⁷ 282 U.S. 311 (1931); see also 18 U.S.C. § 2582(c) (permitting judicial revision of sentences in certain defined circumstances). However, although "[s]tate courts . . . have ordinarily rejected separation of powers claims on similar grounds," there has been at least one state court that "found a separation of powers violation when a trial court held in abeyance a motion for sentence modification, failing to rule on it within a reasonable amount of time following the prescribed 120-day limit." See Cecelia Klingele, "Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release," *William and Mary Law Review* 52, no. 465, (2010): 525.

²⁴⁸ D.C. Code § 11-101 (stating that the District of Columbia Court of Appeals and Superior Court of the District of Columbia are established pursuant to article I of the Constitution).

Columbia (for individuals on probation) or the USPC (for individuals on parole or supervised release), CSOSA develops an individualized supervision plan for each person entering supervision and engages in “contact and surveillance” throughout the release period.²⁴⁹ CSOSA also carries out registration functions in the District for people convicted of a sex offense.²⁵⁰

Even if there is a framework for restoring local control of release decision-making in which CSOSA maintains its supervisory function, at least partial amendment to the CSOSA authorizing provision is required. Under current law, although CSOSA supervises people on supervised release, they remain subject to the authority of the USPC until completion of the term of supervised release.²⁵¹ This provision would need to be updated to reflect the transition of parole authority away from the USPC.

We do not see any legal issues with Congress passing legislation allowing the D.C. Council, D.C. Sentencing Commission, or congressionally created D.C. Board of Parole to provide rules or regulations to CSOSA in connection with parole supervision. Under the Constitution, Congress has broad authority over the District of Columbia and Congress has the power to delegate that authority to the D.C. Council and shape it as Congress sees fit. Additionally, Congress has previously given control to the D.C. government to administer and oversee certain past federal operations, and there thus have been other governmental functions with divided and overlapping responsibilities between D.C. and federal agencies. Specifically, the Lorton Reformatory was a prison constructed by the federal government on federal land administered in part by the D.C. government. The D.C. Circuit in *Cannon v. United States*²⁵² upheld the D.C. government’s administration of the prison.

United States Attorney General Concurrence

As explained above, as part of the Revitalization Act, Congress inserted a provision that forbids the D.C. Council from revising any parole laws or regulations without first obtaining “the concurrence of the Attorney General.”²⁵³ This section of the Revitalization Act allows the U.S. Attorney General to veto any D.C. Council legislation that seeks to alter District parole laws or regulations. The Revitalization Act imposes no standards on the Attorney General and gives the Attorney General unfettered discretion in choosing whether or not to allow a new law or regulation.

An argument can be made that this is an unconstitutional delegation of a purely legislative function to the Executive. “The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to

²⁴⁹ CSOSA, “What We Do: Community Supervision,” <https://www.csosa.gov/community-supervision/>.

²⁵⁰ D.C. Code § 24-133; see also D.C. Metropolitan Police Department, Sex Offender Registration FAQ, <https://mpdc.dc.gov/service/sex-offender-registration-faq>.

²⁵¹ D.C. Code § 24-133.

²⁵² 645 F.2d 1128 (D.C. Cir. 1981).

²⁵³ DC Revitalization Act § 11231(c).

another branch or entity.”²⁵⁴ It is permissible for Congress to delegate some authority so long as Congress first legislates intelligible principles that guide the delegated duty. Thus, Congress can grant the Executive some discretion in how it executes the legislation, so long as that discretion is guided by discernable standards.²⁵⁵

The delegation to the Attorney General in the Revitalization Act, however, seems to lack applicable standards. The statute states simply that the D.C. Council may not revise its parole laws or regulations “without the concurrence of the Attorney General.”²⁵⁶ The statute is therefore silent with respect to what intelligible principle the Attorney General is to use in deciding whether to concur in the revision. The Act’s plain language appears to allow the Attorney General to reject (or accept) a revision for any reason whatsoever. Such boundless legislative discretion arguably cannot be delegated.²⁵⁷

Aside from its lack of any intelligible standard to guide the Attorney General, there exists an additional potential fault in the Revitalization Act’s delegation. The statute purports to delegate to the Attorney General power that Congress could not exercise acting alone. Just as Congress cannot veto D.C. Council legislation via a one-house resolution, a persuasive argument can be made that Congress cannot do an end-run around the Constitution’s presentment and bicameralism requirements by delegating veto power to the Attorney General.

A strong argument can therefore be made that the Revitalization Act’s provision requiring consent from the U.S. Attorney General before the D.C. Council may revise District parole laws is unconstitutional because it “provide[s] literally no guidance for the exercise of discretion.”²⁵⁸ Moreover, the provision seeks to delegate power that Congress does not unilaterally possess – the power to veto D.C. Council legislation without satisfying the bicameralism and presentment procedures of Article I. To deal with these concerns, Congress could repeal or amend the Attorney General clause language of the D.C. Revitalization Act in connection with its enactments restoring local control of parole to the District.

Impact if USPC is Not Reauthorized

There is no clear precedent for what would happen should Congress fail to reauthorize the USPC. If the repeal of the USPC were allowed to go forward, there would no longer be a body to make parole-related determinations for people sentenced under federal or D.C. law. Because many individuals in prison still have the right to periodic parole hearings, those who are denied access to parole determinations presumably would bring legal action through the court system to

²⁵⁴ *Loving v. United States*, 517 U.S. 748, 758 (1996).

²⁵⁵ *Loving v. United States*, 517 U.S. 748, 758 (1996), see also; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, (1928) (holding that when Congress delegates authority, it must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform”).

²⁵⁶ D.C. Code § 24-131(c).

²⁵⁷ See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-19 (1935) (holding delegation unconstitutional because Congress failed to articulate any standard that would curtail the Executive’s discretion).

²⁵⁸ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 447, 474 (2001).

enforce their right to a hearing. This may have the effect of clogging court systems, extending incarceration time for those deserving of parole, and ultimately allowing for the release of individuals regardless of their suitability or readiness. Moreover, this could have the additional effect of denying the government the ability to revoke parole or supervised release in cases where it would be prudent to do so. There is thus a strong need to enact some legislation to address parole for the District going forward, whatever policy approach is selected. Merely allowing the authority of the USPC to lapse seems untenable.

Conclusion

The justification for the USPC maintaining release decision-making authority for people convicted under the D.C criminal code has eroded in recent years. The District is on much firmer financial standing today and there is a robust “home rule” movement in the community that is eager to restore local control to core government functions. The USPC is comprised of staff and commissioners that do not necessarily reside in the District. They are not directly accountable to local leadership or the residents of the District. And their historical patterns of release decision-making and revocations of supervision are increasingly out-of-step with the goals and objectives of District leadership and the broader community. In short, the practice of the USPC handling parole and supervised release decisions for the District is antiquated and the time has come for change.

We recommend establishing a local parole board to handle release decision-making for all persons sentenced under the “old law” indeterminate system. In addition, this local parole board also will set standards of community supervision practice for CSOSA and handle revocation hearings for individuals, regardless of whether they were sentenced under the determinate or indeterminate system. Finally, we recommend the adoption of a second look provision for those people sentenced under the determinate system who have served a minimum of 15 years in prison.

The recommendations outlined in this report should guide the development and staffing of the parole board, the criteria for release decision-making, and how individuals are supervised in the community. If the District follows this plan, we believe it has the opportunity to serve as a model jurisdiction for other states.