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Decision-Making Processes

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On Vibes Alone? An Evaluation of the Massachusetts Parole Board's Inconsistent Decision-Making Processes

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Nicholas[1] pauses when asked to describe himself. "That's a good question," he says, and he wants to think about it. Then he provides a thoughtful list of adjectives: determined, good-natured and hopeful. Humble. Down to earth. Someone with integrity. Loyal—he gets it from his mother. Ambitious. Ambition in particular comes through in many of his answers to my questions about what he wants to do if he receives a parole grant from the Massachusetts Parole Board the next time he appears in front of them. Nick is serving a second-degree life sentence[2] for a crime he committed in his early twenties. The last time he was up for parole, he received a setback of several years, additional time he must serve before he is once again potentially eligible for release.

At his last hearing, Nick got the same justification and directive as 95.7% of denied parole seekers in 2019: that he had "not yet demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society" and so "[h]e should continue to engage in treatment/programming and maintain a positive adjustment."[3] This paper

[1] Nicholas is a pseudonym. Nicholas' life is shared with his permission, and with my gratitude. Elements of Nick's story are kept vague to prevent them from being identifiable but are entirely factually accurate as written.

[2] Nick, and other individuals convicted of second-degree life sentences in Massachusetts, may remain incarcerated for the rest of his life, but he is parole-eligible after serving fifteen years of his life sentence. MASS. GEN. LAWS ANN. ch. 127 § 133A (West 2018).

[3] GORDON HAAS, PAROLE DECISIONS FOR LIFERS FOR THE YEAR 2020 8–9 (Aug. 2021).

attempts to answer a fundamental, if a bit irreverent, research question: What on earth is he supposed to do with that explanation?

The decisions of the Massachusetts Parole Board (or "Board") in hearings held since 2015 for individuals sentenced to second-degree life sentences are publicly available on their website. In Part I, this paper will examine the structure and history of parole in Massachusetts. Part II will introduce a qualitative data set built from reviewing hundreds of these decisions. Troubling trends emerge in this data set, especially when read together with an annual data set and analysis maintained and published by members of the MCI Norfolk Lifers' Group, men who are currently incarcerated on life sentences. Part III of this paper will argue that these trends run counter to the legitimacy of the parole board, counter to commonly accepted theories of punishment, and directly contribute to racist overincarceration in the state of Massachusetts. Part IV of this paper will outline potential solutions, and then Part V will conclude by returning to Nick.

Although Nick's story will be explicitly confined to the introduction and conclusion, I hope he stays in the back of your mind as you read. There is a very real, very high human cost of Massachusetts Parole Board decisions that are ultimately based on little to none of the individual's recent behavior. It is years of Nick's life, and the lives of dozens of others in his position and community.

I. PAROLE BACKGROUND

A. History of American Parole and its Justifications

In the modern era, American courts and other bodies governing sentencing have emphasized that punishment by the state must have some form of legitimate justification and have typically identified legitimate

justifications as rehabilitation, incapacitation, deterrence, or retribution.[4] Parole in the United States originated in the late 1800s and early 1900s as a response to increased emphasis on these penological justifications and punishment theories, specifically rehabilitation.[5]

Rehabilitation is in many ways a modern penological justification rooted in academia and science; rehabilitation rests on a belief that "various biological, psychological, and sociological factors" cause crime, and that addressing these underlying factors through state-mandated punishment will reduce recidivism and make society safer.[6] Prioritization of rehabilitation led to systems of "indeterminate sentencing," where individual judges had autonomy over the length of a convicted individual's sentence regardless of offense and there was little statutory or legislative oversight.[7] The only oversight that existed came from parole boards.[8] The boards periodically reviewed an individual's rehabilitative progress and conduct while incarcerated to determine if the individual was eligible for release.[9]

By the 1980s, popular opinion on both the political left and right had turned against this system of indeterminate sentencing with general parole eligibility.[10] Critics on the right often rejected rehabilitation entirely,

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[4] Gregg v. Georgia, 428 U.S. 153, 182–83 (1976); *see also, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 959 (1991) ("[T]here are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation[.]"); Kimberly L. Patch, *The Sentencing Reform Act: Reconsidering Rehabilitation as a Critical Consideration in Sentencing*, 39 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 165, 166 (2013) (discussing the U.S. Sentencing Commission's recognition of all four justifications and refusal to endorse one over the others).

[5] *See* Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. OF CRIM. L. & CRIMINOLOGY 213, 216–17 (2017).

[6] Patch, *supra* note 4, at 171.

[7] Judge Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. OF CRIM. L. & CRIMINOLOGY 691, 695–97 (2010).

[8] *Id.*

[9] *Id.*

[10] *See* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1181–83 (2017) (explaining that sentencing reform was spurred by widespread concerns across the

arguing that the state should focus more on retribution, a punitive punishment theory rooted in the idea that punishment ought to be proportionate to the harm caused by conduct, regardless of mitigating factors.[11] Critics on the left were troubled by the sentencing disparities and near-limitless discretion given to judges due to the lack of statutory oversight.[12] This led to widespread reform, including the abolition of indeterminate sentencing and parole at the federal level.[13]

Despite these reforms, indeterminate sentences with parole eligibility remains widespread as "the most common approach to sentencing in the United States"[14] in large part due to its prevalence in state systems, including Massachusetts.[15]

B. History of Massachusetts Parole

Massachusetts was the first state in the country to introduce a parole system, which originated in 1837.[16] The original parole system helped recently released individuals establish themselves—with things like jobs, clothes, and transportation—with state funding and assistance.[17] The

political spectrum, from concerns about identity-based disparities in sentencing to those about "undue leniency").

[11] Patch, *supra* note 4, at 175.

[12] *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973) (describing "the unbridled power of the sentencers to be arbitrary and discriminatory").

[13] Isaac Fulwood, *History of the Federal Parole System*, U.S. PAROLE COMM. REP. 1–2 (2003), http://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf [https://perma.cc/PL2K-TUQK].

[14] Thomas & Reingold, *supra* note 5, at 239.

[15] MASS. GEN. LAWS ANN. ch. 279 § 24 (West 2014); *see also* Alexis Lee Watts et al., *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States, Massachusetts*, ROBINA INST. OF CRIM. L. AND CRIM. JUST. 3 (2018), http://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/massachusetts_parole_profile.pdf [https://perma.cc/N2FU-798F].

[16] Watts et al., *supra* note 15.

[17] *Id*.

Massachusetts Parole Board no longer fulfills this function. The current structure of the Massachusetts Parole Board was created in 1955.[18]

Massachusetts has the lowest incarceration rate of any state in the country,[19] and although it is still substantially higher than the incarceration rate of other democracies,[20] the low incarceration rate and appetite for reform is a point of pride for many legislators and policymakers.[21] However, this low incarceration rate has at times allowed problematic realities to go unaddressed for far too long. For example, despite low overall numbers, Massachusetts has substantial racial disparities at every level of the criminal legal system, from charging, to sentencing, and beyond.[22] Of course, the scope of this paper makes us primarily concerned with unaddressed problems in the parole system.

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[18] *Id.*

[19] *State-by-State Data*, THE SENT'G PROJECT, https://www.sentencingproject.org/the-facts/#rankings [https://perma.cc/PFU3-NSEM].

[20] *Massachusetts Profile*, PRISON POL'Y INITIATIVE, http://www.prisonpolicy.org/profiles/MA.html#:~:text=Massachusetts%20has%20an%20incarceration%20rate,almost%20any%20democracy%20on%20earth [https://perma.cc/NW2Y-EHQY] (note that this graph shows numbers of individuals under some kind of state supervision and also includes people on parole. The population in prisons is 133 per 100,000, *State-by-State Data*, *supra* note 19, which still places Massachusetts' incarceration rate above that of the other democracies shown on the graph).

[21] *See, e.g.*, Dartunorro Clark, *Massachusetts Has a Blueprint for What's Next in Criminal Justice Reform*, NBC NEWS (Dec. 24, 2019, 2:00 AM) https://www.nbcnews.com/politics/politics-news/massachusetts-has-blueprint-what-s-next-criminal-justice-reform-n1105911 [https://perma.cc/KE3E-KPYL]; Bob Salsberg, *Massachusetts Legislators Back Revamp of State's Criminal Justice Laws*, BOSTON.COM (Apr. 4, 2018), https://www.boston.com/news/local-news/2018/04/04/massachusetts-legislators-back-revamp-of-states-criminal-justice-laws/ [https://perma.cc/CW8X-9JW9].

[22] ELIZABETH TSAI BISHOP ET AL., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM, THE CRIM. JUST. POL'Y PROG. AT HARV. L. SCH. 41 (Sept. 2020), https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf [https://perma.cc/K88V-VT2K]. This study documented racial disparities not only in charging and sentencing, but also in the use of less severe pretrial dispositions, *id.* at 1, likelihood of incarceration for drug or weapons charges, *id.* at 2, imposition of cash bail, *id.* at 23, and even showed racial disparities in sentencing for crimes that carry statutory minimums, *id.* at 52–55.

The Massachusetts Parole Board is statutorily required to be composed of seven members appointed by the governor who are

> graduates of an accredited four-year college or university and . . . have had at least five years of training and experience in one or more of the following fields: parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology and social work; provided, however, that the panel may, by unanimous vote, submit the name of a person who has demonstrated exceptional qualifications and aptitude for carrying out the duties required of a parole board member, if such person substantially, although not precisely, meets the above qualifications.[23]

The Board's stated mission is "to promote public safety through supervised, conditional release of people who are incarcerated to the community, so that a successful transition from confinement to discharge from parole provides a basis for continued responsible conduct."[24] The members of the Board decide whether individuals eligible for parole are released or returned to prison. It is a weighty decision; one that would hopefully be accompanied by thoughtful deliberation.

When discussing parole grants, this paper will focus specifically on individuals seeking parole on second-degree life sentences, or second-degree "lifers," for two main reasons. First, documentation in these cases is readily available, as the Massachusetts Parole Board posts its second-degree lifer decisions in full on its website.[25] Second, people in these proceedings have a uniquely large stake in them: their only path out of lifetime incarceration is successfully convincing the Board they ought to be released.

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[23] MASS. GEN. LAWS ANN. ch. 27 § 4 (West 2014).
[24] *See About Us*, MASS.GOV, https://www.mass.gov/orgs/massachusetts-parole-board [https://perma.cc/C28U-RFC6].
[25] *See Parole Records and Hearings*, MASS.GOV, https://www.mass.gov/parole-records-and-hearings [https://perma.cc/8XEA-QHWY].

Individuals who are convicted of second-degree life sentences in Massachusetts are typically eligible for parole after fifteen years, and, if denied, are eligible for another parole hearing in no more than five years,[26] a period typically referred to as a "setback." The statutory guidance on parole manages to be verbose while saying nothing at all. Parole may be granted where:

> [T]he board is of the opinion, after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society.[27]

The Board is required to provide a "summary statement of the case indicating the reasons for the decision."[28]

The history of parole and other forms of supervised release in Massachusetts must be considered in context. Massachusetts has had two particularly high-profile cases of violent crimes committed by individuals on supervised release, which shifted the culture of parole in the state: William Horton's alleged attack on a couple in 1987,[29] and Dominic Cinelli's shooting of a police officer in 2010.[30]

In 1988, as George H.W. Bush ran against Massachusetts Governor Michael Dukakis for the presidency, an ad focused on a man named

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[26] MASS. GEN. LAWS ANN. ch. 127 § 133A (West 2018).
[27] MASS. GEN. LAWS ANN. ch. 127 § 130 (West 2019).
[28] *Id.*
[29] *See generally* Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), https://www.themarshallproject.org/2015/05/13/willie-horton-revisited [https://perma.cc/MP6Y-3KAG].
[30] *See* Maria Cramer & Jonathan Saltzman, *'09 Parole of Officer's Killer gets Hard Look*, BOSTON GLOBE (Dec. 29, 2010), http://archive.boston.com/news/local/massachusetts/articles/2010/12/29/parole_of_killer_scrutinized_after_he_guns_down_officer/ [https://perma.cc/AJP9-C8TW].

William Horton[31] was released in support of the Bush campaign.[32] The advertisement showed a photo of Mr. Horton, a Black man, taken recently after he was released from solitary confinement, and used a voiceover to narrate the rape and stabbing he allegedly committed against a white couple while he was released from prison on a weekend furlough program.[33] At the time of his furlough, Mr. Horton was incarcerated on a first-degree murder charge.[34] George H.W. Bush and his advisers discussed Mr. Horton relentlessly on the campaign trail, attempting (and succeeding) to paint Mr. Dukakis as soft on crime,[35] and playing into extremely racist, violent narratives about which members of society are criminals or dangerous to society as a whole.[36]

Although Mr. Horton was on a weekend furlough program, as opposed to paroled, it would be impossible to write a paper on the history of supervised release in Massachusetts—or indeed, in the country—without discussing a

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[31] Although the case and advertisement are commonly referred to as the "Willie" Horton case and ad, Mr. Horton has reportedly stated that he never used the nickname and publicizing it was an attempt to further racialize the crime. *See* Roberto Ortiz, *Revisiting "Willie" Horton: Assessing the Horton Advertisement's Impact on the Incarceration of Black People*, THE CLASSIC J. (Dec. 6, 2021), https://theclassicjournal.uga.edu/index.php/2021/12/06/revisiting-willie-horton/ [https://perma.cc/R7ZK-6JP7].

[32] *See, e.g.*, *George Bush and Willie Horton*, N.Y. TIMES (Nov. 4, 1988), https://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html [https://perma.cc/23SP-D8K5].

[33] Schwartzapfel & Keller, *supra* note 29.

[34] *Id.*

[35] *See, e.g.*, Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html [https://perma.cc/N7NW-QTZ6]; WILLIE HORTON'S SHADOW: CLEMENCY IN MASSACHUSETTS, N.Y.U. L. STATE CLEMENCY PROJECT, https://www.law.nyu.edu/sites/default/files/CACL Clemency MA___June 3%2C 2019 Accessible.pdf [https://perma.cc/P2PQ-78ZD].

[36] *See* Rachel Withers, *George H.W. Bush's "Willie Horton" Ad will Always be the Reference Point for Dog-Whistle Racism*, Vox (Dec. 1, 2018), https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics [https://perma.cc/2DBK-LHBM].

case that "has loomed over any conversation about sentencing reform for over 30 years," per Senator Dick Durbin.[37] The Horton case, and the political impacts of campaigning focused upon it, not only had an effect on the election, it had a profound effect on parole grants in Massachusetts. In 1980, about 80% of parole-eligible individuals were released to parole supervision; in 2002, this number had dropped to 33%.[38]

The Horton case and campaign ad are commonly cited as a pivotal moment in American penal system reform, or lack thereof. After the campaign, "a dozen states eliminated parole . . . [w]ork release, commutations, conjugal visits, furloughs . . . all were eliminated or severely curtailed."[39] Commenters connect the success of the Horton ad and its racist undertones to the "tough on crime" campaigning and legislation pursued by candidates across the aisle for decades, up to and including today.[40]

In 2009, as the shadow of the Horton case was arguably fading, Dominic Cinelli, a fifty-seven-year-old white man, was released on parole by the Massachusetts Parole Board after serving thirty-two years in prison for a second-degree murder conviction.[41] Less than two years later, Mr. Cinelli attempted to rob a department store and killed Woburn police officer John Maguire during a subsequent shootout with police that resulted in Mr. Cinelli's death.[42]

Backlash to parole generally, and the Board specifically, was widespread in Massachusetts, driven in large part by the details of the crime and public

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[37] Schwartzapfel & Keller, *supra* note 29.

[38] LISA BROOKS ET AL., *PRISONER REENTRY IN MASSACHUSETTS*, URB. INST. JUST. POL'Y CTR. 15 (Mar. 2005), https://www.urban.org/sites/default/files/publication/51816/411167-Prisoner-Reentry-in-Massachusetts.PDF [https://perma.cc/LZ6Q-9E7H]

[39] Schwartzapfel & Keller, *supra* note 29.

[40] *The Campaign Ad that Reshaped Criminal Justice*, WNYC STUDIOS (May 18, 2015), https://www.wnycstudios.org/podcasts/takeaway/segments/crime-reshaped-criminal-justice [https://perma.cc/4GCT-5Z7E].

[41] *See* Cramer & Saltzman, *supra* note 30.

[42] *Id.*

anger and condemnation from law enforcement. The headlines almost wrote themselves; years after the fact, Fox News declared Cinelli a "career criminal" and pinned the blame for the murder firmly on the Board.[43] A bipartisan group of state senators introduced a bill that would have required at least three members of the Board to have five or more years of law enforcement experience.[44] Another group of lawmakers used the backlash to push "Melissa's Bill," proposed legislation that altered the parole board appointment process and included a three-strikes provision requiring maximum sentences for repeat offenders, out of committee, where it had been languishing for more than a decade.[45] The crime bill was signed into law by then-Governor Deval Patrick in 2012 as "An Act Relative to Sentencing and Improving Law Enforcement Tools."[46] Though the law is still in effect, its impact has been curtailed somewhat by a Massachusetts Supreme Judicial Court ruling that found its key provision to be ambiguous enough to let judges sentence individuals to probation, as opposed to the maximum jail term.[47]

In the aftermath of the Cinelli murder, Governor Patrick, a Democrat, privately "assured board members they had done nothing wrong . . . urg[ing] them to cooperate with investigators from his office, who ultimately blamed inadequate supervision by Cinelli's parole officer" for

[43] *Massachusetts Cop was Killed by Career Criminal Out on Parole Despite Three Life Sentences*, FOX NEWS (Nov. 28, 2015), https://www.foxnews.com/us/massachusetts-cop-was-killed-by-career-criminal-out-on-parole-despite-three-life-sentences [https://perma.cc/ML5T-46VK].

[44] John Gramlich, *Massachusetts Killing Shines Light on State Parole Boards*, PEW (Feb. 2, 2011), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2011/02/02/massachusetts-killing-shines-light-on-state-parole-boards [https://perma.cc/74HE-9J8T].

[45] Lisa Tobin, *A Renewed Interest in Strict Parole Bill after Officer's Death*, WBUR (Feb. 10, 2011), https://www.wbur.org/news/2011/02/10/parole [https://perma.cc/7K57-EZKD].

[46] *Gov. Patrick Signs 'Three Strikes' Crime Bill Into Law*, CBS BOSTON (Aug. 2, 2012), https://boston.cbslocal.com/2012/08/02/gov-patrick-signs-three-strikes-crime-bill-into-law/ [https://perma.cc/YNR5-8REG]; 2012 Mass. Acts ch. 192.

[47] *See* Commonwealth v. Montarvo, 159 N.E.3d 682 (Mass. 2020).

the shooting.[48] But then, perhaps remembering the political repercussions faced by his predecessor Governor Dukakis, Governor Patrick declared he had "lost confidence in parole"[49] and accepted—or demanded[50]—the resignations of the Board members who had voted to parole Mr. Cinelli.[51]

The newly appointed Board was led by longtime prosecutor Josh Wall, who took over as chairman in the wake of the resignations.[52] The new Board apparently understood what the governor and the public seemed to want from them: no parole. The year before Officer Maguire was killed, the parole grant rate was 42%—still lower than the pre-Horton years, but significantly higher than the years immediately following.[53] The year after the shooting, the grant rate dropped to 26%.[54] All of this happened despite the fact that the Massachusetts parole system was strikingly successful in

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[48] Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html [https://perma.cc/F6DY-JJ7Nl]; for the conclusions of the government investigators in full, *see* Memo from John A. Grossman and Sandra McCroom, Undersecretaries of the Mass. Exec. Off. of Pub. Safety and Sec., to Mary Beth Heffernan, Secretary of the Mass. Exec. Off. of Pub. Safety and Sec. (Jan. 12, 2011), https://www.scribd.com/doc/46819608/Patrick-Administration-Review-Of-Cinelli-Parole# [https://perma.cc/9WNN-K56B].

[49] Jonathan Saltzman, *Patrick Overhauls Parole*, BOSTON GLOBE (Jan. 14, 2011), http://archive.boston.com/news/politics/articles/2011/01/14/five_out_as_governor_overhauls_parole_board/ [https://perma.cc/MZK9-B7VG].

[50] Schwartzapfel, *supra* note 48 ("Still, when board members arrived at work days later, armed troopers escorted them to a conference room where they found Mo Cowan, the governor's chief of staff, distributing resignation letters, according to a wrongful-termination lawsuit filed by one of the board members. Patrick still believed they had done nothing wrong, Cowan told them, but he was asking the entire board to resign nonetheless.")

[51] Abby Goodnough, *5 on Parole Board Resign in Wake of Officer's Death*, N.Y. TIMES (Jan. 13, 2011), https://www.nytimes.com/2011/01/14/us/14parole.html [https://perma.cc/F4TK-AMJC].

[52] Jean Trounstine, *Patrick's Folly*, BOSTON MAGAZINE (July 18, 2011), https://www.bostonmagazine.com/2011/07/18/patricks-folly-parole-reform-in-massachusetts/ [https://perma.cc/QZJ2-XZ6N].

[53] Schwartzapfel, *supra* note 48.

[54] *Id.*

the years leading up to Mr. Cinelli's release; at the time, 76% of individuals on parole supervision completed their parole without re-incarceration, compared to a national average of 49%.[55] The backlash to Mr. Cinelli's release is mirrored across the country in the rare cases when paroled individuals re-offend violently: "in many states, parole boards are so deeply cautious about releasing prisoners who could come back to haunt them that they release only a small fraction of those eligible—and almost none who have committed violent offenses, even those who pose little danger and whom a judge clearly intended to go free."[56]

Extreme fluctuations in parole access after public outcry or political pressure are possible because Massachusetts does not have robust case law or statutory requirements governing the circumstances in which the Board must, or even ought to, grant parole.[57] The 2012 crime bill discussed above included a provision requiring the Board to use a risk and needs assessment when making parole determinations.[58] The statute also points to considerations like participation in risk-reduction programs and behavior while incarcerated to determine whether an individual ought to be paroled, but the only truly mandatory guidance to the Board appears at the very beginning of the statute: a requirement that "[n]o prisoner shall be granted a parole permit merely as a reward for good conduct."[59]

The immense discretion granted to the Board and lack of published criteria considered in parole determinations has led to a system where critics may—and do—reasonably accuse the Board of "making decisions

[55] Trounstine, *supra* note 52.
[56] Beth Schwartzapfel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015, 2:15 PM), https://www.themarshallproject.org/2015/07/10/life-without-parole [https://perma.cc/WM9E-F4UU].
[57] *See generally Parole*, PRISONERS' LEGAL SERV. OF MASS., https://plsma.org/find-help/parole/ [https://perma.cc/AW2G-44AG] (outlining the thin statutory scheme governing parole in Massachusetts and highlighting the Board's "considerable discretion").
[58] Watts et al., *supra* note 15, at 5; MASS. GEN. LAWS ANN. ch. 127 § 130 (West 2019).
[59] MASS. GEN. LAWS ANN. ch. 127 § 130 (West 2019).

based on gut feeling."[60] The available data indicates that, at least where individuals serving second-degree life sentences appear in front of the Board, this assessment may be correct. Where the Board has changed its mind and granted parole to an individual after previously denying them parole, the data shows its professed reasoning is demonstrably inconsistent in a substantial minority of cases.

II. DATA SET

Massachusetts State parole decisions are statutorily required to be publicly available, with any necessarily confidential information redacted.[61] Decisions made in second-degree life sentence cases are posted in their entirety on the Board's website; records in other parole cases may be requested as public record.[62] The Massachusetts Parole Board releases annual statistical reports that outline percentages of grants in both second-degree life hearings and all other hearings and do cursory analysis of the aggregated data.[63] This section will discuss a data set built from examining the publicly available written decisions from cases involving 107 individuals in lifer hearings.

Because the Board posts lifer decisions in their entirety without requiring an additional records request, more thorough, disaggregated data exists about lifer hearings than about parole hearings for individuals with shorter sentences. This paper does not contend that any of the data and analysis from lifer hearings may be extrapolated to decisions in non-lifer hearings, though troubling trends in lifer hearings and parole ought to give rise to increased scrutiny on all parole decisions in Massachusetts.

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[60] Jean Trounstine, *The Massachusetts Parole Board has a Transparency Problem*, DIG BOSTON (Dec. 16, 2021), https://digboston.com/the-massachusetts-parole-board-has-a-transparency-problem/ [https://perma.cc/GX8D-3SN8].

[61] MASS. GEN. LAWS ANN. ch. 127 § 130 (West 2019).

[62] *See Parole Records and Hearings*, MASS.GOV, https://www.mass.gov/parole-records-and-hearings [https://perma.cc/8XEA-QHWY].

[63] *See* MASS. PAROLE BD. 2020 ANN. STAT. REPORT, MASS. PAROLE BD. (2020).

The Norfolk Lifers' Group, a group of men incarcerated at the Massachusetts Correction Institution (MCI) at Norfolk, uses the publicly available record of decisions in second-degree life sentence cases to release annual statistical reports that provide more in-depth analysis of reasoning in grants and denials.[64] The Norfolk Lifers' Group performs both quantitative and qualitative analysis of the Parole Board's decisions in lifer cases but does not perform longitudinal analysis of individual cases.[65] This paper leans heavily on the work of the Norfolk Lifers' Group and attempts to supplement their work by examining longitudinal trends across individual cases.

This paper attempts to determine whether the Board is, as has been suggested, making decisions based on gut feeling. It evaluates, side-by-side, the Board's stated reasoning in denying parole with its stated reasoning in granting parole to that same person after a setback. If the Board is evaluating parole petitions based on some set of standards, one would expect that the individual demonstrated some kind of recommended growth during their setback. If the Board is evaluating parole petitions by the seat of its pants, one would expect many individuals to receive different parole outcomes despite presenting extremely similar cases.

Given the Board's near-limitless discretion in granting parole, it is extremely difficult to determine when an individual "should" have received a parole grant. In many ways, the Board is only accountable to itself, especially when issuing a *denial* and precluding the possibility of a violent recidivist crime committed by an individual released on parole. However, the Board must "consider carefully and thoroughly the merits" of every case where an individual serving a second-degree life sentence is eligible for parole,[66] and they must provide a "summary statement of the case indicating

[64] *See generally* HAAS, *supra* note 3.
[65] *See generally id*.
[66] MASS. GEN. LAWS ANN. ch. 127 § 130 (West 2019).

the reasons for the decision."[67] These statements of reasoning contain very general, boilerplate language (and are sometimes *exclusively* boilerplate language), allowing the Norfolk Lifers' Group to tabulate how often particular reasons are given.[68] As noted in the introduction, in 2019, almost 96% of parole denials claimed that parole was denied at least in part because their release would be "incompatible with the welfare of society."[69]

This section examines a set of longitudinal decisions by the Board for internal consistency, or lack thereof, hoping to gain insight into the Board's thought process. Twenty of the 107 cases examined, or 18.7%, were internally inconsistent.

The data set only examines cases that were for initial grants of parole, as opposed to decisions in parole revocation or rescission hearings, to focus specifically on how the Board was conceptualizing rehabilitation while incarcerated. Additionally, to evaluate potential inconsistency, the data set needs multiple data points. Thus, it only consists of cases where an individual had been *denied* parole at least once before being *granted* parole at a subsequent hearing, excluding grants of parole given at initial hearings.[70] It is also important to note that, during 2020 and 2021, the Board sometimes issued abbreviated decisions due to COVID-19.[71] Where the abbreviated decision did not include *any* discussion of reasoning, it was marked as internally consistent, to avoid overreporting internal inconsistency.

To assess its internal consistency, the Massachusetts Parole Board's rationales for denying parole were compared to those given for granting

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[67] MASS. GEN. LAWS ANN. ch. 127 § 130 (West 2019).
[68] HAAS, *supra* note 3, at 8–9.
[69] *Id.* at 9.
[70] From 2016–2020, only about 10% of initial hearing resulted in a grant of parole, so these excluded grants are a very small subgroup of parole grants. *See* HAAS, *supra* note 3, at 4. It is unclear why the Board is so reluctant to grant parole at an initial hearing.
[71] *See* HAAS, *supra* note 3, at 1–2.

parole to the same individual after a setback. Decisions were considered internally inconsistent if any of the following occurred:

(i) the reasoning given for granting parole was already true at the time of the individual's last denial;

(ii) the Board based the grant of parole on completing specific programs they had recommended, but no such programs were recommended at the last denial; or

(iii) the Board provided a specific reason for denying parole but failed to address that reason at all when granting parole at the subsequent hearing.

For example, in 2021, the Board granted parole to Edward Alicea, supposedly because "[h]e ha[d] completed extensive rehabilitative programming to address need areas." [72] According to the Board, "Many of these programs were recommended by the Board in its prior decision."[73] But the 2021 decision fails to point to any specific programs. In Mr. Alicea's 2017 parole decision—his initial hearing, meaning it was his first and only other time appearing before the Board—the Board not only documented extensive programming already completed, but it also did not recommend a single specific program for Mr. Alicea to complete.[74] This decision is classified as internally inconsistent based on factor (2). [75]

In 2019, the Board granted parole to Hector Custodio. The decision justified his grant in part because "Mr. Custodio ha[d] participated in many programs, including Environmental Companion Program, CRA

[72] Record of Decision in the Matter of Edward Alicea, MASS. PAROLE BD. (Nov. 15, 2021), https://www.mass.gov/doc/edward-alicea-life-sentence-decision-november-15-2021/download [perma.cc/VKC7-S47B].

[73] *Id.*

[74] Decision in the Matter of Edward Alicea, MASS. PAROLE BD. (Mar. 23, 2020), https://www.mass.gov/doc/edward-alicea-life-sentence-decision/download [https://perma.cc/3KQP-E9XL].

[75] These examples are pulled from decisions in the public record and used without the consent of the individuals whose parole hearings are referenced and without discussing the decisions with the individuals whose parole hearings are referenced, with my apologies.

[Correctional Recovery Academy], and Community Outreach. . . Mr. Custodio attends AA [Alcoholics Anonymous] and NA [Narcotics Anonymous] regularly. He earned his GED in 2012 and recently completed Alternatives to Violence, Cognitive Thinking, and the General Maintenance program . . . he works in the kitchen . . . previously, he was a cleaner and a runner."[76] This reasoning seems thorough and well-considered—until reading Mr. Custodio's 2017 denial decision. In 2017, the Board acknowledged that Mr. Custodio had completed "Environmental Companion Program, CRA, Community Outreach, etc." and based its denial on "a lack of candor" when Mr. Custodio discussed the governing offense,[77] something not discussed at all in Mr. Custodio's 2019 grant decision. This decision is classified as internally inconsistent based on factors (1) and (3).

Using internal consistency as a measure is not a foolproof way of determining whether the parole board is meticulously and exhaustively assessing all grants and denials. It is highly probable that this measure is incomplete, as a significant number of the reasons for the denial are too unclear to definitively state that they are inconsistent with eventual grants. For example, the Board denied parole to several individuals in the data set because they needed "a longer period of positive adjustment."[78] Of course, *any* future parole grant would be consistent with this justification, as long as the individual did not have some kind of regression.

One in five individuals granted parole at a lifer review hearing had a grant that was inconsistent with the justification of their last denial. All of these individuals served additional years in prison. They presumably spent

[76] Decision in the Matter of Hector Custodio, MASS. PAROLE BD. (Feb. 18, 2020), https://www.mass.gov/doc/hector-custodio-life-sentence-decision-2/download [https://perma.cc/AJK2-PJRQ].
[77] Decision in the Matter of Hector Custodio, MASS. PAROLE BD. (Aug. 7, 2017), https://www.mass.gov/doc/hector-custodio-life-sentence-decision-0/download [https://perma.cc/XJV2-L5B5].
[78] *See* HAAS, *supra* note 3, at 8–9.

their setback trying to maximize their future chances at parole, without knowing they would be granted parole based on things that were already true at their prior hearing, or that they had been denied parole based on factors the Board did not even deem important enough to mention the next time they appeared. This is troubling for a variety of reasons, discussed in detail in the following section.

III. WHY DOES THIS MATTER?

The most important troubling aspect of this data is that every setback costs individuals years of their lives. Setbacks return people to incarceration despite their potential eligibility for release. The twenty "inconsistent" denials in the data set resulted in a cumulative sixty-three years of setbacks. But the reality of these numbers ought to give pause for many other reasons as well, which this section will explain.

A. Legitimacy and Legality

The Massachusetts Parole Board's inconsistent and unpredictable decisions are almost certainly legal under the current statutory scheme, but this may soon change, either statutorily, due to advocacy for presumptive parole, or caselaw built by consistent challenges to the Board's decisions. Regardless, the Board's legitimacy suffers substantially from its inconsistency, with stakeholders ranging from people who are incarcerated and their families, to attorneys, to lawmakers. The Board is a body that is subject to very little formal statutory oversight and guidance but incredibly susceptible to public pressure, as discussed above. It is important that its decisions be viewed as legitimate, and the current reality means that they are not.

1. Legal Framework

In 1979, the Supreme Court decided *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,[79] a Fourteenth Amendment due process case brought by four individuals who had been denied parole in Nebraska. The Nebraska statute governing their parole proceedings "provid[ed] that the Board 'shall' order an inmate's release unless it conclude[d] that his release should be deferred for at least one of four specified reasons."[80] The crucial issue of the case was whether the incarcerated men could invoke Fourteenth Amendment due process at all, as the protection only "applies when government action deprives a person of liberty or property [and] . . . There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[81] Nebraska argued that the due process protections did not apply to the parole proceedings because the incarcerated men did not have a liberty interest, just "a mere hope that the benefit [of parole] will be obtained."[82]

The Court ultimately held that the existence of a parole scheme in and of itself did not create a protected liberty interest, but that the specific statutory language of the Nebraska statute had created a presumption of parole, enough of a liberty interest to provide "some measure of constitutional protection"[83] in the proceeding.

Both state[84] and federal[85] appellate courts have held the Massachusetts parole statute does *not* create a presumption of parole, making it almost impossible to challenge Board decisions on due process grounds.

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[79] Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1 (1979).
[80] *Id*. at 1 (quotations in original).
[81] *Id.* at 7.
[82] *Id.* at 10 (internal citation omitted).
[83] *Id.* at 12.
[84] *See, e.g.*, Commonwealth v. Hogan, 456 N.E.2d 1162, 1166 (Mass. App. Ct. 1983) ("The applicable Massachusetts statutes do not contain any language similar to that in the Nebraska statute that the Supreme Court scrutinized in *Greenholtz.* General Laws c. 127, § 133, does not create an expectation of parole or parole eligibility but provides only that "[p]arole permits *may* be granted by the parole board to prisoners" (emphasis supplied)

Although the Massachusetts statute does not create a presumption of parole allowing for constitutional challenges, Massachusetts courts have held that Board decisions are subject to "the arbitrary and capricious standard of review." [86] Thus, judicial oversight of Board decisions is appropriate where a decision "lacks any rational explanation that reasonable persons might support."[87] This is an extremely high standard, and Massachusetts courts have sometimes expressed concern about the Board's decisions without finding they meet the arbitrary and capricious standard.

For example, in 2020, the Supreme Judicial Court of Massachusetts urged the Board "to articulate the reasons and evidence"[88] they relied upon in making their decision to deny parole contrary to the recommendation of experts who submitted testimony. The concurrence went further, urging that the Board be required to submit more thorough decisions and reasoning in parole denials, specifically in cases where individuals were convicted as juveniles.[89]

More notably, in December 2021, a Massachusetts Superior Court found that the Board had made an arbitrary and capricious decision when they

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who have met the requisite conditions, i.e., who have served at least two-thirds of the minimum sentence on a kidnapping conviction. Although § 133 defines when a prisoner becomes eligible for parole, there is no requirement that he must be eligible for parole at some time during his imprisonment; parole is at the discretion of the parole board.")

[85] *See, e.g.*, Jimenez v. Conrad, 678 F.3d 44, 46 (1st Cir. 2012) ("The claim fails because the due process guarantee protects only against deprivations of life, liberty, or property, and the law has been settled for over thirty years that a convict has no liberty interest in being paroled unless the statute providing eligibility to seek parole is so phrased as to create a positive entitlement if statutory conditions are met. The Massachusetts statute raises no such expectation.") (internal citation omitted).

[86] *See* Doucette v. Mass. Parole Bd., 18 N.E.3d 1096, 1105 (Mass. App. Ct. 2014).

[87] *See* Doe v. Superintendent of Schs. of Stoughton, 767 N.E.2d 1054, 1058 (Mass. 2002).

[88] *See* Deal v. Mass. Parole Bd., 484 N.E.3d 77, 84 (Mass. 2020).

[89] *Id.* at 85 ("I conclude that the only way we can ensure that the board did not abuse that the board did not abuse its discretion is to require the board to show through its findings that it gave meaningful individualized consideration to these attributes of youth in reaching its decision.").

denied parole to Rolando Jimenez.[90] The Board's decision was based entirely on concerns about Mr. Jimenez's "lack of candor" at previous parole hearings (without detailing the troubling testimony or conduct) and other boilerplate language.[91] The Superior Court remanded back to the Board for a further hearing and updated decision, "because there is nothing that allows plaintiff to know, or for the court reasonably to evaluate, whether the Parole Board abused its discretion."[92] The Superior Court specifically identified the Board's use of boilerplate language as insufficient to provide a valid explanation of Mr. Jimenez's parole denial.[93]

B. Punishment Theory

Another concern raised by the Board's inconsistent grants and denials is its total disregard for punishment theory. The modern Massachusetts Advisory Sentencing Guidelines state that the purposes of the Massachusetts criminal legal system "include deterrence, public protection, retribution, and rehabilitation."[94] As discussed in Section I(A), parole developed in large part as a response to increased emphasis on punishment theory in the carceral system, specifically on the theory of rehabilitation. Both at the state level and nationally, the Board's failure to engage with individuals' rehabilitation and instead hand down setbacks for no reason runs directly counter to the theory on which the Board was founded. The Massachusetts Parole Board is inconsistent and cursory in its evaluation of individuals' progress towards rehabilitation while incarcerated. This reality

[90] *See* MEMORANDUM AND ORDER ON MOTION FOR JUDGMENT OF THE PLEADINGS, ROLANDO JIMENEZ V. MASS. PAROLE BD., MASS. SUPER. CT, (Dec. 21, 2021), https://drive.google.com/file/d/1ixhmbttCMmlTvoq_8WSt9P_9VdfTk8Ms/view [https://perma.cc/6GKH-Q32B].
[91] *Id*. at 3–6.
[92] *Id.* at 7.
[93] *Id.*
[94] *See* ADVISORY SENTENCING GUIDELINES, MASS. SENT'G COMM'N 102 (Nov. 2017), https://ww.mass.gov/doc/advisory-sentencing-guidelines/download [https://perma.cc/FAU3-8U2T].

directly undermines the purpose of the parole system as it has been understood since the time of its inception, as well as the purpose of the broader state criminal legal system.

1. Mass Incarceration

As noted above, although Massachusetts has a comparatively low incarceration rate within the United States, "it still imprisons more people than almost every other country in the world, with the exception of seven (Cuba, Rwanda, Russia, El Salvador, Azerbaijan, Panama, and Thailand)."[95] Even without international comparisons, it is troubling and important to note that Massachusetts prison spending increased by 25% in the past decade,[96] and prison populations rose in 2020 despite the pandemic.[97] Massachusetts residents and politicians have an appetite for continuing to reduce prison population in the state; for example, bills are currently pending at the Massachusetts State House that create a moratorium on new prison construction,[98] that end the practice of sentencing individuals to life without parole,[99] and that restructure parole supervision.[100] Advocacy to end life without parole in the state specifically gives rise to additional concerns about the Board's decision-making process.[101] If parole grants are inherently unpredictable, often inconsistent,

[95] *See* MASS INCARCERATION IN MASSACHUSETTS, ARTSEMERSON (Oct. 4, 2018), https://artsemerson.org/2018/10/04/mass-incarceration-in-massachusetts/ [https://perma.cc/5NM6-BCY5].
[96] *See* Ben Forman & Michael Widmer, *Revisiting Correctional Expenditure Trends in Massachusetts*, MASSINC (May 2018), https://massinc.org/wp-content/uploads/2018/05/Revisiting-Correctional-Expenditure-Trends-in-Massachusetts.pdf [https://perma.cc/TK88-WLBU].
[97] *See* Deborah Becker, *Massachusetts Incarceration Numbers Rise, After Steep Drop*, WBUR (Feb. 2, 2021), https://www.wbur.org/news/2021/02/02/massachusetts-jail-prison-population-pandemic-decline-rebound [https://perma.cc/D37Z-WNMF].
[98] *See* Mass. S. 2030, 192nd Gen. Ct. of the Commonwealth of Mass. (2022).
[99] *Id.* at 1797.
[100] *Id.* at 1600.
[101] *See* Chris Lisinski, *Mass. Lawmakers Consider Bill Ending Sentences of Life Without Parole*, NBC BOSTON (Oct. 5, 2021), https://www.nbcboston.com/news/politics/mass-

and seemingly unconnected from actual evidence of rehabilitation, ending life without parole will be a hollow victory.

2. Racism

Concerns about mass incarceration cannot be separated from concerns about racism in the criminal legal system, in Massachusetts and in the nation. In 2020, the Massachusetts Legislature created a Special Commission on Structural Racism in the Massachusetts Parole Process, which was tasked to "make an investigation and study into disparate treatment of persons of color in the parole process and determine the role of structural racism in those disparities."[102]

The Commission was created at least in part as a response to a 2020 Harvard Law School report that found far-reaching structural racism in the Massachusetts criminal legal system, specifically in sentencing.[103] The study found that "people of color are more likely to serve longer sentences, even after accounting for criminal history, demographics, initial charge severity, court jurisdiction, and neighborhood characteristics. Initial sentencing determines a person's parole eligibility date, demonstrating that people of color are likely at a disadvantage in parole eligibility as a result."[104]

Black and Hispanic/Latinx individuals only make up about 21% of the Massachusetts general population, while they made up 55% of the prison population in 2020.[105] Although Black, Hispanic/Latinx, and white

lawmakers-consider-bill-ending-sentences-of-life-without-parole/2509165/; *What is CELWOP?*, CAMPAIGN TO END LIFE WITHOUT PAROLE, https://www.celwop.org/ [https://perma.cc/PRR8-8GNW].

[102] *See* MASS. GEN. LAWS ch. 253 § 111 (West 2020).

[103] BISHOP ET AL., *supra* note 22.

[104] *See* SPECIAL COMMISSION ON STRUCTURAL RACISM IN THE MASSACHUSETTS PAROLE PROCESS, FINAL REPORT 13 (Dec. 2021).

[105] *Id.* at 14.

individuals receive parole grants with similar frequency,[106] the dramatic overrepresentation of Black and Hispanic/Latinx individuals at every level of the Massachusetts criminal legal system makes a race-neutral parole system—particularly an unpredictable and inconsistent one—yet another perpetrator of structural racism.

IV. POTENTIAL REFORM

There is no reform to the parole system that gives back the years Massachusetts citizens have lost to inconsistent and potentially arbitrary and capricious setbacks handed down to them by the Massachusetts Parole Board. While working to ensure people are no longer subject to the racist whims of the criminal legal system, it is imperative to remember that this work comes too late for individuals who are currently incarcerated. The system has stolen years from them.

Moving forward, Massachusetts must make changes to its parole system to prevent more unnecessary loss. To continue working towards decarceration and to combat systemic racism, Massachusetts must establish a system of presumptive parole, where individuals are automatically paroled unless there are demonstrable reasons they ought *not* be, and it must ensure that grants and denials are consistent and based on serious engagement with individual rehabilitation.

A. A Note on Abolition

Before offering suggestions for change, it is important to frame the scope of this paper and its discussion of parole systems and potential changes. As prison abolition becomes more widely discussed and accepted as a serious

[106] *See id.* at 19 (showing that 53% of Black individuals, 58% of Hispanic/Latinx individuals, and 55% of white individuals received parole after their 2020 hearings).

theory of change by mainstream publications and theorists,[107] it would be a mistake to consider parole as separate from the carceral state.

This paper focuses on parole as it is currently implemented in Massachusetts, and ultimately makes recommendations that are immediate and incremental. Parole is, of course, a less-restrictive form of state supervision than active incarceration, and ultimately this paper argues that people should receive parole more often and more predictably. However, this argument is intended as an immediate and incremental reaction to the criminal legal system in its current iteration. In a system where mass incarceration is spiraling out of control and has been for decades, people should receive parole more often and more predictably instead of incarceration. That truth does not negate another: the ultimate goal of reform ought to be eliminating systems that set people up to fail and profit off the deprivation of liberty. Parole is certainly one of these systems.

Nationally, 4.5 million individuals, or one in fifty-five American adults, are on probation or parole, and as in every other level of the criminal legal system, Black people are substantially overrepresented in this restrictive system.[108] Massachusetts, so proud of its low incarceration rate, is thoroughly in the middle of the pack when it comes to parole, with a rate of one in eighty-five residents on parole or probation.[109] Parole and probation are incarceration-lite, and carry substantial risks of returning to full incarceration; in 2015, 25% of individuals newly incarcerated in Massachusetts were jailed due to a probation or parole violation.[110]A recent

[107] *See, e.g.*, Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html. [https://perma.cc/QYE9-2KN4].

[108] *See* PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 6, PEW (Sept. 25, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities [https://perma.cc/XE6K-4ZR5].

[109] *Id.*

[110] *Id.* at 10.

Harvard Kennedy School study declared that "the largest alternative to incarceration in the United States [parole and probation systems] is simultaneously one of the most significant drivers of mass incarceration."[111] Although parole is less restrictive than physical incarceration, it still carries substantial restrictions and a high risk of reincarceration. One must not consider parole as a viable replacement for mass incarceration because parole and probation systems in turn drive mass incarceration.[112] The structural racism of the prison system is not solved by increased parole grants, particularly when those grants might be for indefinite parole, limiting their capacity to live independently until death.

In Massachusetts, anyone granted parole at a lifer hearing is automatically placed on "life parole," meaning they are subject to parole conditions for the rest of their lives.[113] While on parole, individuals may be

[111] Michael Jacobson et al., *Less is More: How Reducing Probation Populations Can Improve Outcomes*, Papers from the Executive Session on Community Corrections at Harv. Kennedy Sch., 6, (Aug. 2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf [https://perma.cc/CUB3-8LGQ].

[112] For more discussion of parole's role in mass incarceration, *see generally, e.g.*, Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887 (2014); Jennifer Miller, *The Endless Trap of American Parole*, WASH. POST (May 24, 2021), https://www.washingtonpost.com/magazine/2021/05/24/moral-outrage-american-parole/ [https://perma.cc/AZ75-UJPG].

[113] 120 Mass. Code Regs. 100.00 (2017) ("For sentences committed on or after July 1, 1994, the parole discharge date is reached by adding the maximum term of the sentence to the sentence effective date and then deducting all earned good time and prison camp deductions while incarcerated from the maximum term of incarceration."). The Board can technically terminate parole early, *see* MASS. GEN. LAWS ch. 127, § 130A (2019) ("The parole board may, by majority vote of all of the members, issue to a parolee under its supervision a certificate of termination of sentence, provided that in the judgment of the board such termination of sentence shall be in the public interest; and provided, further, that in no case will such certificate of termination of sentence be issued unless the parolee has completed at least one year of satisfactory parole ; provided, however, that the parole board, by a majority vote of all its members, may grant a certificate of termination if the parolee has successfully completed the so-called special incarceration boot camp program and subsequently completed at least four months of satisfactory parole"). It is unclear how often—if at all—this early termination is deployed in lifer cases. The Board's Annual Statistical Report only discusses early discharges from parole

subject to things like drug and alcohol testing and GPS monitoring, and violations of parole terms, including non-violent ones, may lead to re-incarceration.[114] In 2020, 454 individuals were re-incarcerated due to parole violations in Massachusetts;[115] the Board does not publish data on whether these violations were non-violent.

An abolitionist lens does not require advocacy for the immediate abolition of any carceral system, including parole. The 1987 Sentencing Commission's recommendations led to the end of parole at the federal system.[116] This led to worse outcomes because the abolition of the system was not accompanied by investment in less carceral solutions. Instead, this abolition increased sentence length,[117] directly contributing to the mass incarceration problem in the United States. This paper suggests the immediate abolition of parole because the current system makes it likely that the abolition of parole would not be accompanied by reduced sentences and social supports or other reforms that would reduce incarceration; parole is, right now, the only widely available pathway for incarcerated individuals to regain some degree of freedom after demonstrating they are rehabilitated. However, suggested reforms ought to be considered within a framework prioritizing moving away from incarceration altogether,[118] through societal restructuring that makes incarceration less and less necessary in the first place.

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in non-lifer cases via a program called "compliance credits" for which lifers are ineligible, or in general terms that are not broken out by governing offense, *see* MASS. PAROLE BD., *supra* note 63, at 8, 29–30, 37–39.

[114] MASS. PAROLE BD. 2020 ANN. STAT. REPORT, *supra* note 63 at 27–29.

[115] *Id.* at 35.

[116] *See* Fulwood, *supra* note 13, at 1–3.

[117] Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 302 (2013).

[118] For more thorough discussions of abolition, *see generally* ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021); ALEX VITALE, THE END OF POLICING (2017).

B. Presumptive Parole

In 2002, a Boston Bar Association task force published a report titled "Parole Practices in Massachusetts and Their Effect on Community Reintegration."[119] Twenty years ago, the task force recommended, among other things, that Massachusetts shift to a system of presumptive parole.[120] Their recommendations remain pertinent today. The most immediate solution to the inconsistent decisions put forth by the Board is a statutory shift to presumptive parole in Massachusetts.

As discussed in Section III(A)(1), where the statutory language used to structure a parole system indicates individuals "shall" be granted parole, there is a presumptive parole system. The use of "shall" creates a liberty interest in a parole grant, as the individuals arguably have a right to parole that is being taken away, as opposed to parole being a privilege.[121] This liberty interest entitles individuals to constitutional due process protections and allows for substantially more judicial oversight in parole proceedings.[122] The fastest way to remedy inconsistent, baseless denials of parole is a one-two punch, first making parole the default, barring explicit, evidence-based justifications to deny, and then making the underlying decision-making process more protective of individuals seeking parole.

Bills shifting the Massachusetts system to presumptive parole were introduced in both the Massachusetts House[123] and Senate[124] the 2022 legislative session but were stalled in committee at the time of writing. This

[119] *Parole Practices in Massachusetts and Their Effect on Community Reintegration*, BOS. BAR ASS'N TASK FORCE ON PAROLE AND CMTY. REINTEGRATION (Aug. 2002), https://static.prisonpolicy.org/scans/FinalReport08-14-02.pdf [https://perma.cc/NA3D-4W3R].
[120] *Id.* at 2, 27.
[121] Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 12 (holding that the Nebraska state statute's use of the word "shall" created enough of a liberty interest to provide "some measure of constitutional protection").
[122] *Id.*
[123] H.B. 2503, 192nd Gen. Court of the Commonwealth of Mass. (Mass. 2022).
[124] S.B. 1560, 192nd Gen. Court of the Commonwealth of Mass. (Mass. 2022).

bill, introduced in both chambers of the Statehouse as "An Act to Promote Equitable Access to Parole," also includes provisions to alter the composition of the Board to reflect more diverse viewpoints and center individuals with professional and lived experience that directly touches on incarceration and parole, *i.e.*, an additional emphasis on psychologists and social workers, as well as a requirement that at least one member of the Board have direct experience with incarceration and parole systems.[125]

This paper's most salient recommendation is increased advocacy and pressure to get this bill, or similar bills that shift to a presumptive parole system, passed in Massachusetts. The data evaluated in Section II of this paper implies that the Board is not—at least not always—engaging seriously with each case in front of them, and is, intentionally or unintentionally, making ultimate decisions about people's freedom based not on a coherent understanding of rehabilitation, but on how they feel that day or month or year. This is compounded by the lack of judicial oversight created by the Massachusetts parole statute, forcing decisions to be incredibly egregious before they can be overturned.[126] The average wait time for a parole decision in a lifer hearing held in 2020 was 225 days.[127] Lest one think this is a product of COVID-19, the average wait time in 2019 was 290 days.[128] The Board has ample time to seriously engage with their decisions, and it is frankly unacceptable that they currently force incarcerated individuals to wait months and months for a decision that provides no insight into the Board's decision. A presumptive parole system

[125] 2021–2022 LEGISLATIVE SESSION FACT SHEET, SUPPORT KEY IMPROVEMENTS TO PAROLE, PRISONERS' LEGAL SERVICES OF MASS.
[126] *See* Commonwealth v. Cole, 468 Mass. 294, 302 (2014) (explaining that parole "is a function of the executive branch of government with which, if otherwise constitutionally exercised, the judiciary must not interfere").
[127] HAAS, *supra* note 3, at 14.
[128] GORDON HAAS & JAMES KEOWN, PAROLE DECISIONS FOR LIFERS FOR THE YEAR 2019 12–13 (Sept. 2020).

ensures that the Board either provides decisions that are actually useful to the individuals they are keeping behind bars, or to release them.

1. Board Composition

Efforts to reform the parole system in Massachusetts have also focused on changing the Board's composition.[129] Although the Board is currently statutorily required to have at least one member with forensic psychology experience,[130] this may be met by the appointment of individuals who have worked in law enforcement. Board membership in Massachusetts has often skewed towards individuals with prosecution and law enforcement experience, as it did in the aftermath of the Cinelli murder, discussed in Section I(B). The current Board website does not have biographies for current members, which is troubling. Providing information about Board members is an extremely low-effort way to increase transparency. However, once one leaves the Board website it is easy to find the relevant information. Out of the six current Board members as of May 6, 2022, five have prosecution, law enforcement (including within the Massachusetts Department of Corrections), and/or victims' services experience.[131] Only

[129] *See* PRISONERS' LEGAL SERVICES OF MASS., *supra* note 125; *see also* BOS. BAR ASS'N TASK FORCE ON PAROLE AND CMTY. REINTEGRATION, *supra* note 119.
[130] MASS. GEN. LAWS ANN. ch. 27 § 4 (West 2014).
[131] *See Governor Baker Appoints Gloriann Moroney as Chair of the Massachusetts Parole Board*, MASS.GOV (Apr. 30, 2019), https://www.mass.gov/news/governor-baker-appoints-gloriann-moroney-as-chair-of-the-massachusetts-parole-board [https://perma.cc/R94P-L2Y6] ("Gloriann Moroney has more than a decade of experience as a prosecutor in the Suffolk County District Attorney's Office[.]"); Dan Ring, *East Longmeadow Resident Sheila Dupre is Poised for Confirmation to the Massachusetts Parole Board*, MASSLIVE (Sept. 28, 2011), https://www.masslive.com/news/2011/09/east_longmeadow_woman_is_poise.html [https://perma.cc/9BYW-YNZ4] ("Gov. Deval L. Patrick's new pick for the state Parole Board appears set to be confirmed next week despite the concerns of a couple of leading advocates for inmate rights. Sheila M. Dupre, 43, of East Longmeadow, currently a deputy director with the Massachusetts Department of Corrections[.]"); *Cohasset Woman Joining Parole Board*, WICKED LOCAL (Mar. 29, 2014), https://www.wickedlocal.com/story/cohasset-mariner/2014/03/29/cohasset-woman-joining-parole-board/37915518007/ [https://perma.cc/S6YY-UYPN] ("Hurley is

one member has experience in criminal defense,[132] and zero of the six members have experience focused specifically on advocacy for individuals who are incarcerated. Although it may seem that Board members whose work focuses on advocacy for individuals who are incarcerated might be biased and ought to be avoided, why would this be any less true for Board members who have experience working in victims' services or law enforcement or prosecution?

Statutory requirements that the Board have at least some members with experience working on behalf of incarcerated individuals can only help the Board be more consistent and thoughtful in its decisions. Note that this statutory requirement can easily come with an equivalent requirement that some number of Board members have experience in law enforcement, prosecution, and/or victims' services, it is likely unnecessary, given how public pressure after high-profile recidivism, like Dominic Cinelli's, and

currently a parole hearing examiner. . . Hurley had been nominated for the parole board once before—by then-Gov. Mitt Romney in 2003. The Governor's Council narrowly rejected her that time, saying she wouldn't add diversity to a board that councilors said was already dominated by members with backgrounds in criminal justice. Councilors who voted against Hurley said the board's makeup was leading to an unnecessarily low number of paroles, and a resulting higher number of offenders returning to prison."); *Governor Baker Nominates Paul G. Pino of North Falmouth as Associate Justice of the District Court and Colette M. Santa of Milford as a Member of the Parole Board* (Oct. 11, 2017), *available at* https://archives.lib.state.ma.us/bitstream/handle/2452/744409/ocn795183245-2017-10-11.pdf?sequence=1&isAllowed=y [https://perma.cc/G9L3-474R] ("Colette Santa's extensive service within the Massachusetts Department of Correction makes her well qualified for a position on the Parole Board[.]"); *Governor Patrick Announces Four Nominees to State Parole Board* (Mar. 4, 2011), *available at* https://archives.lib.state.ma.us/bitstream/handle/2452/125685/ocn795183245-2011-03-04.PDF?sequence=1 [https://perma.cc/BL89-8LUY] ("Dr. Charlene Bonner; forensic psychologist serving the Plymouth County courts and former court psychologist for Middlesex County Juvenile Court; experienced in conducting court-ordered offender evaluations for substance abuse, criminal responsibility, and psychological testing.").

[132] *See* Jean Trounstine, *Meet the Newest Member of the Massachusetts Parole Board: Tonomey Coleman*, BOSTON.COM (Mar. 6, 2013), https://www.bostonmagazine.com/news/2013/03/06/meet-the-new-massachusetts-parole-board-member-tonomey-coleman/ [https://perma.cc/HE7A-99X8] ("The newest member of the Massachusetts Parole Board is defense attorney Tonomey Coleman[.]").

carceral defaults have consistently led to overrepresentation of these groups on the Board.

2. Increased Litigation

Finally, the most immediate route for change is through increased litigation challenging Board decisions as arbitrary and capricious. As discussed in Section III(A), Massachusetts courts are beginning to show an appetite for this type of litigation,[133] and the fastest way to ensure the Board is making decisions thoughtfully and consistently is to give them a headache if they do *not* make decisions thoughtfully and consistently. A presumptive parole system makes this type of litigation more effective because increased judicial protections kick in and denials do not have to rise to the extremely high arbitrary and capricious standard to be invalidated. Presumptive parole is not *necessary* in order to win these cases, however, as indicated by the memorandum order in *Jimenez*.[134] While legislators work to make it easier to win challenges to parole denials, lawyers advocating for the rights of people who are unfairly denied parole *must* work to make the challenges anyway, to minimize harm to individuals currently impacted by the Board's inconsistency.

V. CONCLUSION

Nick was granted parole after the completion of this paper but is still incarcerated; the Board required him to spend time in a minimum-security facility before his release. Both his initial denial in 2020 and his grant in 2022 were one and a half single-sided pages long. His setback was one of the many based on nothing—or at least nothing was articulated to him, or his lawyers, or his community.

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[133] *See* MEMORANDUM AND ORDER ON MOTION FOR JUDGMENT OF THE PLEADINGS, ROLANDO JIMENEZ V. MASS. PAROLE BD., MASS. SUPER. CT (Dec. 21, 2021).
[134] Memorandum and Order on Motion for Judgment of the Pleadings, Jimenez v. Conrad, 678 F.3d 44 (1st Cir. 2012).

What if Nick had been denied again in 2022? Once again, he would have no real recourse. Those two years are gone. To some, this might feel like a small injustice; Nick is serving a life sentence, and a few additional years may not seem like much. But it is. He lost two years on his last setback.

What would Nick have done with all that extra time? While incarcerated, in the years of his setback, he graduated from college, earning a bachelor's degree. Had he been paroled, he still would have gone to school and walked across the stage along with the rest of his classmates. Nick enjoys working out, and he hopes to become a certified personal trainer. There is no certification option in his original prison facility or his current minimum-security facility, pushing back the timeline. He would like to work with the Department of Corrections to bring certification options to the facilities, opening avenues for other incarcerated individuals and giving them more earning potential upon release. Nick was in juvenile detention as a kid, and he had the opportunity to speak to high schoolers through Project Youth, sharing his life experience in the hopes of keeping kids out of the criminal legal system. Who knows how many more lives Nick would have touched in a few more years out of prison? Who knows how much he would have achieved?

There has been plenty of recent public attention on the frustratingly opaque criminal court system and how a lack of transparency can contribute to structural racism. There has been much less public attention on the equally important and equally frustrating parole system. The Massachusetts Parole Board is a beacon of hope to many people who are incarcerated, to their loved ones, and communities. Incarcerated individuals deserve to know how to best earn release and rejoin their communities. They deserve to know why their parole was denied. And most of all, they deserve a real, honest chance to leave prison when they are rehabilitated, and not be at the mercy of an inconsistent governing body with little oversight.

Nick deserves better.