

Rehabilitation or Revolving Door: How Parole Is A Trap for Those in Poverty

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On any given day, one in four incarcerated persons in the United States is locked up for a technical violation of their community supervision. The United States has thus created a mass incarceration problem and mass supervision problem that fuel each other through the parole system. When an individual is fortunate enough to be released from prison and permitted to begin reentry into society through parole, the paroling authority often imposes numerous conditions of release. These myriad conditions vary widely, but many parolees are required to comply with exceedingly long lists of requirements, many of them financial. If a parolee violates any of these conditions, a revocation of parole occurs and the parolee is once again confined. This revolving door between prison and parole is all too common, with nearly half of all parole terminations resulting in the return of the parolee to prison, rather than successful completion of the sentence. In addition to the onerousness of the imposed conditions, the financial cost of compliance with parole conditions contributes to a host of the technical violations that further the United States' mass incarceration problem. This Article argues that parole in its current form entraps those in poverty and must be reformed with a particular focus on easing the financial burden of parole compliance.

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INTRODUCTION

The United States has a mass incarceration problem,¹ but it also has a mass supervision problem. One in every sixty-six adults in the United States is under community supervision.² This population of approximately 3.9 million includes those who are on probation and those who are on parole.³ These seemingly separate mass incarceration and mass supervision problems are interconnected and fuel one another. On any given day in the United States, one in four of all admissions to state prisons nationwide is due to technical violations⁴ of community supervision.⁵ The annual cost of

¹ See, e.g., *United States Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> [<https://perma.cc/PE3E-2Z52>] (last visited July 23, 2022) (“With nearly two million people behind bars at any given time, the United States has the highest incarceration rate of any country in the world.”); James Cullen, *The History of Mass Incarceration*, THE BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/V29J-6YMK>] (“[T]he U.S. incarcerates more people than any nation in the world, including China. And the U.S. is also the leader in the prison population rate.”).

² See DANIELLE KAEBLE, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, PROBATION AND PAROLE IN THE UNITED STATES, 2020 1 (2021) (showing that the overall population of those on community supervision decreased, reflecting a sharp decline in probation and an increase in parole in 2020). For a discussion of the phrase “community supervision,” and how it is arguably merely good marketing, see Josie Duffy Rice & Donovan X. Ramsey, *Justice in America Episode 22: Probation and Parole*, THE APPEAL (Mar. 4, 2020), <https://theappeal.org/justice-in-america-probation-and-parole/> [<https://perma.cc/BS9Z-BNZW>].

³ See KAEBLE, *supra* note 2. While probation refers to an alternative to incarceration and may include sentences which combine incarceration and periods of community supervision, parole is generally a period of conditional supervised release after an offender has served a term of incarceration.

⁴ Technical violations refer to violations of the conditions of supervision and do not include commissions of new crimes. Examples of technical violations include failure to pay fees, staying out beyond curfew, and failing to inform of an address change. See generally *Limiting Incarceration for Technical Violations of Probation and Parole*, NAT'L CONF. OF STATE LEGISLATURES (June 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/limiting-incarceration-for-technical-violations-of-probation-and-parole.aspx> [<https://perma.cc/QH2Y-L76T>] (discussing some states' use of caps on incarceration for technical violations).

⁵ *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, THE COUNCIL OF STATE GOV'TS JUST. CTR. (June 18, 2019), <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf> [<https://perma.cc/6LJ7-BUB3>] [hereinafter *Confined and Costly*]; see also Carrie Pettus-Davis & Stephanie Kennedy, *Going Back to Jail Without Committing a Crime: Early Findings from a Multi-State Trial*, FLA. STATE UNIV. INST. FOR JUST. RSCH. & DEV. (Feb. 2020), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Going_Back_to_Jail.pdf [<https://perma.cc/5K4X-FW8B>] (explaining the complexity of recidivism by discussing the role of technical violations in new incarcerations).

incarcerating this segment of the population is \$2.8 billion.⁶ At its core, when an offender is granted parole, they⁷ are granted some freedom with the caveat that the state will supervise their activities. Although this freedom is presumably preferable to custody,⁸ a host of concerns in the parole system must be addressed to prevent people from finding themselves ensnared in the traps and pitfalls that may force their return to prison.

As mass supervision has continued to garner public attention, with coverage of hip-hop artist Meek Mill's probation revocation and subsequent probation and parole reform advocacy,⁹ some states have begun implementing changes to their parole systems.¹⁰ Meek Mill had initially been

⁶ *Confined and Costly*, *supra* note 5. For a discussion on why focusing on the costs of incarcerating individuals (“dollar-per-inmate” arguments) can undermine decarceration efforts, see Josie Duffy Rice & Clint Smith, *Justice in America Episode 13: Juvenile Justice*, THE APPEAL (Jan. 30, 2019), <https://theappeal.org/justice-in-america-episode-13-juvenile-justice/> [<https://perma.cc/AJR3-BM9H>].

⁷ This work intentionally uses the singular “they.”

⁸ However, there is a curious phenomenon of prisoners waiving their parole hearings, choosing instead to remain in prison. For a discussion of this, see Michael Ostermann, *Parole? Nope, Not for Me: Voluntarily Maxing Out of Prison*, 57 CRIME & DELINQ. 686, 686 (2011); Brianna L. Best, Eric J. Wodahl & Malcolm D. Holmes, *Waiving Away the Chance of Freedom: Exploring Why Prisoners Decide Against Applying for Parole*, 58 INT. J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 320, 320 (2014).

⁹ See *About Us*, REFORM ALLIANCE, <https://reformalliance.com/about/> [<https://perma.cc/GU8F-A72N>] (last visited July 23, 2022). Meek Mill was on parole when he was returned to prison for illegally “popping a wheelie.” *Id.* This spurred outrage and spawned the #FreeMeek movement. See also *Free Meek*, AMAZON PRIME VIDEO (2019), <https://www.amazon.com/Free-Meek-Season-1/dp/B0875TQ2LB> (docuseries covering Meek Mills’ experience with the criminal justice system).

¹⁰ See, e.g., Magnus Lofstrom, Mia Bird & Brandon Martin, *California’s Historic Corrections Reforms*, PUB. POL’Y INST. CAL. 3 (Sept. 2016), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_916MLR.pdf [<https://perma.cc/P599-GN99>] (discussing reforms in California through 2016); Don Thompson, *California Court Unanimously Rejects Early Parole Releases for Violent Felons: Not What Voters Intended*, ASSOCIATED PRESS (Jan. 3, 2022), <https://www.redding.com/story/news/local/california/2022/01/03/california-supreme-court-unanimously-rejects-early-parole-releases-for-violent-felons-crime-prop-57/9083475002/> [<https://perma.cc/V7ZF-VUYJ>] (discussing the limitation the California Supreme Court placed on the scope of Proposition 57, which allows most prison inmates to seek earlier paroles); LA. DEP’T OF PUB. SAFETY & CORR., LOUISIANA JUSTICE REINVESTMENT REFORMS 2020 ANNUAL PERFORMANCE REPORT 23 (Oct. 2021), <https://s32082.pcdn.co/wp-content/uploads/2021/11/2020-JRI-Annual-Performance-Report.pdf> [<https://perma.cc/J7RQ-2YTE>] (discussing the increase in discretionary parole releases); Brennan O’Keefe, *A Step Towards Criminal Justice Reform: Act 122*, LA. L. REV., <https://lawreview.law.lsu.edu/2021/11/15/a-step-towards-criminal-justice-reform-act-122/> [<https://perma.cc/CG78-P8JM>] (last visited July 23, 2022) (discussing a new law that could reduce parole times for nearly 3,000 people); *Michigan Enacts Landmark Jail Reforms*, PEW (Sept. 23, 2021), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/michigan-enacts-landmark-jail-reforms> [<https://perma.cc/524W-6BDN>]

convicted in 2008 for drug- and firearm-related offenses, when he was just nineteen years old. He was sentenced to eleven-and-a-half to twenty-three months in prison and seven years of probation.¹¹ He was paroled under house arrest after five months in prison. In December 2012, the court ordered him to stop scheduling performances and suspended his ability to travel outside the city of Philadelphia. On several occasions, he traveled without obtaining the required permission.¹² Meek Mill's career demanded that he travel for concerts and to promote his music, but his supervision required that he obtain court approval prior to such travel. In July 2014, he returned to prison for five months and was given an additional five years of probation. After his release from prison, he continued to travel for his music career without obtaining approval in advance. The judge imposed several penalties before eventually sentencing him to two to four years in prison in 2017 for repeatedly violating his conditions.

A docuseries titled *Free Meek*¹³ highlights the challenges that he faced as someone who was system-involved while living a rags-to-riches story.¹⁴ The resulting public outcry of “#FreeMeek”¹⁵ has raised awareness of the potential for supervision conditions and the length of time under supervision¹⁶ to repress probationers and parolees who attempt to improve

(explaining recently enacted legislation aimed at reducing jail populations, in part through declining to incarcerate parolees for minor technical violations); Larry Spruill, *New Laws Look to Overhaul Michigan's Parole, Probation System*, CLICKONDETROIT (Jan. 8, 2021), <https://www.clickondetroit.com/news/michigan/2021/01/09/new-laws-looks-to-overhaul-michigans-parole-probation-system/> [https://perma.cc/EG7E-QSP8] (describing the recent package of criminal justice reform laws in Michigan that “will reduce adult felony probation sentences in Michigan from five years to three years and prevent endless extensions on misdemeanor and felony probation terms”).

¹¹ See Franki Rudnesky, *A Complete Timeline: Meek Mill's Legal Troubles*, NBC10 PHILA. (June 26, 2018), <https://www.nbcphiladelphia.com/news/local/meek-mill-legal-troubles-philadelphia/51827/> [https://perma.cc/X4HM-FCNS]. Although parole and probation are distinct forms of supervision, the conditions imposed and penalties for violations are sufficiently similar to allow Meek Mill's experience to illustrate problems with the parole system's requirements.

¹² For a comprehensive timeline of Meek Mill's interaction with the criminal justice system, see *id.*

¹³ *Free Meek*, *supra* note 9.

¹⁴ Meek Mill's experience with the system led to the creation of an advocacy group called REFORM Alliance, which “aims to transform probation and parole by changing laws, systems and culture to create real pathways to work and wellbeing.” See REFORM ALLIANCE, *supra* note 9.

¹⁵ *Id.* (referring to the “international #FreeMeek movement”).

¹⁶ Meek Mill was under community supervision—probation and then parole—from around 2008 until he returned to prison in 2017. See Nerisha Penrose, *A Look at Meek Mill's Journey Through the Justice System*, BILLBOARD (Nov. 8, 2017), <https://www.billboard.com/music/rb-hip-hop/meek-mill-jail-time-legal-troubles-timeline-prison-sentence-8029995/> [https://perma.cc/BZZ7-LWX2]. Meek Mill was freed in

their stations in life.

Meek Mill had the financial means to challenge the judge's decision through the appellate process, secure a dismissal,¹⁷ and raise awareness of the revolving door problem with the parole system. However, most others are not so fortunate.¹⁸ The intersection of poverty and parole demands attention. The ways in which the current system of parole stacks the chips against the parolee who lives in poverty must be addressed. Parole conditions and the financial burdens of complying with those conditions traps those parolees with limited means into a cycle of incarceration.

While there is much research on how the systems of parole and conditions imposed on parolees may undermine parole's purported goal of rehabilitation, there is surprisingly little research on how burdensome these conditions are when imposed on those parolees who live in poverty. This Article aims to fill that gap in the literature by exploring how the financial costs to comply with parole conditions contribute to the revolving door between parole and incarceration. Although broader parole reform is needed, lawmakers and policymakers should consider the financial impacts of parole on parolees and focus their efforts on easing these burdens of compliance.

It is expensive to comply with the parole conditions required to remain quasi-free (and ultimately regain freedom), and most parolees simply cannot afford to avoid the technical violations that lead to re-incarceration. At the outset of this Article, it is important to acknowledge the racial disparities among those who are incarcerated and supervised.¹⁹ People of

December 2020. *See Meek Mill Freed from Prison in Pennsylvania*, ASSOCIATED PRESS (Dec. 3, 2020), <https://apnews.com/article/archive-kevin-hart-north-america-music-philadelphia-76ers-1927610021> [<https://perma.cc/M2FZ-YWED>].

¹⁷ *See Bobby Allyn, Meek Mill Pleads Guilty to Misdemeanor Gun Charge, Ends 12-Year Legal Case*, NPR (Aug. 27, 2019), <https://www.npr.org/2019/08/27/754769378/meek-mill-pleads-guilty-to-misdemeanor-gun-charge-ends-12-year-legal-case> [<https://perma.cc/DB8F-GJM3>].

¹⁸ Most people post-release from prison are left to work in “‘felon-friendly’ industries,” which often pay low wages and offer little to no benefits. The work is also often dangerous and physically demanding. The most common industry in which this group works is manufacturing and construction; the second most common industry in which this group works is retail and food. *See* Zawadi Rucks-Ahidiana, David J. Harding & Heather M. Harris, *Race and the Geography of Opportunity in the Post-Prison Labor Market*, 68 SOC. PROBS. 438, 439 (2020).

¹⁹ For a discussion of the unique challenges facing African-Americans, particularly those from impoverished backgrounds, who seek parole and live under parole supervision, see Olinda Moyd, *Racial Disparities Inherent in America's Fragmented Parole System*, AM. BAR ASSOC. (May 1, 2021), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2021/spring/racial-disparities-inherent-americas-fragmented-parole-system/. For data on the racial disparity in incarceration rates, see, for example, Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (Oct. 13,

color, especially those who grew up in poverty, are overrepresented in American prisons and are similarly overrepresented on parole.²⁰ A 2018 study by the Brookings Institute analyzed the labor market for formerly incarcerated persons and found that both employment rates and earnings are low for this group.²¹ In the first year after release, only twenty percent earn more than \$15,000.²² For someone earning these low wages, it is impossible to afford to comply with their parole requirements.

The issue of economic class, which often overlaps with race, contributes greatly to the revolving door problem. The criminalization of poverty in the United States is the phenomenon wherein “many aspects of being poor have been rendered criminal.”²³ One way in which commentators argue that our system criminalizes poverty is through the imposition of legal financial obligations (LFOs), including fees, fines, and costs.²⁴ For the poor,

2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/7AP4-LQ37>] (“The latest available data regarding people sentenced to state prison reveal that Black Americans are imprisoned at a rate that is roughly five times the rate of white Americans.”). For data on incarceration and a brief discussion on the chicken-and-egg relationship between poverty and incarceration, see Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/9HZU-9PZG>] (“Poverty . . . plays a central role in mass incarceration. . . . Poverty is not only a predictor of incarceration; it is also frequently the outcome, as a criminal record and time spent in prison destroys wealth, creates debt, and decimates job opportunities.”).

²⁰ See KAEBLE, *supra* note 2, at 28 app. tbl.11 (thirty-seven percent of parolees whose race is known are Black); Jake Horowitz & Connie Utada, *Community Supervision Marked by Racial and Gender Disparities*, PEW (Dec. 6, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/12/06/community-supervision-marked-by-racial-and-gender-disparities> [<https://perma.cc/44QP-5QJY>]; see also *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/GL9C-Y6BS>] (“Some research suggests that parole boards are influenced by an applicant’s race in their decision making, though more research is needed in this area.”).

²¹ See Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST. 7 (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [<https://perma.cc/2Y28-MPPZ>].

²² *Id.*

²³ Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015).

²⁴ See Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASSOC. (Oct. 3, 2016),

<https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/> [<https://perma.cc/MJY4-HMKP>] (describing the layers of monetary charges that can be imposed upon those who

mandatory LFOs can be impossible to pay, but failure to pay leads to greater consequences, including piled-on monetary sanctions, interest penalties, incarceration, garnished wages, and continued ensnarement in the criminal justice system.²⁵

While the poor tend to be treated as “presumptive criminals,”²⁶ their involvement with the criminal system makes them poorer.²⁷ The system does this by burying them in fees, fines, interest, and costs. For those on parole, these LFOs are significant, and failure to pay may lead to a revocation of parole and return to prison.²⁸

But even apart from LFOs, requirements that, for example, force parolees to choose between working a shift and attending their appointment with their parole officer unfairly penalize poor parolees. Many individuals who would comply with their conditions of release fail to do so simply because they lack the means or resources needed to fulfill their obligations. Keeping parolees in the poverty conditions that are known to be criminogenic only perpetuates the poverty-to-prison-to-parole cycle. Establishing insurmountable obstacles and punishing parolees for failing to overcome them is nothing short of cruelty.

Part I shows the history and disjointed landscape of the parole system in the United States. Because each state defines and implements its own parole conditions and procedures, the phrase “parole system” is perhaps a misnomer. Nevertheless, this Part provides a brief and high-level overview of parole in the United States and summarizes the existing debate and criticisms of parole. Part II argues that the most common conditions of release imposed on parolees fail to achieve their stated aims and set up parolees to fail. Significantly, the financial cost of compliance is too great a burden for parolees to reasonably bear, contributing to the ongoing revolving door problem. If the goal of parole is to rehabilitate and reintegrate, then creating financial hurdles for impoverished people on parole is counterproductive and inhumane.

become system-involved and how these layers amount to criminalizing poverty).

²⁵ *See id.*

²⁶ Natapoff, *supra* note 23, at 446.

²⁷ *See id.*

²⁸ For an explanation of how revocation processes work in various U.S. jurisdictions, see Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey & Kelly Lyn Mitchell, *The Continuing Leverage of Releasing Authorities: Findings from a National Survey*, ROBINIA INST. OF CRIM. L. & CRIM. JUST. 39–44 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/final_national_parole_survey_2017.pdf [<https://perma.cc/AQ6Z-9RNX>].

I. PLACING PAROLE WITHIN THE CARCERAL STATE

Parole release is used in thirty-four states. In these states, judges impose a sentencing range or maximum sentence, but parole boards ultimately decide the duration of the offender's prison term.²⁹ The parole system is said to have dual objectives of recidivism reduction and reintegration.³⁰ This Part will provide a brief history of parole and its justifications, as well as an overview of its structure.

A. BRIEF HISTORY OF PAROLE IN THE UNITED STATES

The rehabilitative philosophy of criminal justice dominated the American penal system from the late nineteenth through most of the twentieth century.³¹ This rehabilitative model justified the introduction of parole to the United States sentencing framework in the late nineteenth century.³² Under this system of parole, judges impose an indeterminate sentence during which corrections officials would aim to rehabilitate the offender and prepare them for reentry into society.³³ Once the offender is deemed fit for release on parole, the offender may reenter society while remaining under strict supervision.³⁴ Parolees must comply with various conditions during the parole period, and failure to comply with these conditions³⁵ results in a revocation of parole and return to prison. Satisfying these conditions is meant

²⁹ See Edward E. Rhine, Kelly Lyn Mitchell & Kevin R. Reitz, *Levers of Change in Parole Release and Revocation*, ROBIN INSTITUTE OF CRIM. L. & CRIM. JUST. 6 (2018), <https://robinainstitute.umn.edu/publications/levers-change-parole-release-and-revocation> [<https://perma.cc/3M8D-B3A8>].

³⁰ See Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *The Future of Parole Release*, 46 CRIME & JUST. 279, 308 (2016).

³¹ See Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 7-8 (2013); Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, 81 FED. PROBATION 18, 18 (2017).

³² See Larkin, *supra* note 31, at 7. For a discussion on the origin of parole as a method of relieving governors of the burden of exercising clemency, see Sheldon L. Messinger, John E. Berecochea, David Rauma & Richard A. Berk, *The Foundations of Parole in California*, 19 LAW & SOC. REV. 69, 69 (1985).

³³ See Larkin, *supra* note 31, at 8; Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, in SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 43, 43-50 (Cyrus Tata and Neil Hutton eds., 2002) (describing the 1970s as a period still dominated by rehabilitative ideals, but shifting toward a crime control model, and the 1980s as a period where the national discourse shifted strongly towards tough on crime politics).

³⁴ In this instance, "supervision" refers broadly to the state's monitoring of the parolee for compliance with parole conditions.

³⁵ See *infra* Part II for more on parole conditions.

to indicate that the offender is rehabilitated, and as such, will result in a completion of the sentence.

By 1942, every state and federal government had an established parole system.³⁶ Throughout most of the twentieth century, nearly all federal prisoners served parole-eligible sentences that allowed for potential release after serving one-third of the full sentence.³⁷ Parole was so prolific that in 1972, the Supreme Court referred to parole as “an integral part of the penological system.”³⁸ In 1979, the average federal prisoner served just 48% of their sentence before being paroled.³⁹

From the 1970s through the 1990s, the political climate surrounding sentencing sharply turned away from rehabilitation.⁴⁰ The rehabilitative model that once justified parole was falling out of fashion against the backdrop of rising crime rates, giving way to “tough on crime” politics and the war on drugs.⁴¹ Meanwhile, critics and commentators questioned the legitimacy of discretionary sentencing systems that create unpredictable outcomes.⁴² In the last quarter of the twentieth century, lawmakers began

³⁶ Larkin, *supra* note 31, at 8–9.

³⁷ Berman, *supra* note 31.

³⁸ *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

³⁹ MARGARET WERNER CAHALAN, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984 163 tbl.6-17 (Dec. 1986).

⁴⁰ See FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 7–20 (1981) (referring to the 1970s as a period of “wide and precipitous decline of penal rehabilitationism”); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 65 (2003) (“[S]oon incapacitation and ‘just deserts’ replaced rehabilitation as the primary goal of American prisons. Even rank-and-file Americans abandoned their faith in rehabilitation.”).

⁴¹ See, e.g., National Security PAC, *Willie Horton Political Ad 1988*, YOUTUBE (Oct. 27, 2009), <https://www.youtube.com/watch?v=EC9j6Wfdq3o> (the infamous Willie Horton ad used in George H.W. Bush’s 1988 presidential campaign against Michael Dukakis).

⁴² See Rhine et al., *supra* note 30, at 279 (referencing parole boards’ “precipitous loss of legitimacy and a sharp curtailment in their authority”). Some explanations for this questioning of discretionary parole systems include the view that uncertain prison terms create too much uncertainty for the prisoners. See PETERSILIA, *supra* note 40, at 63 (“[P]arole and indeterminate sentencing were challenged on moral grounds as unjust and inhumane, especially when imposed on unwilling participants. . . . Prisoners argued that not knowing their release dates held them in ‘suspended animation’ and contributed one more pain to their imprisonment.”). Others noted the risk that bias and discrimination would impact the parole board’s exercise of authority. See *id.* at 62 (noting boards’ “personal preferences often resulted in unwarranted sentencing disparities or racial and gender bias”); EDWARD E. RHINE, WILLIAM R. SMITH, RONALD W. JACKSON, PEGGY B. BURKE & ROGER LABELLE, PAROLING AUTHORITIES: RECENT HISTORY AND CURRENT PRACTICE 32–33 (1991) (“[In] no other part of the [criminal justice] system is so much power concentrated in so few hands.”); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM

sentencing reform efforts that centered on fixed, determinate, mandatory sentences with the goal of incapacitating offenders and promoting public safety.⁴³ During this period, parole was an easy target for these reform efforts.

Crime control supplanted rehabilitation. From the 1970s through the 1990s, the federal government and many states revised their parole systems. Twenty states and the federal government completely abolished discretionary parole during this period.⁴⁴ By 2000, only sixteen states left their parole systems untouched.⁴⁵ Mandatory minimum sentencing statutes and “Truth in Sentencing” laws replaced discretionary sentences.⁴⁶ Many states passed Three Strikes laws, which guaranteed lengthy incarceration terms, including life sentences, for recidivists.⁴⁷ These changes resulted in skyrocketing incarceration rates from the 1970s to today.⁴⁸

From this mass incarceration problem sprouted a mass supervision problem, which, perhaps counterintuitively, further fuels the mass incarceration problem, creating an ouroboros-like⁴⁹ problem.⁵⁰ The “tough on

AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 173 (1980) (explaining that parole board “judgments were personal and therefore not subject to debate or reconsideration”).

⁴³ See Berman, *supra* note 31, at 19; Greene, *supra* note 33, at 9 (explaining that although mandatory sentencing was “largely discredited” in the early 1970s, “between 1975 and 1985 every state passed at least one mandatory sentencing law”).

⁴⁴ Rhine et al., *supra* note 30, at 279.

⁴⁵ Larkin, *supra* note 31, at 10; see also PETERSILIA, *supra* note 40, at 65 (“By the end of 2002, just 16 states still gave their parole boards full authority to release inmates through a discretionary process.”).

⁴⁶ Larkin, *supra* note 31, at 10 (“Twenty-seven states and the District of Columbia adopted so-called ‘truth-in-sentencing laws,’ which require an offender to be imprisoned for at least 85 percent of his sentence.”).

⁴⁷ See Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 130–31 (2009) (attributing the root of the United States’ mass incarceration problem to these sentencing practices); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing how the carceral state functions to create a “racial caste” system which preys on Black and Brown communities); *13th*, NETFLIX (2016), <https://www.netflix.com/title/80091741> (showing how the United States prison system furthers technically constitutional slavery and disproportionately ensnares Black and Brown people).

⁴⁸ From 1970 to 2021, the United States’ incarcerated population has increased 500%. See *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/Y3FN-6FM6>] (last visited July 25, 2022); see also *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, HUM. RTS. WATCH (July 31, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states#> [<https://perma.cc/6TUR-FWDS>].

⁴⁹ The ouroboros is a circular symbol of a snake eating its own tail, representing an infinite cycle.

⁵⁰ See, e.g., Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1015 (2013) (“[I]n many cases, community supervision is not an

crime” measures meant that more people were incarcerated for lengthier prison terms before becoming eligible for parole.⁵¹ Concurrently with public pressure for a more retributive or punitive approach to sentencing, parole releasing authorities were pressured to exert more stringent standards in their decisionmaking with respect to determining both whether to grant parole and whether to revoke parole when the parolee violates their conditions.⁵² More imprisonment and more restrictive parole requirements have contributed to prison population growth.⁵³ In fact, one in four of all admissions to state

alternative to imprisonment but only a delayed form of it.”); Miriam Aroni Krinsky & Vincent Schiraldi, Opinion, *Community Supervision, Once Intended to Help Offenders, Contributes More to Mass Incarceration*, USA TODAY (Nov. 19, 2020), <https://www.usatoday.com/story/opinion/policing/2020/11/19/supervision-once-intended-help-offenders-ups-mass-incarceration-column/3765824001/> [<https://perma.cc/KE4P-8D87>]; Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 304 (2016) (partly attributing the reincarceration of parolees to insufficient community-based prisoner reentry programs); Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 587, 591 (2020) (identifying the distinction between supervised release and parole, but referring broadly to the mass supervision problem). See also Philadelphia District Attorney Larry Krasner’s statements on the subject, including: *New Philadelphia D.A.O. Policies Announced March 21, 2019 to End Mass Supervision*, PHILA. DIST. ATT’YS OFF. (Mar. 21, 2019), <https://medium.com/philadelphia-justice/philadelphia-daos-policies-to-end-mass-supervision-fd5988cfe1f1> [<https://perma.cc/EE9H-TB7W>] (“Mass supervision is a major driver of mass incarceration.”); PHILA. DIST. ATT’YS OFF., *ENDING MASS SUPERVISION: EVALUATING REFORMS* 6 (Apr. 2021), <https://raw.githubusercontent.com/phillydao/phillydao-public-data/master/docs/reports/DAO%20Supervision%20Report%20Digital%202021-04-19.pdf> [<https://perma.cc/K998-XHP3>] (“The overuse of community supervision, however, has reinforced mass incarceration rather than act as an alternative.”); *DA Krasner Reforms Are Safely Shrinking Probation & Parole System, Yielding as Much as \$40M to Reinvest in Prevention of Crime*, PHILA. DIST. ATT’YS OFF. (Apr. 19, 2021), <https://medium.com/philadelphia-justice/da-krasner-reforms-are-safely-shrinking-probation-parole-system-yielding-as-much-as-40m-to-a822b4861d16> [<https://perma.cc/E3DB-8MTN>] (referring to mass supervision as the “evil twin of mass incarceration”).

⁵¹ See Ruhland, et al., *supra* note 28, at 9 (“[N]umerous states moved towards greater determinacy in their sentencing structures, while the country as a whole pursued ‘tough on crime’ measures aimed at increasing the number of offenders committed to prison and the length of time they would serve.”).

⁵² See *id.* (“During [the ‘tough on crime’] period, releasing authorities faced widespread criticisms questioning their lack of transparency in operations, and decision-making practices viewed by many as arbitrary and unjust. . . . This was followed by increased demands for more severity in criminal punishments which exerted significant pressure on releasing authorities.”).

⁵³ See *id.* at 39 (“There has been a long-standing recognition that the policies driving revocation practices represent an important contributor to prison population growth in most states.”).

prisons nationwide is due to technical violations⁵⁴ of community supervision.⁵⁵ The annual cost of incarcerating this segment of the incarcerated population is \$2.8 billion.⁵⁶

For the past several decades, much discussion around the U.S. criminal justice system has centered on the glaring issue of mass incarceration. The United States notoriously incarcerates at the highest rate per capita of any nation.⁵⁷ Proponents of the so-called “decarceration movement”⁵⁸ leaned into using the parole system to reduce prison populations.⁵⁹ This strategy failed in two ways: first, expanding parole merely exchanged a mass incarceration crisis for a mass supervision crisis⁶⁰; second,

⁵⁴ Technical violations refer to violations of the conditions of supervision and do not include commissions of new crimes. Examples of technical violations include failure to pay fees, staying out beyond curfew, and failing to inform of an address change. *See generally Limiting Incarceration for Technical Violations of Probation and Parole*, NAT’L CONF. OF STATE LEGISLATURES (June 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/limiting-incarceration-for-technical-violations-of-probation-and-parole.aspx> [<https://perma.cc/QH2Y-L76T>] (discussing some states’ use of caps on incarceration for technical violations).

⁵⁵ *Confined and Costly*, *supra* note 5; *see also* Pettus-Davis & Kennedy, *supra* note 5 (explaining the complexity of recidivism by discussing the role of technical violations in new incarcerations).

⁵⁶ *Confined and Costly*, *supra* note 5. For a discussion on why focusing on the costs of incarcerating individuals (“dollar-per-inmate” arguments) can undermine decarceration efforts, *see* Duffy Rice & Smith, *supra* note 6.

⁵⁷ *See, e.g.*, Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/>.

⁵⁸ *See, e.g.*, William Harms, *Leading the Way in Advancing Decarceration*, UNIV. OF CHI. SCH. OF SOC. SERV. ADMIN. MAG., Spring 2018, https://crownschool.uchicago.edu/ssa_magazine/leading-way-advancing-decarceration [<https://perma.cc/EKM2-Z5F3>] (“Epperson and other leaders of the decarceration movement hope to cut the prison and jail population . . .”).

⁵⁹ *See, e.g.*, Damion Shade, *Parole Reform Was Crucial in Ending Oklahoma’s Status as the World’s Prison Capital*, OKLA. POL’Y INST. (Aug. 25, 2020), <https://okpolicy.org/parole-reform-was-crucial-in-ending-oklahomas-status-as-the-worlds-prison-capital/> [<https://perma.cc/FVC9-BY59>] (explaining that increased parole reduced the prison population); *Solutions*, ACLU, <https://www.aclu.org/other/solutions> [<https://perma.cc/63YN-M9RG>] (last visited July 30, 2022) (recommending that “[w]e should strengthen and streamline our parole and probation systems so that those who genuinely pose public safety risks are adequately monitored; this will ensure that the vast majority of those who pose little or no safety risks are not unnecessarily kept in or returned to prisons”); *see also* German Lopez, *Bernie Sanders’s Plan to Abolish Private Prisons, Explained*, VOX (Sept. 18, 2015), <https://www.vox.com/2015/9/10/9299851/bernie-sanders-private-prisons> (discussing Bernie Sanders’s 2016 presidential campaign platform wherein he proposed reinstating federal parole as a means to ease mass incarceration).

⁶⁰ *See* Priscilla A. Ocen, *Awakening to a Mass-Supervision Crisis*, ATLANTIC (Dec. 26, 2019), <https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108/>.

many parolees often return to prison for violating the conditions of their parole.⁶¹

In recent years, scholars have critiqued numerous facets of the mass supervision system. Some scholars take the position that parole may be a viable means for ending mass incarceration but have acknowledged that achieving this objective will require significant revisions to current systems of parole.⁶² For example, some scholars argue that the discretionary parole system grants exceedingly broad authority to parole boards and invites decisions that are so arbitrary that they undermine the goals of proportionality and uniformity.⁶³ Others argue that discretionary parole systems can serve to promote public safety by allowing the board to consider public safety risks and decide to keep inmates in prisons longer.⁶⁴ Some advocate for discretionary parole in general, but suggest a merit-based mechanism for inmates who meet certain criteria as an additional path to early release in the event the board denies their parole application.⁶⁵

B. JUSTIFICATIONS OF PAROLE

Any state-imposed penalty that restricts a person's liberty must be morally justified. In the parole context, the primary rationale supporting its use is rehabilitation.⁶⁶ However, perhaps in light of rehabilitation's fall from favor, some proponents of parole sometimes also tout parole's incapacitative

⁶¹ See BARBARA OUDEKERK & DANIELLE KAEBLE, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, PROBATION AND PAROLE IN THE UNITED STATES, 2019, at 10 tbl.6, 31 app. tbl.12 (July 2021). More than one in four parolees returns to prison before completing their parole. A majority of these are reincarcerated with technical violations of their parole conditions and not for committing new offenses. See *id.*

⁶² See Rhine et al., *supra* note 30, at 279.

⁶³ See e.g., *id.*; Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 187 (2005). For a brief, nuanced discussion of discretionary parole, see Berman, *supra* note 31, at 22; Steven L. Chanenson, *Five Questions for the Next Thirty Years of Federal Sentencing*, 81 FED. PROB. 23, 24 (2017).

⁶⁴ See PETERSILIA, *supra* note 40, at 55 (discussing evolving views on discretionary parole systems).

⁶⁵ See Daniel M. Fetsco, *Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends*, 11 WYO. L. REV. 99, 102–03 (2011).

⁶⁶ See, e.g., Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 479 (1999). *But see* Netanel Dagan & Dana Segev, *Retributive Whisper: Communicative Elements in Parole*, 40 LAW & SOC'Y INQUIRY 611, 611 (2015) (arguing that parole can serve an implicit retributive purpose). See also Tonja Jacobi, L. Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 928–31 (2014) (discussing the rise of retribution as a parole justification and how this shift from rehabilitation to retributivism has resulted in adverse consequences to recidivism rates and created deleterious effects on parolees and their communities).

function, arguing that parole keeps wrongdoers confined and supervised until they prove themselves sufficiently rehabilitated to reenter society. Some have gone so far as to argue that parole may only be justified by an incapacitation rationale.⁶⁷

Despite rehabilitation's decline in popularity, it still serves as a principal justification for parole.⁶⁸ Many scholars and commentators embrace the rehabilitative rationale to advance their proposals for parole reform. For example, in their ten-point proposal for parole reform, leading scholars on parole Rhine, Petersilia, and Reitz focus their recommendations on those that are likely to contribute to recidivism reduction and reintegration.⁶⁹ Many advocate for providing further resources to parolees with the aim of assisting in their rehabilitation, including substance abuse treatment and career training.⁷⁰ Likewise, others criticize the parole system for insufficiently

⁶⁷ See Aaron M. Nathan, *Is There a Moral Philosophy of Parole?*, 48 CRIM. L. BULL. 1, 3 (2012) ("Thus, if parole . . . is justified, it must ultimately be by the need for incapacitation as a form of protective or self-defensive force."). Those holding the view that parole may only be justified by an incapacitative rationale see the purported rationale of rehabilitation as necessarily relying upon parole's incapacitative function. See *id.* at 4 ("If the parole system is primarily rehabilitative in purpose it must exist as a rational compromise with the demands of incapacitation. Rehabilitation is a derivative purpose of punishment perhaps best understood as a rational system of limiting the extent of incapacitation necessary for controlling crimes, based on affirmative measures affecting the character of the criminal against whom society would prefer not to have to defend itself quite so much. The legitimate purpose of parole therefore is incapacitation.").

In response to the incapacitation rationale some use in support of incarceration, Peter N. Salib leans into incapacitation to support his recommended technological enhancements to the parole system. He argues that parole, which already serves an incapacitative function in its current form, can be an even more effective form of incapacitation than incarceration is, if the scholar's proposed "efficient system" of parole, which relies upon technology and surveillance, were implemented. See Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 163–65 (2017) (addressing a possible objection, explaining that prisoners who are released with parole are less likely to reoffend than prisoners released after serving full sentences in prison, and discussing the potential further benefits of implementing the proposed "efficient system").

⁶⁸ See Rhine et al., *supra* note 30, at 318 ("From sentencing to parole, the justice system therefore changes from one concerned with retribution to one preoccupied primarily with risk and the rehabilitation of the offender."). But see Dagan & Segev, *supra* note 66 (arguing that parole can serve a retributive purpose); Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminant Sentencing*, 48 AM. CRIM. L. REV. 1247, 1247 (2011) (arguing that indeterminant sentencing has no clear theoretical justification because the rehabilitation paradigm was generally rejected beginning in the 1970s and proposing a new communicative theory of punishment to support indeterminant sentencing).

⁶⁹ Rhine et al., *supra* note 30, at 279–280 (arguing that prison reform must start with parole reform and that reforming parole to better address rehabilitation will help end mass incarceration).

⁷⁰ See, e.g., Hadar Aviram, Valerie Kraml & Nicole Schmidt, *Dangerousness, Risk, and*

rehabilitating those who struggle with substance abuse.⁷¹ Some critics outright reject the idea that parole serves a retributive or rehabilitative purpose and instead argue that parole simply serves the practical purpose of controlling prison overcrowding.⁷²

Much of the criticism of the structure of parole hinges on its rehabilitative function, with critics arguing that potential and actual parolees are unfairly assessed⁷³ and inadequately supported⁷⁴ if rehabilitation is the goal. Many deem parole in its current form a failure to achieve its purported goal of rehabilitation due to the myriad ways in which parolees may find themselves returned to prison.⁷⁵

Release, 7 HASTINGS RACE & POVERTY L.J. 175, 184 (2010) (“But more importantly, it is imperative to retool parole services as an instrument of hope, emphasizing vocational and educational skills for released inmates, as well as drug and alcohol treatment for those who need them. In that way, the exit from prison will truly become a way out, rather than a trap door leading formerly incarcerated people back within its walls.”).

⁷¹ See Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 858 (2000); see also Emily R. Murphy, *Paved with Good Intentions: Sentencing Alternatives from Neuroscience and the Policy of Problem-Solving Courts*, 37 LAW & PSYCH. REV. 83, 112–13 (2013) (discussing drug courts and treatment programs and explaining that they can be incorporated into parole systems as a condition of parole).

⁷² See Jonathan Simon, *The New Overcrowding*, 48 CONN. L. REV. 1191, 1198–99 (2016) (“In theory, parole was supposed to be based on an administrative judgment that the prisoner had been effectively rehabilitated and, with proper aftercare (parole supervision which was invented at the same time), could return to the community with little risk of further criminal behavior. While imperfect, there is little doubt that parole allowed prison managers to regulate the level of overcrowding.”) (footnote omitted).

⁷³ See, e.g., Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 384–93 (2019) (arguing that decision makers throughout the criminal justice system, including in the parole system, arbitrarily make character-based decisions, which may be biased or otherwise unjust); Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 566 (2019) (critiquing the lack of judicial due process in parole board decisionmaking as presenting constitutional problems); Rhine et al., *supra* note 30, at 279, 281 (discussing, in part, how much discretion is appropriate in parole board decisionmaking).

⁷⁴ See, e.g., Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 423, 438 (2011) (discussing the general shift from rehabilitation to surveillance); Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C.J.L. & SOC. JUST. 319, 350 (2016) (arguing in part that current restrictions on sex offenders inadequately rehabilitate); Phillip Grudzina, *Secular Dissent: Protecting Non-Believers from Coercive Religious Parole Programs*, 106 J. CRIM. L. & CRIMINOLOGY 565, 565 (2016) (discussing the problems with rehabilitative parole programs for alcohol and substance abuse that have religious underpinnings).

⁷⁵ See *infra* Part II.

C. STRUCTURE OF PAROLE

In making parole determinations, boards consider a variety of factors and goals, such as the offender's characteristics, the need to protect society from the offender, and education and treatment options for the offender.⁷⁶ The reality, however, is that there are few restraints on parole board decisionmaking, and parole boards consider factors that some argue are unconstitutional. For example, some parole boards might consider newfound religiosity as a factor in favor of parole.⁷⁷ Other parole boards might look broadly at whether the prospective parolee has "insight," an amorphous term that California parole boards use as a proxy for determining whether someone is likely to recidivate.⁷⁸ Because of the seemingly opaque parole review process, some criticize the process for making it exceedingly difficult for inmates to understand how to "get parole."⁷⁹

The scope of the supervision and conditions are so great that some claim that parole supervision is no longer aimed at helping offenders reintegrate and has instead shifted its primary goal "to closely monitor[ing] parolees and punish[ing] them for failing to meet required conditions."⁸⁰ In the federal system, so long as conditions "involve[] no greater deprivation of liberty than is reasonably necessary" to effectuate the goals of parole, then the conditions are permissible.⁸¹ States' parole boards enjoy similarly broad

⁷⁶ See 18 U.S.C. §§ 3553(a), 3583(c). For an argument for expanded parole eligibility in Louisiana (a state with a particularly restricted parole system), see generally Monica L. Bergeron, *Second Place Isn't Good Enough: Achieving True Reform Through Expanded Parole Eligibility*, 80 LA. L. REV. 109 (2019).

⁷⁷ See, e.g., Daniel W. Sack, Note, *Guardians as Gatekeepers and Other Issues of the Establishment Clause and Parole*, 50 COLUM. J.L. & SOC. PROBS. 379, 379 (2017) (discussing how much weight boards should put on newfound religiosity).

⁷⁸ See Victor L. Shammass, *The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight*, 42 POL. & LEGAL ANTHROPOLOGY REV. 142, 142 (2019).

⁷⁹ See Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/nine-things-you-probably-didn-t-know-about-parole> [<https://perma.cc/2KMU-X46X>]; see also Quinn, *supra* note 73 (critiquing the constitutional problems and dangers of parole boards making decisions without being subject to judicial due process and review); Rhine et al., *supra* note 30, at 284 (suggesting that parole release decisions should be more structured and transparent and should more closely resemble sentencing hearings).

⁸⁰ Takei, *supra* note 47, at 138; see also Scott-Hayward, *supra* note 74, at 438–40 (arguing that increasing caseloads caused a shift in the parole system's focus from prisoner reentry to surveillance and punishment).

⁸¹ 18 U.S.C. § 3583(d)(2); see also *United States v. Watson*, 582 F.3d 974, 982 (9th Cir. 2009) (holding that "conditions are permissible if they are reasonably related to the goals of deterrence, protection of the public, or rehabilitation of the offender, taking into account the offender's history and personal characteristics, and involv[ing] no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release").

discretion.⁸²

While sentencing judges establish the upper limits of a prison term, parole boards hold tremendous power over the actual terms of offenders' confinements.⁸³ Parole boards are composed of individuals who are usually appointed to the position of board member by the state Governor or the Director/Commissioner of Corrections. There is considerable debate about whether the statutory requirements for becoming a parole board member are sufficient to ensure that these decisionmakers are qualified to hold such power.⁸⁴

II. THE REVOLVING DOOR

The primary justification of parole is to rehabilitate the offender by reintegrating them into society. The state also has an interest in assuring public safety by protecting society from criminal harms. To effectuate these aims, parole boards impose conditions on parolees. It follows, then, that there should be some nexus between the conditions of parole and these goals.⁸⁵ In the initial meeting between the new parolee and their parole officer, the parole officer informs the parolee of the conditions of their parole and ensures that they understand the conditions.⁸⁶ These conditions are now more numerous

⁸² See, e.g., *Harris v. Indiana*, 836 N.E.2d 267, 273–74 (Ind. Ct. App. 2005) (limiting parole board discretion only with respect to unfair restrictions on fundamental rights and requiring the condition to be related to the conviction); *In re Stevens*, 15 Cal. Rptr. 3d 168, 171, 175 (Cal. Ct. App. 2004) (restricting conditions to those that relate to the convicted offense).

⁸³ See generally Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, in OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS (Joan Petersilia & Kevin R. Reitz eds., 2012) (showing the development of parole release and supervision over a 25-year period). See also Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 195 (2009) (“Sentencing decisions are usually made by judges while decisions about conditions of incarceration are usually made by prison bureaucrats (under conditions that are generally less open, accountable, and reviewable than they are in the courtroom).”).

⁸⁴ For an empirical argument showing that parole board members are highly qualified, see Jason P. Robey & Edward E. Rhine, *Parole Board Members: Statutory Requirements, Educational Achievements, and Institutional Structure*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (Mar. 1, 2017), [<https://perma.cc/DU7K-7XSK>]. For a critical view of the requirements to be a parole board member, see Katherine Barrett & Richard Greene, *To Work on Parole Boards, No Experience Necessary*, GOVERNING (Aug. 31, 2016), [<https://www.governing.com/archive/gov-parole-boards-hiring-decisions.html>] [<https://perma.cc/N9R6-D56U>].

⁸⁵ See Rhine et al., *supra* note 30, at 325–26 (discussing the dual objectives of parole as recidivism reduction and reintegration). *But see* James M. Binnall, *Released from Prison . . . but Placed in Solitary Confinement: A Parolee Reveals the Practical Ramifications of Samson v. California*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 65–66 (2008) (claiming that public safety may weigh more heavily than parolee reentry).

⁸⁶ See, e.g., Ocen, *supra* note 60 (citing a spokesperson for the California Department of

than ever, with the average parolee subject to nineteen conditions.⁸⁷ Some conditions are nearly always applied to parolees.⁸⁸ Many jurisdictions implement so-called “intensive supervision programs” which involve heightened levels of surveillance and so many conditions that scholars note that “[e]ven law abiding citizens would have difficulty complying with all the conditions imposed upon parolees.”⁸⁹

Despite its rehabilitative aims, parole counterproductively creates a “perpetual incarceration machine”⁹⁰ at great expense to the state by forming a set of excessively broad circumstances under which parolees may be returned to prison.⁹¹ Some critics look to the conditions imposed on parolees, many of which are highly restrictive on the parolees’ liberty. Scholars and commentators have criticized many of these conditions, including: chemical

Corrections and Rehabilitation, who “noted that a parolee’s first meeting with her parole officer generally includes a rundown of [the parole] conditions”); Duffy Rice & Ramsey, *supra* note 2 (guest parole officer discusses the procedure she follows in her initial meeting with a new parolee).

⁸⁷ See Lawrence F. Travis III & James Stacey, *A Half Century of Parole Rules: Conditions of Parole in the United States, 2008*, 38 J. CRIM. JUST. 604, 605–06 (2010) (showing that the average number of conditions imposed on parolees in 2008 was nineteen, an increase from 1996 when the average was eleven and a half imposed conditions).

⁸⁸ Many commentators critique the “one-size-fits-all” approach to parole conditions. See, e.g., Moyd, *supra* note 19 (“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.”).

⁸⁹ Jacobi et al., *supra* note 66, at 927–28 (citing examples including curfews, tardiness to appointments with parole officers, and overnight stays).

⁹⁰ Stephen C. Richards & Richard S. Jones, *Perpetual Incarceration Machine: Structural Impediments to Postprison Success*, 13 J. CONTEMP. CRIM. JUST. 4, 4 (1997) (using this term to generally refer to the “structural impediments that contribute to parole failure and recidivism”).

⁹¹ See, e.g., Gennaro F. Vito, George E. Higgins & Richard Tewksbury, *Characteristics of Parole Violators in Kentucky*, 76 FED. PROB. 19, 19 (2012). This has been described as a “continuous game of ‘catch and release.’” Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 253 (2008).

castration,⁹² technological surveillance,⁹³ “no-contact” restrictions,⁹⁴ employment requirements,⁹⁵ and pornography restrictions.⁹⁶

The Bureau of Justice Statistics reports that 41.7%—nearly half—of all exits from parole are due to reentries to incarceration.⁹⁷ Nationwide, on any given day, one-quarter of the incarcerated population consists of those who are reincarcerated for technical violations while on parole or probation.⁹⁸ The phrase “technical violations” refers to a failure to comply with a condition of one’s supervision. This does not include the commission of new crimes.⁹⁹ When the average parolee has nineteen conditions with which to comply, many of which could be violated through external forces preventing even well-meaning parolees from compliance, it is no wonder that one in four of all incarcerated persons in the United States is incarcerated for a technical violation.

For a program intended to promote reentry into society and to rehabilitate offenders, this statistic calls into question the parole system’s success. Several factors may contribute to this revolving door problem, but this Part discusses some of the most common parole conditions and notes

⁹² See Haley A. Smith, *Common Enemy and Political Opportunity Leave Archaically Modern Sentencing Unchecked: The Unconstitutionality of Louisiana’s Chemical Castration Statute*, 59 LOY. L. REV. 211, 212 (2013).

⁹³ See Sarah Shekhter, *Every Step You Take, They’ll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085, 1088–89 (2011) (discussing GPS monitoring of sex offenders); Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. L. REV. 379, 380 (2018); Mirko Bagaric, Dan Hunter & Colin Loberg, *Introducing Disruptive Technology to Criminal Sanctions: Punishment by Computer Monitoring to Enhance Sentencing Fairness and Efficiency*, 84 BROOK. L. REV. 1227, 1230 (2019) (discussing how technology may be used to more effectively monitor those on supervision).

⁹⁴ See Sharon Brett, Note, *“No Contact” Parole Restrictions: Unconstitutional and Counterproductive*, 18 MICH. J. GENDER & L. 485, 488–89, 500 (2012) (arguing that no-contact restrictions impede rehabilitation and are not sufficiently narrowly tailored).

⁹⁵ See Mark Pogrebin, Mary West-Smith, Alexandra Walker & N. Prabha Unnithan, *Employment Isn’t Enough: Financial Obstacles Experienced by Ex-Prisoners During the Reentry Process*, 39 CRIM. JUST. REV. 394, 399 (2014); see also *infra* Part II.E.

⁹⁶ See Laura A. Napoli, *Demystifying “Pornography”: Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression*, 11 UNIV. N.H. L. REV. 69, 70 (2013) (discussing conditions outright banning the possession of pornography).

⁹⁷ OUDEKERK & KAEBLE, *supra* note 61, at 10 tbl.6.

⁹⁸ *Confined and Costly*, *supra* note 5.

⁹⁹ See Pettus-Davis & Kennedy, *supra* note 5, at 7 (“Research suggests that 45% of the more than 600,000 annual state prison admissions across the nation are due to probation or parole revocations. While individuals can have their probation or parole status revoked for committing new crimes, 26% of new prison admissions are due solely to technical violations.”).

existing criticisms that these conditions fail to achieve parole's intended goals as a practical matter. The conditions included in this Part are: regular reporting to the parole officer, payment of fees, consent to law enforcement searches, prohibitions against inter-offender associations, and the employment requirement. In addition to describing the punitive, harsh, and numerous conditions imposed on parolees, this Part argues that the financial burden of complying with these parole conditions disproportionately harms the poor.

A. REGULAR REPORTING TO PAROLE OFFICER

Regular reporting to a parole officer is the most common condition imposed on parolees.¹⁰⁰ This condition enables the government to routinely monitor released parolees to ensure a successful reintegration. Typically, a parolee must regularly travel to their parole officer's office at a specified time, where the parole officer asks questions and may require that the parolee submit to a drug test to ensure that the parolee is complying with their conditions.

Parolees often return to prison due to attendance issues at their meetings with their parole officer, their place of employment,¹⁰¹ or other places where they are obligated to go.¹⁰² Transportation issues are among the most common explanations for these failures to attend.¹⁰³ In urban areas,

¹⁰⁰ See, e.g., HAW. PAROLING AUTH., PAROLE HANDBOOK 17 (2020), https://dps.hawaii.gov/hpa/files/2020/11/HPA-Parole-Handbook_Revised_09_2020-1.pdf [<https://perma.cc/NL3Y-RUDS>]; MASS. PAROLE BD., SUPERVISION MANUAL FOR PAROLEES 4 (Nov. 22, 2016), <https://www.mass.gov/doc/parole-supervision-manual/download> [<https://perma.cc/A8TW-FX9C>]; MO. DEP'T OF CORR., RULES AND REGULATIONS GOVERNING THE CONDITIONS OF PROBATION, PAROLE, AND CONDITIONAL RELEASE 7 (Aug. 2017), <https://doc.mo.gov/sites/doc/files/2018-01/White-Book.pdf> [<https://perma.cc/WPH7-4GYD>]; PA. PAROLE BD., UNDERSTAND THE PROCESS: YOUR PAROLE HANDBOOK 32 (Feb. 2022), <https://www.parole.pa.gov/Information/Documents/Publications/Final%20Parole%20Handbook.pdf> [<https://perma.cc/6DSJ-GSKZ>].

¹⁰¹ See *infra* Part II.E.

¹⁰² See Pettus-Davis & Kennedy, *supra* note 5, at 8 (“Participants [who were asked about their reincarcerations] described a range of technical violations for expected events – missing check-ins with supervising officers and violating curfew – and unexpected events – being arrested, having one’s charges dropped, and returning to jail for coming into contact with law enforcement.”).

¹⁰³ See, e.g., Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. POVERTY L. & POL’Y 219, 231 (2006) (discussing reliability issues with public transportation in urban areas and the difficulty parolees face in areas without public transportation). For a discussion on how civil forfeiture of a vehicle can impact one’s compliance with parole obligations, see Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures*

parolees often rely upon public transportation, which may be unreliable, causing the well-meaning parolee to miss their appointment. In rural areas, transportation issues arise when the trip to the parole officer is a considerable distance.¹⁰⁴ Apart from transportation, parolees might deliberately avoid attending their appointments if they are unable to pay the fees that are due at that meeting.¹⁰⁵ This, of course, results in two violations: a failure to report and a failure to pay. In other cases, parolees may find it burdensome to manage their work schedules, family schedules, and parole officer meetings. Requesting time off from work may create tension between the parolee and their employer, particularly in construction and manufacturing jobs that represent the most common industries in which parolees work, because these positions are often less flexible. In addition to the employer-employee relationship issues associated with taking time off from work, there is also the financial cost. These jobs often pay low wages on an hourly basis, so even if the employer is supportive of the employee fulfilling their parole obligations, there are potentially devastating financial consequences if a parolee must, for example, take a half day on a Tuesday to meet the parole officer at 2:00 PM.¹⁰⁶

The traditional, in-person monitoring process is burdensome for parolees and parole officers, leading some to propose electronic monitoring as a solution. As technology has evolved, scheduled in-person meetings are

After Timbs, 129 YALE L.J.F. 430, 446 (2020) (quoting Tyson Timbs of *Timbs v. Indiana*, 139 S. Ct. 682 (2019), saying, “To me it doesn’t make sense; if they’re trying to rehabilitate me and help me help myself, why do you want to make things harder by taking away the vehicle I need to meet with my parole officer or go to a drug recovery program or go to work? You need a car to do all these things.”). *See also* Pettus-Davis & Kennedy, *supra* note 5, at 8–12 (citing examples of people who were reincarcerated for technical violations like breaking curfew or missing appointments due to funerals, emergency room visits, or employment conflicts).

¹⁰⁴ *See* Josie Duffy Rice & Clint Smith, *Justice in America Episode 12: The Criminalization of Poverty*, THE APPEAL (Jan. 23, 2019), <https://theappeal.org/justice-in-america-the-criminalization-of-poverty/> [<https://perma.cc/4UTA-2LW6>] (interviewing Sara Totonchi of the Southern Center for Human Rights in Georgia, who notes: “In some situations we’ve seen people have to report monthly, in other situations, numerous situations, we’ve had people forced to report weekly. When you, um, think about what a weekly report would mean for a person in rural Georgia where there is no public transportation, trying to hold on to a job or take care of your family. We’ve had clients who have walked 10 miles each way to report weekly.”).

¹⁰⁵ For an extreme example of this, see Kayode Crown, *Mississippi Parolees Paying for Supervision May Perpetuate More Criminality for Poor*, MISS. FREE PRESS (Nov. 22, 2021), <https://www.mississippifreepress.org/18335/mississippi-parolees-paying-for-supervision-may-perpetuate-more-criminality-for-poor/> [<https://perma.cc/QR9U-7GJS>] (telling the story of a woman who fled the state because she could not afford her supervision fees).

¹⁰⁶ For further discussion of employment issues for parolees, see *infra* Part II.E.

less accurate and less efficient than alternatives. Parole officers only observe the parolee in the parole officer's office at a scheduled time; technological advancements allow for constant monitoring of parolees in their day-to-day environments.¹⁰⁷ Many scholars have addressed these technological developments in community supervision. Some argue that technological monitoring should be used on the grounds that it achieves the rehabilitative goals of community supervision while reducing concerns about equity and fairness.¹⁰⁸ Others are critical of the use of technology to continually monitor parolees.¹⁰⁹ Some have referred to GPS monitoring in the form of ankle monitoring devices as the "electronic ball and chain."¹¹⁰ One scholar argues that electronic surveillance might result in "greater rates of re-arrest and incarceration, and in turn be criminogenic, by focusing on perfect detection and enforcement of violations of technical rules drafted with the limits of the physical world in mind."¹¹¹ While electronic monitoring might be more accurate and efficient, the use of such technology raises significant privacy concerns.¹¹²

Apart from electronic monitoring, other technology exists that might enable less burdensome compliance with the mandatory meetings. Especially since the COVID-19 pandemic, video conferencing has proven itself to be an effective option for meetings.¹¹³ Yet, even these technologies require the

¹⁰⁷ These technologies include radio frequency monitoring, GPS-equipped ankle monitors, and smartphone applications.

¹⁰⁸ See, e.g., Bagaric et al., *supra* note 93; Mirko Akrap, *RFID Implementation: Testing in Prisons and Parolees for the Greater Good*, 33 J. INFO. TECH. & PRIVACY L. 22, 29 (2016).

¹⁰⁹ See, e.g., Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 723 (2020) (discussing the Fourth Amendment issues which arise when those on community supervision are continually surveilled, stating that "no empirical evidence suggests that broadly applied electronic surveillance corresponds to greater public safety, increased rehabilitation, or lower recidivism rates"); Frank Joecheon Lee, Note, *Severing the Invisible Leash: A Challenge to Tennessee's Sex Offender Monitoring Act in Doe v. Bredesen*, 44 U.C. DAVIS L. REV. 683, 686 (2010); Shekhter, *supra* note 93, at 1089.

¹¹⁰ BRETT STORY, *PRISON LAND: MAPPING CARCERAL POWER ACROSS NEOLIBERAL AMERICA* 157 (2019).

¹¹¹ Weisburd, *supra* note 109, at 723–24.

¹¹² For a fuller discussion, see generally Weisburd *supra* note 109.

¹¹³ *But see* Beth Schwartzapfel, *Probation and Parole Officers Are Rethinking Their Rules as Coronavirus Spreads*, MARSHALL PROJECT (Apr. 3, 2020), <https://www.themarshallproject.org/2020/04/03/probation-and-parole-officers-are-rethinking-their-rules-as-coronavirus-spreads> [https://perma.cc/W9VH-E6LS] ("Around the country, officers are using video and phone calls to keep in touch with people they supervise, but they lose some nuance and personal connection when they're no longer in people's living rooms, observing family dynamics, or visiting workplaces and having informal chats with whoever manages the person there, probation and parole professionals

parolee to have functional devices, stable internet connections, and sufficient available quiet time to report regularly with their parole officers.

B. PAYMENT OF FEES

Another harsh condition of parole is the requirement to pay fees associated with the supervision. States' parole systems are often at least partially user-funded, meaning that states require parolees to pay fees for their supervision, electronic surveillance, drug testing, and drug or mental health treatment. Fees vary widely among the states, with some states charging flat rates and other charging a monthly fee for the duration of the supervision.¹¹⁴

Courts also often assess fines or restitution in a defendant's sentence at the time of conviction. Upon release, repayment of the fine becomes a condition of parole. During the defendant's term of incarceration, interest may accrue, increasing the amount the parolee must repay to satisfy their parole requirements. If a parolee fails to repay the debt—whether unable or unwilling—the state may reincarcerate them.¹¹⁵ Many organizations, including the ACLU,¹¹⁶ Brennan Center for Justice,¹¹⁷ Southern Poverty Law Center,¹¹⁸ and Equal Justice Under Law,¹¹⁹ have scrutinized this practice as operating unconstitutional debtors' prisons.¹²⁰ Despite the Supreme Court

said in interviews.”).

¹¹⁴ For example, Delaware charges \$200 regardless of the offense or term of supervision. By contrast, Massachusetts charges \$80 per month. Michigan charges \$30 per month for supervision without electronic monitoring, but that fee doubles to \$60 per month if the parolee is subject to an electronic monitoring device. *See Fees*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, <https://www.interstatecompact.org/resources/fees> [https://perma.cc/SE9B-QXEL] (last visited July 31, 2022).

¹¹⁵ *See* Takei, *supra* note 47, at 139.

¹¹⁶ *See In for a Penny: The Rise of America's New Debtors' Prisons*, ACLU 6 (Oct. 2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://perma.cc/48JX-AQ5A].

¹¹⁷ Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 19 (2010) https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/9T76-HG2L].

¹¹⁸ *SPLC Lawsuit: Alabama City Operating Debtors' Prison*, THE S. POVERTY L. CTR. (Sept. 8, 2015), <https://www.splcenter.org/news/2015/09/08/splc-lawsuit-alabama-city-operating-debtors%E2%80%99-prison> [https://perma.cc/WX79-D5WB].

¹¹⁹ *Shutting Down Debtors' Prisons*, EQUAL JUST. UNDER L., <https://equaljusticeunderlaw.org/private-debtors-prisons#:~:text=Shutting%20Down%20Debtors'%20Prisons&text=Although%20debtors'%20prisons%20were%20banned,target%20people%20who%20are%20poor.&text=%E2%80%99Privatization%20of%20our%20justice%20system,people%2> [https://perma.cc/5VHU-FDSZ] (last visited July 31, 2022).

¹²⁰ The phrase “debtors’ prison” refers to the practice of incarcerating a person for the failure to pay an obligation. For further discussion on the historical and modern forms of

ruling in *Bearden v. Georgia*, which declared the practice of incarcerating individuals because they are unable to afford court-ordered fines and fees unconstitutional¹²¹, many judges simply decline to inquire into the issue of whether the parolee's failure to pay is due to inability or choice.¹²²

A 2019 study on probationer fees, which often mirror parole fees, shows that probationers are much more likely to be low-income than the general population.¹²³ The data suggest that state policies which impose high fees on people who experience poverty undermine the purported goal of allowing people to continue to work and manage their familial obligations. This is attributed to the high cost of the fees in relation to wages and cost of living.¹²⁴

About 80% of formerly incarcerated persons earn less than \$15,000 per year.¹²⁵ There is no state in the United States with a cost of living that allows for a single person to meet their basic needs on those wages.¹²⁶ Passing the costs of supervision onto these people is not only unconscionable, but it is also counterproductive to the goals of rehabilitation. People earning low wages who must pay fees to the state to avoid incarceration may turn to criminal activity to make their monthly payments.¹²⁷ This is particularly

debtors' prisons, see Whitney Bennis & Blake Strode, *Debtors' Prison in 21st Century America*, ATLANTIC (Feb. 23, 2016),

<https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/>

("Historically, the phrase debtors' prison refers to any detention facility in which people are incarcerated for their failure to pay a debt. Today, the 'debts' that lead to incarceration take the form of monetary penalties established and enforced by municipal courts.")

¹²¹ 461 U.S. 660, 661–62 (1982).

¹²² See Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018),

<https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>

[<https://perma.cc/7A9R-E9HH>] (presenting data and recommending that judges determine one's ability to pay prior to imposing fees and fines); see also Llorente, *supra* note 24 ("A defendant cannot be incarcerated unless the failure to pay is 'willful.' But . . . the 'interpretation of concepts like willfulness and indigence are inconsistent, and so this results in indigent people being incarcerated for failure to pay.'")

¹²³ Mack Finkel, *New Data: Low Incomes – But High Fees – For People on Probation*, PRISON POL'Y INITIATIVE (Apr. 9, 2019),

https://www.prisonpolicy.org/blog/2019/04/09/probation_income/ [<https://perma.cc/YD4B-2LU8>].

¹²⁴ See *id.*

¹²⁵ Looney & Turner, *supra* note 21.

¹²⁶ See Francisco Velasquez, *How Much Money a Single Person Needs to Earn to Get By in Every U.S. State*, CNBC (Aug. 25, 2021), <https://www.cnbc.com/2021/08/17/income-a-single-person-needs-to-get-by-in-every-us-state.html> [<https://perma.cc/E8T4-LZUF>]. The notoriously low federal poverty line, as of 2021, for a single person is \$12,880. ANNUAL UPDATE OF THE HHS POVERTY GUIDELINES, 86 Fed. Reg. 7732, 7733 (Feb. 1, 2021).

¹²⁷ See Crown, *supra* note 105 (telling anecdotes about low-income parolees who turn to theft, drug dealing, and prostitution to pay their fees).

troublesome for those supervised individuals who have limited employment opportunities and those who have financial obligations to their families.¹²⁸ As with other conditions, failure to pay fees can result in revocation of parole and reincarceration.

This fee requirement disproportionately affects poor parolees and their families. What may be nominal to some, particularly those who have more financially secure support systems, can be absolutely devastating for those with limited means. The threat of reincarceration for failure to pay may force some parolees to choose between paying their fees or paying a utility bill.¹²⁹ Placing parolees in a situation in which they may forgo basic necessities to avoid reincarceration is excessively harsh, insufficiently tailored to the specific parolee, and counterproductive to the goal of rehabilitation.

C. CONSENT TO LAW ENFORCEMENT SEARCHES

The Supreme Court has noted that parolees occupy a unique position somewhere between those who are incarcerated and those who are in no way entangled in the criminal justice system.¹³⁰ Thus, many rights free persons enjoy may be substantially curtailed for parolees. A common and controversial condition of parole is the requirement that parolees consent to routine law enforcement searches of their person, home, and effects.

One possible explanation for the revolving door problem is that there has been a shift over time from the rehabilitative focus of parole to a more retributive one, particularly with respect to the type and extent of surveillance, which some have described as “punitive surveillance.”¹³¹ In

¹²⁸ See Ebony Ruhland, *The Impact of Fees and Fines for Individuals on Probation and Parole*, ROBINAINST. CRIM. L. & CRIM. JUST. (May 23, 2016), <https://robinainstitute.umn.edu/news-views/impact-fees-and-fines-individuals-probation-and-parole> [https://perma.cc/6TVK-S9NF].

¹²⁹ See Heller, *supra* note 103, at 228 (“Since these financial requirements are placed on all individuals leaving prison, they have a disproportionately harsh impact on poor probationers, parolees, and their families.”). As applied to probationers, see Finkel, *supra* note 123 (“States must acknowledge that people on probation are mostly low-income, and driving them further into poverty through monthly fees is cruel and counterproductive.”).

¹³⁰ The Court explained in *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972): “Though the State properly subjects [the parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison,” and parolees are free to “do a wide range of things open to persons who have never been convicted of any crime.”

¹³¹ Jacobi et al., *supra* note 66, at 927 (describing punitive surveillance and explaining that “[t]oday, many jurisdictions have intensive supervision programs (‘ISPs’), a model characterized by closer surveillance of parolees, with an emphasis on finding violations, revoking parole, and returning them to custody. The result is an increased number of revocations for minor technical violations, placing parolees at constant risk of incarceration because the sheer number of technical violations makes it extremely difficult to avoid a

particular, the reduction in Fourth Amendment rights, along with the prohibition against inter-offender associations, enable law enforcement to easily reincarcerate parolees for minor infractions or violations of their conditions of parole.¹³²

Given the nature of parolees' limited liberty interests, it is perhaps unsurprising that the Supreme Court held that states may dispense with the usual probable cause and warrant requirements for searching ordinary citizens and may instead engage in searches and seizures of parolees so long as they are reasonable.¹³³ The parolees' reduced liberty interests cannot compete with the state's "overwhelming interest" in supervising parolees."¹³⁴ Thus, states may require that all parolees agree to be subject to searches at any time by police and parole officers as an eligibility condition of their release.¹³⁵

Some criticize this level of erosion of parolees' privacy protections as inconsistent with the goals of parole. An empirical study shows that these parole conditions increase parolees' vulnerability to criminal elements and worsen recidivism.¹³⁶ Further, by mandating that parolees waive their Fourth Amendment protections, the police may exploit the vulnerable parolee.

Parolees, who occupy the unique space of being only quasi-free, may be vulnerable targets to unlikely abusers. Some have argued that these conditions provide leverage to police who may recruit parolees as confidential informants, a role that necessarily relies on the parolee to establish and maintain relationships with criminals, which may increase the parolee's likelihood of committing new crimes.¹³⁷ When parolees fail to deliver information to police, police may easily cite pretextual technical violations upon which to base an arrest.

Parolees' lack of Fourth Amendment protections means that police can perform suspicionless searches and seizures of parolees and use any evidence they might obtain through these searches and seizures against the parolee. The average time on parole is just under two years, with considerable variation across states.¹³⁸ This length of time under supervision creates a large

violation.") (footnotes omitted). For a more thorough discussion on punitive surveillance, see generally Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022).

¹³² See Jacobi et al., *supra* note 66, at 926–27.

¹³³ See *Samson v. California*, 547 U.S. 843, 846 (2006).

¹³⁴ *Id.* at 853 (quoting *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998)).

¹³⁵ See *id.* at 852.

¹³⁶ See Jacobi et al., *supra* note 66, at 887.

¹³⁷ See *id.* at 938.

¹³⁸ *States Can Shorten Probation and Protect Public Safety*, PEW (Apr. 15, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten->

window of opportunity during which the state may discover a violation. Mandating that a person who is rebuilding their life post-prison waive their Fourth Amendment protections for an average of two years exposes these parolees to great risk of excessive interaction with police and the above-described consequences that may follow. Moreover, authorizing Fourth Amendment searches without so much as a modicum of suspicion for an average of two years is excessively intrusive, even in light of the unique space parolees occupy as neither free nor imprisoned. Although perhaps a reduced level of suspicion may be appropriate for searches of parolees to ensure the goals of reentry are achieved, subjecting parolees to suspicionless searches for years is unjustifiable.

D. PROHIBITION AGAINST INTER-OFFENDER ASSOCIATIONS

An especially controversial condition of release is the prohibition of inter-offender associations. Twenty-nine states, the District of Columbia, and the federal government impose this condition as a standard condition of release.¹³⁹ Professor James Binnall argues that these jurisdictions incorrectly “presume that offenders are perpetually prone to criminality . . . and that inter-offender relationships are uniformly, or at least consistently, criminogenic.”¹⁴⁰ Yet, there is no empirical evidence to suggest any nexus between this condition and rehabilitation, and there is some evidence to suggest that no-association rules further isolate parolees, which harms their reintegration efforts.¹⁴¹

On the other hand, there have been studies showing that the neighborhood in which someone resides during their first year out of prison may impact their rehabilitation.¹⁴² An important determinant during this critical and vulnerable point in a parolee’s life is the parolee density of the neighborhood in which the parolee lives. The more parolee-dense a zip code is, the less likely the parolee is to avoid reincarceration.¹⁴³

probation-and-protect-public-safety [<https://perma.cc/9U3V-LGTG>].

¹³⁹ See James M. Binnall, *Divided We Fall: Parole Supervision Conditions Prohibiting “Inter-Offender” Associations*, 22 UNIV. PA. J.L. & SOC. CHANGE 25, 27 (2019).

¹⁴⁰ *Id.* at 28–29.

¹⁴¹ See *id.* at 48 (“[I]n the face of evidence to the contrary, offender no-association restrictions presume that inter-offender relationships are uniformly anti-social. Such a presumption contradicts empirical and experiential data that makes clear that inter-offender relationships can be pro-social and reformative.”).

¹⁴² See Dana Goldstein, *You Can’t Go Home Again*, MARSHALL PROJECT (June 4, 2015), <https://www.themarshallproject.org/2015/06/04/you-can-t-go-home-again> [<https://perma.cc/34AN-PLG3>].

¹⁴³ This applies to recidivism and to parole condition violations. See *id.* (“In neighborhoods where five of every 1,000 residents had recently been released from prison, 34 percent of parolees returned to prison within one year, either for committing a new crime or for

This unsettled area of research essentially leaves researchers in two camps: those who say that returning to the same environment where one lived at the time of the criminality increases one's likelihood to recidivate and those who say that returning to their familiar environment with family and existing social networks can enhance accountability and support rehabilitation.¹⁴⁴

Some more general studies have shown that parolee reentry success is less likely when parolees return to impoverished urban communities.¹⁴⁵ Yet for parolees, who often have poor employment prospects, low income, bad credit, and felony convictions, returning home to the environment where they began criminality may be the only option. Housing discrimination, in addition to financial barriers, also limits parolees' opportunities. Thus, for many parolees who live in communities with a high density of offenders, avoiding inter-offender associations is unfeasible.

Relatedly, when this condition is coupled with the mandatory waiver of Fourth Amendment protections, the neighborhoods to which parolees often return have greater law enforcement presence. In these neighborhoods, interactions with police are more frequent than in more affluent communities.¹⁴⁶ Parolees in these communities are vulnerable to police inappropriately exercising authority over them, which subjects these parolees to a threat of reincarceration.¹⁴⁷ However, these parolees often have limited prospects and difficulty obtaining housing elsewhere.

Scholars have noted that police over-surveil poor communities.¹⁴⁸ Increased police presence and law enforcement in these communities amounts to heightened scrutiny, which results in "increased state physical control [such as incarceration] over poorer, less educated, and non-white individuals."¹⁴⁹ This form of control over all the people living in these

breaking the rules of parole.").

¹⁴⁴ See *id.*; Binnall, *supra* note 139, at 48; David J. Harding, Jeffrey D. Morenoff & Claire W. Herbert, *Home Is Hard to Find: Neighborhoods, Institutions, and the Residential Trajectories of Returning Prisoners*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 216 (2013) ("Several studies have now shown that returning prisoners who live in more disadvantaged neighborhoods are more likely to recidivate.").

¹⁴⁵ See Harding et al, *supra* note 144.

¹⁴⁶ See, e.g., Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTS NOW (June 17, 2020), <https://now.tufts.edu/articles/how-racial-segregation-and-policing-intersect-america> [<https://perma.cc/76VN-DCG8>]; Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

¹⁴⁷ See *infra* Part II.

¹⁴⁸ See Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1476 (2020) (discussing the myriad ways in which poverty is criminalized).

¹⁴⁹ *Id.* at 1487.

communities is problematic, but for parolees, it can be downright devastating. The state already extensively monitors parolees through reporting, electronic surveillance devices, and other means. The addition of continual police surveillance exposes vulnerable parolees to coercion and abuse.¹⁵⁰ Police may use the threat of technical violations—namely, inter-offender associations—as leverage to coerce parolees into endangering themselves as informants.¹⁵¹ The excessive monitoring and exploitation of parolees in poor communities further endangers poor parolees and keeps them vulnerable to cycling in and out of prison.

E. THE EMPLOYMENT REQUIREMENT

Parolees must obtain and maintain employment. This condition directly relates to the likelihood of a parolee successfully reintegrating into society.¹⁵² Despite the importance of employment on a parolee’s ability to avoid the revolving door, many systemic obstacles stand in their path. First, American employers are hesitant to hire those who have been incarcerated.¹⁵³ This

¹⁵⁰ See, e.g., Kathryn M. Kleis, *Facilitating Failure: Parole, Reentry, and Obstacles to Success*, 34 DIALECTICAL ANTHROPOLOGY 525, 525 (2010) (discussing the coerciveness of New York State’s control over parolees through the emergence of the “Prisoner Reentry Industry”); Jacobi et al., *supra* note 66, at 890, 925 (discussing how police target parolee-dense neighborhoods, which results in the attrition of constitutional rights).

¹⁵¹ See Jacobi et al., *supra* note 66, at 890 (“[T]he possibility of being incarcerated for three months for minor or technical violations of parole provides a powerful means of leverage over parolees. Police use this leverage to recruit parolees as confidential informants, a role that places parolees in danger but nonetheless serves an important community policing function. However, it also makes the parolee subject to less altruistic forms of influence.”).

¹⁵² See Christy Visher, Sara Debus & Jennifer Yahner, *Employment After Prison: A Longitudinal Study of Releasees in Three States*, URB. INST. JUST. POL’Y CTR. (Oct. 2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF> [<https://perma.cc/Y22X-3HMZ>] (“Some criminal justice research suggests that finding and maintaining a legitimate job can reduce former prisoners’ chances of reoffending, and the higher the wage, the less likely it is that individuals will return to crime.”); Liz Benecchi, *Recidivism Imprisons American Progress*, HARV. POL. REV. (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/> [<https://perma.cc/422Z-XE7T>] (arguing that reduced recidivism could be achieved, in part, through a “prison-to-work pipeline . . . [that would] lower the recidivism rate”).

¹⁵³ See Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 56–58 (2015) (discussing employer biases towards hiring formerly incarcerated persons). There has been advocacy aimed to address this issue. Specifically, the Ban the Box campaign launched in 2004 as a civil rights movement of formerly incarcerated people who faced employment discrimination on the basis of their criminal history. See *About: The Ban the Box Campaign*, BAN THE BOX, http://bantheboxcampaign.org/about/#.Yf1J09_MI2w [<https://perma.cc/8WVS-GGEK>] (last visited July 31, 2022). This movement has enjoyed some success and laws prohibiting

employer hesitancy disproportionately impacts Black parolees and especially Black female parolees.¹⁵⁴ In some jurisdictions, the majority of the paroled population is unemployed.¹⁵⁵ Second, many paths to employment opportunities are specifically foreclosed for parolees, often through state action. Careers that require licensing, but do not require college degrees, such as those in insurance, real estate, financial services, and even barber services, may be financially lucrative. However, states often disqualify ex-offenders from obtaining licenses which would authorize them to gain employment in these positions.¹⁵⁶

Third, because parolees must maintain employment to avoid reincarceration, they are vulnerable to predatory schemes of exploitation. In New York City, for example, an unregulated industry of labor brokers has emerged. These “body shops” offer poverty wages and no protections to contracted workers, supplying wealthy developers with cheap construction labor. These brokers specifically “exploit parole mandates of maintaining employment as a condition of release.”¹⁵⁷

Gainful employment is not only good for reducing the likelihood of recidivism; it also enables parolees to comply with their other conditions. Parolees’ employment is often their sole source of income, as they are frequently ineligible for public benefits.¹⁵⁸ Parolees are required to pay their fees, fines, and restitution, as well as their expenses for their electronic monitoring, drug treatment, and drug testing. These expenses, in addition to

employers from asking about criminal history have been passed in several cities. However, critics note that employers who are prohibited from asking about criminal history may instead discriminate by using race and stereotypes as a proxy. *See* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 191 (2017) (empirical study showing that criminal records are a barrier to employment and that Ban the Box policies increase racial discrimination in employment decisions).

¹⁵⁴ *See* Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html#figure2> [<https://perma.cc/A4VM-RPQF>] (showing formerly incarcerated Black women and men have an unemployment rate of 43.6% and 35.2%, respectively, compared to 6.4% and 7.7% unemployment rate for those groups in the general population).

¹⁵⁵ *See* Josh Seim & David J. Harding, *Parolefare: Post-Prison Supervision and Low-Wage Work*, 6 RUSSELL SAGE FOUND. J. SOC. SCIS. 173, 181 (2020).

¹⁵⁶ *See* Sophie Quinton, *To Help Ex-Offenders Get Jobs, Some States Reconsider Licenses*, PEW (Mar. 8, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/08/to-help-ex-offenders-get-jobs-some-states-reconsider-licenses> [<https://perma.cc/CF62-VCXB>].

¹⁵⁷ *Laborers’ Fight Back*, REAL REENTRY FOR N.Y., <https://www.realreentry.org/> [<https://perma.cc/339S-6P5C>] (last visited July 31, 2022).

¹⁵⁸ Heller, *supra* note 103, at 239 (“[S]ocial safety nets such as welfare, food stamps, and public housing are denied to many convicted offenders.”).

basic living expenses and the costs of miscellaneous necessities one needs when starting a fresh life, demand more income than what is typically offered through employment in the low-wage jobs often offered to parolees.¹⁵⁹ Instead of barriers and obstacles, states should create pathways to employment, providing services and opportunities that allow parolees to have a fighting chance of success in their reentry.

CONCLUSION

If the purpose of parole is to rehabilitate those convicted of a criminal offense, then the rate at which those on parole return to prison invites criticism of its efficacy. This revolving door may be attributable to the harshness and rigidity of the conditions with which parolees must comply, and to the financial burden of compliance with the imposed conditions. If we are serious about successfully reintegrating parolees into society, we must carefully examine the structure and conditions of parole to ensure that our system sets up a pathway to freedom, rather than an obstacle course.

¹⁵⁹ See Pogrebin et al., *supra* note 95, at 397.