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Racial Disparities Inherent in America's Fragmented Parole System

BY OLINDA MOYD

This global health crisis has proven to be an equal opportunity discloser, in that it has spotlighted the layers of inequities and racial disparities so engrained in America's structural systems. Nowhere else is this more evident than in our criminal legal system, where justice is often austere for African Americans. The ghastly statistics of the number of people confined in jails and prisons do not fully capture the scope and extensive reach of those swept up in our legal system. It is estimated that about 4.5 million people are on community supervision, to include probation and parole, which far outnumber the 2.3 million individuals behind bars. According to the Bureau of Justice Statistics, 28 percent of people on probation and 38 percent of people on parole are African Americans. However, African Americans make up only 13 percent of the US adult population. In 2018, African Americans were 2.6 times more likely to be on probation and 4 times more likely to be on parole, as compared to Caucasians, as reported by Michael Gelb. Michael Gelb, *Racial Disparities Still Mar Probation, Parole Despite 14% Decline: Report*, The Crime Rep. (Aug. 13, 2020), <https://bit.ly/3q0QVrj>.

Unless one is directly impacted, one probably cannot comprehend the challenging road African Americans must walk to be granted parole, to navigate parole conditions, and to successfully complete supervision.

This road is filled with potholes and detours, but this is the road that thousands must maneuver every day of their lives. While the total number of people under parole or probation has declined in recent years, this decline still does not erase key flaws rampant in community supervision practices. Much focus has, rightfully, been devoted to ending mass incarceration, which has ripped families apart, stripped communities of valuable resources, and demoralized so many people of color. But the dehumanization doesn't end when you exit the prison gates and are "on papers," reflective of a time when recently freed slaves had to display their freedom papers in order to prove their legitimate status in society.

Parole Grant Considerations

Parole boards are fragmented institutions that operate in fear of releasing "the wrong person," so they err to the other extreme and deny release to so many who deserve a second chance. One former client explained that "winning the chance to be granted parole is like playing the game of Monopoly, landing

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on the corner 'go to jail' square, and repeatedly rolling the dice in hopes of getting the 'get out of jail free' card." It's all a guessing game, and because most parole boards operate without transparency, there is little accountability to the communities they serve.

Prisons are warehouses that offer few opportunities for meaningful rehabilitation, so the reality is that most people leave prison the same way they entered. Regardless, decisions about who are granted parole so they can leave prison are often made based on many factors, including seriousness of the offense, institutional adjustment, programming achievements, security classification, release planning, and potential for employment. Many African Americans come from communities that have been resource deficient with substandard education, leaving many with limited marketable skills. Some institutional programs require a certain comprehension level in order to enroll. This is true even for drug treatment programs because the therapeutic daily regimen consists of participating in group sessions and workshops while completing life-skills education workbooks. For many years, DC residents detained at the Correctional Treatment Facility could participate in a six-month treatment program, but the programs would only accept persons who had a sixth-grade reading level and the physical ability to walk up stairs to programming rooms. So for many former clients who had learning or physical disabilities, this program was out of reach for them.

Many people entering prison have behavioral health issues that have been ignored or gone untreated as taboo in African American families. Some suffer from physical deficiencies due to lead paint and exposure to other environmental hazards. They also enter with nutritional deficiencies due to food deserts so common in many poor neighborhoods. These deficiencies are worsened by prolonged confinement. How do you establish a solid release plan when you've been torn from your family and often held in prisons miles away from home? How do you reach educational goals when you are already so far below grade level and educational classes are limited? How do you address your addictions when you are repeatedly transferred from facility to facility each time you near the top of the long wait list? These are just some of the dilemmas that people in parole limbo face. They should not be penalized based on factors that correlate with race.

Many African Americans who are serving time have been sentenced by the court to serve a range of time—an indeterminate sentence. The presumption should be that a person appearing before the board

will be granted parole, especially those who have already served the minimum time based on their sentencing guidelines. Denial or release should be based on meaningful assessments of a person's risk of engaging in serious criminal conduct and readiness for reentry. Denials based solely on the fact that a person has not served enough time or based on the "circumstances of the underlying offense" should be outlawed. But I have seen many parole denials stating these exact reasons or providing no explanation at all.

It is not unusual for persons to be denied parole at their first parole hearing—regardless of their transformation, adjustments, and achievements. Many inside consider the first hearing a dress rehearsal. Institutions are replete with stories of men and women who have had numerous parole hearings but have been denied repeatedly by the same or different board members. In 2016 Mr. John MacKenzie was found dead in his New York prison cell, apparently taking his life after being denied parole for the 10th time. He earned multiple degrees and created a Victims Awareness Program during his confinement that began in 1975. He became eligible for parole in 2000 and had litigated the fact that the board's repeated denials failed to consider his remorse and achievements. The New York Supreme Court found the parole board in contempt and a new hearing was ordered. The matter was under appeal at the time of his death. The repeated denials in his case were based on the fact that the victim in his case was a police officer. *The NYS Parole Board Killed John MacKenzie*, Release Aging People in Prison (Aug. 6, 2016), <https://bit.ly/2XhGqn6>. The status of the victim is another oblique factor that parole boards, consciously or unconsciously, take into consideration in decision-making.

Often, African Americans are confined in prison much longer than the judiciary ever anticipated because they get repeated denials from the parole board, even those whom a judge clearly intended to go free. Some describe it as getting resentenced all over again. You might not get an explanation for the denial or any recommendation for what to "correct" or accomplish before seeing the board again. Maryland is one of only three states where, even if a person gets a favorable recommendation from the parole board, you must overcome the hurdle of getting approval from the governor if you are serving a life sentence. For persons serving life or extreme sentences, the parole process is even more daunting and repeated denials are common, despite completing every available recommended program.

Consider the Decision-Makers

There are too many African Americans who languish in prisons today due to the inaction of a parole board. These boards possess an enormous amount of power in that they determine the length of sentence a person will serve, conditions of post-release, whether violations will result in revocation, and whether parole supervision can be terminated early due to compliance. But who are these people making such paramount decisions?

In many states, appointments to the local parole boards are the result of political favors, and often the decision-makers are not homegrown from the local community. They have little understanding of the neighborhood patterns, lifestyle traditions, or cultural norms that people bring with them into the hearing room. Without these connections, their assessments can be skewed and decisions can be unreasonable, not based on real life. I represented a woman who was being questioned by a hearing official about being a middle-school dropout. The hearing official asked her why she didn't just get on the school bus. The woman spent several minutes explaining that no school bus ran in her neighborhood and described how her morning started with her waking up, finding her own breakfast, and getting to the metro without any parental supervision because her father was not around and her mother worked the night shift. The disconnection was startling. Like each of us, board members have inherent biases and preconceived notions about the people who come before them.

In the District of Columbia, the US Parole Commission has the authority to make decisions about who gets granted parole (for persons sentenced before August 2000), who gets denied parole, whose parole gets revoked, or who gets terminated from parole supervision for persons sentenced in DC Superior Court. The president has the authority to appoint five commissioners who make all of the final decisions. These presidentially appointed commissioners hail from states all over the country and have come from as far as California, Kentucky, Missouri, and Kansas to make life-altering decisions on persons who come from the innermost wards of the District of Columbia. Since the passage of the Revitalization Act in 1997 and the abolishment of the local parole board, only a few of the commissioners have been from the District or surrounding areas. Some examiners, who actually conduct the hearings and make recommendations to the commissioners, commute from elsewhere to the District of Columbia. During this pandemic, the two examiners who typically commute from Pennsylvania are now conducting

remote hearings from their residences.

Direct gubernatorial appointments, usually with some type of confirmation from the local legislature, accounts for the structure of most state parole boards. These positions come with a handsome salary and government benefits. Some board members have law enforcement backgrounds, but some come into these coveted positions and have zero knowledge of the legal system. One of the American Correctional Association's standards for parole boards is that at least two-thirds of the members have at least three years of experience in criminal justice or a related position. But this is not always the case. Due to the lack of transparency, it's hard to determine the number of state parole boards that meet this basic benchmark. Some boards publish the biographies of their members and some do not. Once selected, the quality of mandatory training varies wildly between jurisdictions.

The case complexity, the emotional exertion, the number of cases heard per day, and examiner fatigue are all undocumented factors that also influence hearing outcomes. Hearing over 30-60 cases a day means spending about three minutes on each life-or-death case. One former client spoke about how his 10-minute hearing was hardly enough time to discuss all that he had achieved during the 30 years he has been in prison. He described feelings of anxiety and hurriedness as he tried to tell his life story and detail his steps toward transformation in such limited time.

African Americans who are unable to effectively communicate or tell their story at a hearing can become frustrated and derail their chances at parole. Some boards have in-person hearings, some meet via video, and some make decisions just based on the file review by passing the file among the board members until they have enough votes to decide the case. Their vote may have more to do with whether they trust a certain colleague rather than whether the person is truly rehabilitated and is no longer a risk to society.

Inherent Biases in Risk Assessment Tools

Predicting human behavior is tricky, and the use of risk assessment instruments has been the topic of debate among policy makers, community advocates, academics, and formerly incarcerated persons. There are those who argue that well-validated assessment instruments provide transparency into previously hidden decision-making processes. But others view risk assessment tools as a part of the problem in the biased legal system because they tend to focus on static and not dynamic factors. States routinely use different assessment tools at different stages of the criminal justice process and for different purposes—

mostly designed to predict risk of flight, risk of threat to society, and probability of recidivism. The battle between allowing too much discretion or “gut instinct” versus using an algorithm designed to reduce bias is a tug of war. While the use of structured grids or guidelines may establish uniformity, standardized tests have not been kind to African Americans. In a report from the Pretrial Justice Institute, they conclude that “[r]egardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices.” Pretrial Just. Inst., *Updated Position on Pretrial Risk Assessment Tools* 1 (Feb. 7, 2020), <https://bit.ly/38hnDOS>. This was an about-face from their previous position after hearing from civil rights organizations, impacted people, and researchers. There is a social cost to be paid for profiling the poor and racial minorities and for eliminating the humanity element from predicting human behavior.

Risk assessment scores and ratings take precedence in parole consideration decisions even before the person walks into the hearing room. These scorings matrices continue to be implemented, despite the flaws and racial inequities found in many of them. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) tool, which has been used by correctional officials for years, is designed to identify the likelihood of reoffending in the future. The COMPAS was found to have a higher false-positive rate for Blacks than whites, which meant that Blacks were more likely to have been misclassified as medium or high risk by the COMPAS. Rhys Dipshan & Victoria Hudgins, *Risk Assessment Tools Aren't Immune from Systemic Bias. So Why Use Them?*, Law.com (July 17, 2020), <https://bit.ly/3rZ29OK>. A person identified as a high risk is less likely to be recommended for parole consideration. Another commonly used quantitative survey of offender attributes relevant for making decisions about levels of supervision and treatment, the Level of Service Inventory–Revised (LSI–Revised), is also reported to have a high false-positive rate, meaning that many individuals scored as high risk may not ever present any future problems. Don Andrews, James Bonta & J. Stephen Wormith, *Level of Services/Case Management Inventory (LS/CMI): An Offender Assessment System: User's Manual* 47 (Multi-Health Systems, Inc. 2004).

Background factors such as age, family history, and criminal history are typical scoring components in most risk assessment instruments. Criminal history is often a scoring factor that every person is certain to lose or gain (depending on the instrument) here because

every person seeking parole comes with a criminal history or they would not be in such predicament. Parole denials based on the underlying offense are unfair when they are doubly scored based on the crime severity and the crime type. Some instruments factor in the age at first arrest and the number of arrests as well as the number of convictions. Heavy police surveillance in African American neighborhoods, racial profiling, and freely uninhibited police discretion increase the chances of being stopped, questioned, and subsequently arrested. Even if the matter does not proceed to prosecution, the calculation of one's criminal history appears more daunting at first glance to board members who are reviewing the case. Counting prior parole or probation violations and court appearance “no-shows” fails to consider obstacles the under-resourced communities endure day in and day out.

Parole boards that use assessment tools must carefully scrutinize how each factor impacts African Americans. To guard against biases, they should ensure that the development of assessment tools is transparent and implemented with independent oversight and that the tools are evidence based and culturally responsive.

Parole Supervision

Except for those who are put to death or suffer some other demise, the vast majority of people who enter prison will walk out and be on some form of supervision. This often-forgotten population is comprised of our neighbors, friends, and loved ones who are in the community but remain under the control of the courts or paroling authorities. Walking out of prison from physical confinement into a world where your daily activities are intensely monitored can be demoralizing. Having your freedom, but not really, sets many on a downward spiral towards depression and other mental impairments, including post-traumatic stress. Supervision agencies use community supervision as a surveillance mechanism to monitor and sanction those who violate their release conditions. They fail to understand that supervision can be a mechanism to offer support services and encourage positive activities through meaningful incentives.

Some major challenges with parole supervision include the imposition of one-size-fits-all conditions and the excessive length of time that people are placed on supervision. Many people under supervision do not actually require high-intensity supervision and are convinced that it is a setup for failure. They would warn you against believing that placement

on community supervision means the system is being lenient. Parole supervision should be reserved only for people who present a high risk of reoffending. Extensive supervision is counterproductive.

Supervision officers are typically undertrained and overworked. They have heavy caseloads, are strapped for resources, and are told to track people's failures and mishaps instead of providing any meaningful individualized support that people need. It is hard to fathom that a 15-minute interaction three days a week could have any significant impact on transforming lifestyles. These frequent mandatory meetings merely serve as daily interruptions that make parolees risk losing the job that they worked diligently to secure.

Protocol, training, and oversight for parole officers vary in different states. Cultural clashes between supervision officers and the people whom they supervise are not to be minimized. In Minnesota, African Americans make up 6 percent of the total population, but 35 percent of the state prison population. Native Americans in Minnesota make up only 1 percent of the total population, but 10 percent of the state prison population and a large percentage of persons on supervision. Native Americans supervised by all-white supervision officers felt that they didn't really understand them when they talked about alcoholism and cultural norms that explained why they could not get to meetings in a timely manner. There are 11 sovereign American Indian nations in the state, and they all have unique traditions and customs that present cultural misunderstandings. Additionally, supervision offices are often physically located miles from the neighborhoods they serve. One former client had to take the metro train and bus to get to his supervision office when there was a satellite office within walking distance from his home. When asked why he could not be transferred to the closer location, his parole officer told him that his offense required that he report to the main supervision office in downtown DC.

Most people leave prison with a laundry list of standard conditions with which they must comply. In some cases, parolees have special conditions compounded on top of the standard conditions. Individuals are not able to leave prison without



John Jones, after serving 30 years in Maryland prison, now helps other returning citizens transition back into society.

signing a contract stating that they understand the conditions and agree to follow them. Excessive rules can present barriers to successful supervision, especially when people may have supervision in more than one jurisdiction. Consolidation of supervision between jurisdictions would also minimize the double supervision requirements that make supervision almost impossible. Sprinting from the office of a DC supervision officer to a federal court or adjacent local jurisdiction supervision office augments the stress people experience.

Best practices mandate that conditions should be narrowly tailored to achieve the specific goal of rehabilitation. Yet, the practice of assembly-line stamping of 18 to 20 or more conditions for every person leaving prison is typical in most states.

Most conditions have no correlation to the original offense and offer no support to people as they return to

their family and communities and try to mend broken relationships, all while starting life all over again. The constant interruptions in daily activities in order to remain in compliance with supervision are countless. These interruptions include hours spent waiting to see a supervision officer for daily office or weekly home visits, having to plug in an electronic monitoring device twice a day to avoid a dead battery, and leaving your job to go to a weekly program meeting. A former client who suffered with paranoid schizophrenia was unable to sit for long periods of time waiting to see his parole officer, so he was frequently marked as a "no-show" when he would walk the hallway instead of sitting still in the crowded waiting room. Conditions must be individualized. Standard supervision rules often include twice-weekly drug tests, monthly supervision fees, monthly supervision meetings, warrantless searches, lie detector tests, curfews, court-ordered treatment and counseling sessions, and staying away from others who have a record, even if they are close relatives. Conditions should be limited so as to manage individual risks and needs in a minimally invasive way. Regular progress reviews should be conducted to monitor achievements and needs with step-down restrictions to reward compliance. This way, supervision officers can better redirect resources toward higher-risk individuals who might need greater

holistic, wrap-around services and more support.

The majority of reoffending occurs in the first few years after release, but after this period continuing supervision has diminishing returns. Contrary to best practices, African Americans are kept on parole supervision way too long, even beyond the point of any redeeming value. Mr. John Jones, pictured on page 10, was released in Maryland in February 2013 after serving 30 years. His sentence began when he was 17 years old and he was released at 47 years old and has been on supervision ever since. While conditions that would interfere with his daily activities have decreased—urine submission, check-in with a supervision officer, participation in treatment programs, etc.—just being on supervision limits his ability to travel without permission and interferes with doing the work that he is most passionate about—helping other returning citizens transition back into society. He is prohibited from reaching back into prisons to begin reentry with those who are nearing release and he cannot associate with others who have criminal records. This condition remains standard despite common knowledge that participants in peer-led reentry support programs have higher success rates.

Parole boards should allow people to reduce their supervision periods through compliant behavior. In California the governor has called for the shortening of parole to a maximum of two years instead of the typical five years for felonies. Early termination should be freely exercised by the courts or paroling authority as a reward for compliance.

The Revocation Hamster Wheel

Every person leaves prison energized to be successful, vowing never to return. But unnecessary intensive parole supervision practices are viewed as merely a setup for failure. Placement on parole supervision is not an alternative to prison if it merely serves to expand the reach of correctional control.

Most discussions about the high recidivism rate fail to recognize that many people returned to prison are incarcerated for engaging in behavior that is not criminal, but is solely violation behavior due to a person's supervision status. According to a Pew report, community supervision is a leading driver of mass incarceration. Pew Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* (Apr. 2020), <https://bit.ly/2XeAQSa>. Nationwide, about 600,000 people entering the nation's prisons in 2016 were there for violating their parole, according to the Bureau of Justice Statistics. In 2018 in the State of New York, almost 40 percent of

everyone sent to prison in the state were returned for "technical" violations. by Tyler Nims & Vincent Schiraldi, *When It Comes to Parole Supervision, Less Is More*, The Crime Rep. (Dec. 6, 2019), <https://bit.ly/3nk91mf>. The most common technical violations include testing positive for drug use (including marijuana), failure to meet with the supervision officer, not being available for home visits, and failure to submit a urine sample for testing. The failure to pay supervision fees (electronic monitoring fees, drug screening fees, and program fees), fines, surcharges, restitution, and assessments can land one back in prison. These are all-too-common reasons why many return to prison and why many parolees live in fear that routine mishaps will send them back. Technical violations can carry a sentence upward of 12 to 16 months in the District of Columbia.

Intensive scrutiny for minor violation behavior and return to custody for technical violations result in job and income loss, family interruptions, and housing instability or displacement. When a person fails to appear for an office meeting or to submit a urine sample, the supervision officer may impose graduated sanctions, which typically include more frequent testing or meeting dates. So the one missed test or meeting gets multiplied and becomes the basis of the violation report seeking arrest and detention.

Even though *Morrissey v. Brewer*, 408 U.S. 471 (1972), mandates that people be given a prompt revocation hearing, they often wait for months for a revocation hearing, being further alienated and torn from their family structure. What if you just didn't show up for work and were unable to call your boss to let them know you would not be in? This is the reality for many who are arrested for technical violations and then the employment, housing, and even child custody become compromised. Even if no violation behavior is ultimately found, the average length of stay awaiting a hearing and final decision in the District of Columbia is about three months. When the violations are found to be baseless or without merit and the person is released a few months later, by then they have lost everything. Economic opportunities, which are already limited, evaporate.

A new arrest can send someone back to jail regardless of the court's disposition if the individual is on community supervision. Some states will await the outcome of the court case, but in the District of Columbia, it is common for supervisees to be revoked for an offense that is not papered by a prosecutor or dismissed by a judge, or even when found not guilty by a jury for the same offense. Losses in the court system often fuel law enforcement to appear

and testify at revocation hearings, where they are almost guaranteed a win because of the “kangaroo court” lower standard of proof and little formality. It is common knowledge to police officers that if they cannot secure a conviction, they know the person is likely to “go down” at a parole hearing.

The Urban Institute reports that, after other relevant factors, African Americans have significantly higher revocation rates than white and Hispanic Americans. African Americans are 50 percent more likely than Caucasians to have their paroles revoked for technical violations. Kendra Bradner et al., *Research Brief, More Work to Do: Analysis of Probation and Parole in the United States, 2017-2018*, Columbia Univ. Just. Lab (Aug. 2020). Further destabilization of an already vulnerable population only serves to further compound the problem.

Community supervision officers explain their initial motivation to do this work as a means to provide social support services. Over the years, however, it has merely become an extension of law enforcement and the “tail ‘em and jail ‘em” philosophy rules. Supervision officers are fully aware that people respond positively to reinforcement that encourages them to continue the good behavior.

Sending people back to prison for technical violations can be a death sentence, especially during this pandemic. Our jails and prisons are breeding grounds for the virus to spread like wildfire. The first COVID-19 deaths at Rikers Island were Raymond Riveras and Michael Tyson, who were both held on technical violations. Did no one consider the fact that they should not have been there in the first place? Record spikes are predicted, especially as the infection rate in prisons has reached 275,000 and new strands of the virus mutate.

Many would argue that the practice of sending so many African Americans back to jail for technical violations is just one more weapon in the arsenal designed to destroy the African American family and communities. Overall, while most people are returned for technical violations, the rearrest rate among African Americans is disproportionately high when compared to other races. This is due, in significant part, to systemic racism including the intensive police surveillance in African American neighborhoods, which increases likely police encounters, which can easily translate in a return to jail. Clients often complained that when stopped by officers in DC, they are asked if they are “on papers.” This makes them more prone to unsubstantiated rearrests and unjustified return to prison.

In Conclusion

We need to reimagine parole in America without racial inequities and design a system that seeks to:

- Address and eliminate structural and individual biases in policing practices, prosecutorial discretion, extreme sentencing, and mass incarceration.
- Offer every incarcerated person a fair opportunity at a second chance.
- Presume that persons who have served the bottom range of their sentence should be paroled, unless proven otherwise at a hearing at which constitutional due process safeguards are standard.
- Mandate that parole decision-makers recognize the history of racial bias in the criminal system and that they must reflect the community they serve.
- Not make parole decisions solely on the underlying offense, race, or status of the victim or other oblique factors.
- Model a more restorative approach to supervision that includes providing access to resources.
- Eliminate or minimize the use of algorithms so that decisions are based on the individual's readiness for a successful reentry and other measurable positive human traits.

In addition:

- Parole conditions must be limited and individualized (with input from the supervisee) to reach a specific lifestyle goal, and parole supervision must end when the goal is achieved.
- No one should be returned to prison for technical violations or new arrests that do not result in a conviction.
- Prison populations must be decreased during a global health crisis that puts the health of the entire population at risk.

Now is the time to create a safe, fair, and equitable parole system, and people from impacted communities must not just have a seat at the table, but must lead the discussion seeking solutions for dismantling our current fragmented parole system and starting anew. ■