

Parole, Power, and Punishment



The Massachusetts Parole Board's Discriminatory
Treatment of People with Mental Health Disabilities

LAW OFFICE 3 IN
PARTNERSHIP WITH



Parole, Power, and Punishment

The Massachusetts Parole Board's Discriminatory Treatment of People with Mental Health Disabilities

Northeastern University School of Law

Legal Skills in Social Context

Law Office 3 (LO 3)

In partnership with: **Mental Health Legal Advisors Committee (MHLAC)**

Spring 2022

Ari Appel, Jacqueline Cassano, Allyson Crays, Chelsea Diaz, Nadia Eldemery, Michelle Fong,
Abygail Hoey, Erin Hudgins, Maria Solis Kennedy, Alana Khan, Ivy Miller, Taylor Nadherny,
Rebecca Sparks, Nina Thacker, & Jacqueline Vieira

Lawyering Fellows: Xenovia Bartholomew & Allison Mastrangelo

LSSC Professor: Andrew Haile, Esq.

Acknowledgements

LO 3 would like to thank the following people for generously sharing their expertise, time, and passion in support of our project:

Jerry Breecher	Professor Emeritus and Data Analyst for Mass Parole Watch
Daniel M. Fetsco, Esq.	Assistant Academic Professional Lecturer, Department of Criminal Justice, University of Wyoming; Former Executive Director of the Wyoming Parole Board
Professor Jeffrey Harris, Esq.	Professor at Boston University School of Law and Criminal Defense Attorney at the Law Offices of Jeffrey Harris
Robert Hernandez, Esq.	Staff Attorney at Mental Health Legal Advisors Committee
Professor Wally Holohan	Professor at Northeastern University School of Law and Founding Director of the Prisoners' Rights Clinic at NUSL
Robyn Holt	Director at Criminal Justice Advocacy Program (New Jersey)
Christopher G. Humphrey, Esq.	Wyoming Attorney; Defense Bar Representative, Adult Community Corrections Board (Wyoming)
Eric John Marcy, Esq.	New Jersey Criminal Attorney at Wilentz, Goldman & Spitzer, P.A.
Tyler Marovitz	AmeriCorps Legal Advocate at Mental Health Legal Advisors Committee
Ivy Moody, Esq.	Staff Attorney at Mental Health Legal Advisors Committee
Caitlin Parton, Esq.	Former Staff Attorney at Mental Health Legal Advisors Committee
Tatum Pritchard, Esq.	Director of Litigation at Disability Law Center
Julia Villarruel	Paralegal at Mental Health Legal Advisors Committee

Amy Vorenberg, Esq.

Former New Hampshire Adult Parole Board Member and
Professor Emeritus at University of New Hampshire
School of Law

Mara Voukydis, Esq.

Attorney in the Youth Advocacy Division at Committee
for Public Counsel Services

Table of Contents

Legal Skills in Social Context	7
Mental Health Legal Advisors Committee	8
Executive Summary	9
1: An Introduction to Parole in its Broader Carceral Context.....	11
2: The History of Parole in the Commonwealth	14
2.1 What is Parole and Why Do We Have it?	14
2.2 Massachusetts Parole Board.....	16
2.3 The Impact of Select Cases on the Massachusetts Parole Process.....	17
2.4 The Shifting Composition of the Parole Board.....	19
2.5 The Lack of Information on People with Disabilities in the Parole System.....	21
3: The Parole Process and ADA Violations	22
3.1 Introducing Parole Processes and Discrimination within Massachusetts	22
3.2 Federal and State Protections for People with Disabilities	23
3.3 An Individual’s Eligibility for Parole.....	26
3.4 Requesting a Parole Hearing and Reasonable Accommodations.....	27
3.5 An Individual’s Preparation to Seek Parole	28
3.6 Seeking Parole Before the Board	30
3.7 Inherent Discrimination in the Parole Board’s Decision-Making Process	31
3.8 The “Warehousing” Problem	33
3.9 Discriminatory Language in Parole Decisions.....	35
3.10 The Cyclical Denial of Parole	37
3.11 Temporariness of Parole: The Revocation Hearings.....	39
4: Multi-State Survey: What Can We Learn from Other States’ Parole Systems?	42
4.1 State Analyses: Best and Worst Practices	42
4.2 Rhode Island.....	44
4.3 New Hampshire.....	47
4.4 New Jersey	49
4.5 Wyoming.....	51

4.6 What Can Massachusetts Take Away from Other States' Parole Practices? 53

5. Recommendations: Shifting Massachusetts to a More Equitable and Just Parole Process
..... 54

6: Conclusion 62

Legal Skills in Social Context

Northeastern University School of Law (NUSL) created the “Legal Skills in Social Context” (LSSC) program to offer first-year law students the opportunity to work alongside organizations on various social justice projects. NUSL separates the first-year class into “Law Offices” and assigns each Law Office to an accompanying nonprofit/government organization. Within the course, students advance their core skills of lawyering within a collaborative team setting. Additionally, students apply extensive legal research to further the mission of their partnering public-service organization. The collaboration between LSSC and these organizations creates a final work product that, when implemented, helps to achieve social justice objectives.¹

¹ *Legal Skills in Social Context*, Northeastern University School of Law, <https://law.northeastern.edu/experience/lssc/> (last visited Mar. 1, 2022).

Mental Health Legal Advisors Committee

Mental Health Legal Advisors Committee (MHLAC) is a Massachusetts State agency that provides legal and policy advocacy for people with mental health disabilities. MHLAC aims to change the systems that negatively affect their clients while helping people navigate these systems. Three principles guide MHLAC's advocacy: (1) addressing systemic problems while striving to achieve maximum impact from limited resources; (2) prioritizing issues affecting people disadvantaged for various reasons by emphasizing the intersection of problems people face; and (3) resolving client problems with an open-minded analysis of the tactics most likely to succeed in achieving relief.²

² *MHLAC's Mission Statement: What We Do*, Mental Health Legal Advisors Committee, <https://mhlac.org/what-we-do/> (last visited Mar. 1, 2022).

Executive Summary

On behalf of MHLAC, LO 3 examined the Massachusetts Parole Board's (the Board) treatment of incarcerated people with mental health disabilities.

Parole exists as an opportunity for incarcerated people to reintegrate into society, and the Board exists to facilitate the process of release and reentry—but it fails in many aspects of its mission. Comprised almost exclusively of former law enforcement officials, the Board regularly denies parole to qualified applicants, publishes decisions late, and makes decisions using arbitrary criteria with little oversight or accountability. The Board's defective design and bureaucratic dysfunction have devastating consequences for all parole-eligible people but particularly for those struggling with mental health disabilities.

Incarcerated people with mental health disabilities face relentless challenges navigating the criminal legal system, which itself creates and worsens disabilities. The parole process offers no reprieve: the Board's policies disadvantage and discriminate against parole applicants with mental health disabilities. The Board fails to ensure reasonable and necessary accommodations that Title II of the Americans with Disabilities Act (ADA) requires. And often, the Board's decision-making policies weaponize applicants' mental health disabilities to justify withholding, postponing, or denying release. Notably, in 2021, following an investigation into the Board's violation of the ADA's non-discrimination requirements, the U.S. Attorney's Office entered into a settlement agreement with the Board to ensure proper reporting, enforcement, and other provisions relating to the Title II breach.³

³ Although this particular settlement revolved around the Board's practice of requiring individuals on parole with a substance use disorder to take a specific medication—even when their medical provider might suggest something

In this paper, we propose a series of recommendations to ensure fair treatment for incarcerated people with mental health disabilities in Massachusetts. These recommendations stem from our research into the historical trends of parole in Massachusetts, the Board’s regulatory framework and applicable ADA violations, and a multi-state survey of other parole systems. Although these recommendations aim to ensure more equitable parole outcomes for those with mental health disabilities, implementation of the suggested changes would improve the parole system for all incarcerated people.

else—the underlying theme of the Board’s disregard of applying the ADA properly to its practices applies to our research regarding those with mental health disabilities. Settlement Agreement Between the United States and the Massachusetts Parole Board, U.S. v. Massachusetts Parole Board, DJ 204-36-241 (Dec. 14, 2021).

1: An Introduction to Parole in its Broader Carceral Context

The United States incarcerates more people than any other nation in the world.⁴ Further, people with mental health disabilities fill our nation's jails and prisons.⁵ As of 2016, incarcerated people in U.S. prisons reported having disabilities at nearly triple the reporting rate of the nonincarcerated.⁶ This statistic encompasses a broad range of physical and cognitive conditions.⁷ In this paper, we focus on mental health and cognitive disabilities, which we will refer to as “disabilities” throughout the paper. Nonetheless, our research applies beyond conditions that affect the mind, especially as the Americans with Disabilities Act (ADA) includes individuals with mental and physical disabilities.

Additionally, every stage of the carceral process—from policing to parole—yields worse outcomes for Black and Brown people. For example, in 2020, Black people comprised only nine percent of the Massachusetts population but twenty-nine percent of the Massachusetts prison population.⁸ Latinx people comprised around twelve percent of the Massachusetts population but twenty-six percent of those incarcerated.⁹ In contrast, white people comprised just over eighty percent of the Massachusetts population but only forty-two percent of the incarcerated population.¹⁰ The criminal legal system particularly targets Black and Brown people with

⁴ *Highest to Lowest - Prison Population Total*, World Prison Brief, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Jan. 28, 2022).

⁵ Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 *Psychiatric Servs.* 862, 862 (2014).

⁶ Laura M. Maruschak et al., *Disabilities Reported by Prisoners: Survey of Prison Inmates, 2016* 1 (U.S. Dep't of Just., Bureau of Just. Stat. ed., 2021).

⁷ *Id.*

⁸ See *QuickFacts: Massachusetts*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/MA,US/POP010220> (last visited Mar. 7, 2022); Rsch. and Plan. Div., Mass. Dep't of Corr., *Massachusetts Department of Corrections Prison Population Trends 2020* (Mass. Dep't of Corr. ed., 2021).

⁹ *Id.*

¹⁰ *Id.*

disabilities: according to disability rights organizer and attorney Talila A. Lewis, “the combination of disability and skin color amounts to a double bind.”¹¹

One prong of the criminal legal system provides an opportunity for rapid progress towards decarceration: parole. Parole allows incarcerated people to complete a portion of their sentence outside of prison and in their communities—under specified terms and conditions.¹² The parole system, however, suffers from the same systemic issues that plague the criminal legal system, including the discriminatory treatment of people with disabilities.

Instead of providing necessary services to address individual needs, the U.S. relies on punitive structures to contain mental health issues and crises. Indeed, since the deinstitutionalization of psychiatric hospitals, prisons have become the country’s primary site for “managing” mental illness.¹³ But incarceration only exacerbates the issue: correctional officers are often ill-equipped to respond to mental health crises and incarcerated people face dehumanizing living conditions while lacking access to services in prison.¹⁴ These conditions result in mental health deterioration for incarcerated people.¹⁵ Prisons do not provide adequate mental health care or supervision to people with disabilities.¹⁶

¹¹ Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, Time Magazine (June 25, 2020), <https://time.com/5857438/police-violence-black-disabled/>.

¹² See generally Mass. Gen. Laws ch. 27, § 5 (2022).

¹³ Garrett A. R. Yursza Warfield, *Managing Mentally Ill Inmates in Massachusetts: Risk Assessment, Classification, and Programming in a House of Correction* (April 2012) (Ph.D. dissertation, Northeastern University) (on file with the Northeastern University Library).

¹⁴ *The History, Causes, and Facts on Mass Incarceration*, Fair Fight Initiative, <https://www.fairfightinitiative.org/the-history-causes-and-facts-on-mass-incarceration/> (last visited Jan. 28, 2022).

¹⁵ *Id.*

¹⁶ An investigation of Massachusetts prisons published in 2020 found “systemic deficiencies in prison facilities” and that, instead of providing assistance, the Massachusetts Department of Corrections exposed incarcerated people experiencing mental health crises to conditions that harmed them. See Deborah Becker, *U.S. Attorney Finds Constitutional Violations at Massachusetts Prisons*, WBUR (Nov. 17, 2020), <https://www.wbur.org/news/2020/11/17/us-attorney-constitutional-violations-massachusetts-prisons>.

In this paper, we will examine the Board’s treatment of incarcerated people with disabilities. We will discuss the history of parole, current policies and practices throughout the parole process, the application of the ADA and state law to these policies, and practices in other states. Finally, we will provide recommendations to improve the Massachusetts parole system for people with disabilities.

Broadly, we must shift priorities away from incarceration as treatment. Because ninety-five percent of people in prison will return home,¹⁷ we must commit to investing resources into a robust network of community-based services that address the critical needs of those returning to their communities and enhance public safety. In achieving these goals, we can ensure meaningful access to parole—and to freedom—for all people.

¹⁷ Jeremy Travis et al., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 9, (Urb. Inst.: Just. Pol’y Ctr. ed., 2001).

2: The History of Parole in the Commonwealth

2.1 What is Parole and Why Do We Have it?

Since its inception, parole has operated as a middle-ground between incarceration and freedom.¹⁸ Before the mid-1800s, a determinate sentencing model guided punishment: courts imposed sentences of an exact number of years on individuals convicted of crimes, with no opportunity for release until the expiration of the specified term.¹⁹ But as incarceration rates climbed globally, releasing a percentage of the prison population became increasingly urgent.²⁰ Simultaneously, public views on the purpose of punishment began to shift towards rehabilitation, which led to the creation of indeterminate sentences.²¹ With this sentencing scheme, courts assigned a time range for individuals to serve, allowing for the possibility of release after a minimum number of years as a reward for “good behavior.”²²

In a country whose criminal legal system currently operates primarily on retribution, deterrence, and incapacitation punishment theories, parole can offer a glimpse into a more rehabilitative model.²³ Parole gives incarcerated people a chance to serve a remaining portion of

¹⁸ *Probation and Parole: History, Goals, and Decision-Making*, Jrank, <https://law.jrank.org/pages/1817/Probation-Parole-History-Goals-Decision-Making-Origins-probation-parole.html>. (last visited Jan. 28, 2022).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See Paul H. Robinson, *"Life Without Parole" Under Modern Theories of Punishment*, Penn. L.: Legal Scholarship Repository 138 (June 1, 2012); Katharine Bradley & R.B. Michael Oliver, *The Role of Parole: Policy Brief 6* (Cmty. Res. for Just. ed., 2001).

their sentences outside of prison, allowing them to rejoin and contribute to their communities, under specific supervisory conditions.²⁴

Unfortunately, parole trends often mirror broader trends in the criminal legal system. For example, after the 1970s kicked off decades of emphasis on punitive punishment in the U.S., the 1980s and 1990s produced harsh sentencing reforms including mandatory minimum sentences, “three strikes” sentencing schemes, and life without the possibility of parole laws.²⁵ Around the same time, the number of people on parole who returned to prison on technical violations—violations of parole conditions such as failing a drug test or missing a meeting with a parole officer—increased rapidly.²⁶ Around 280,000 people per day remain in prison for these minor technical violations of parole or probation conditions, illustrating the extension of punitive practices into carceral structures beyond prison walls.²⁷

²⁴ See *Frequently Asked Questions*, U.S. Dep’t of Just. U.S. Parole Comm’n (Sept. 29, 2015), [https://www.justice.gov/uspc/frequently-asked-questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20\(2\)%20parole%20protects%20society.](https://www.justice.gov/uspc/frequently-asked-questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20(2)%20parole%20protects%20society.)

²⁵ See Ctr. on the Admin. of Crim. L., N.Y. U. L., *Willie Horton's Shadow: Clemency in Massachusetts* https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA__June%203%2C%202019%20Accessibl e.pdf (last visited Mar. 8, 2022); See Nat’l Rsch. Council et al., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 44 (The Nat’l Academies Press ed., 2014).

²⁶ See *id.* at 42; The Council of State Governments Just. Ctr., *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets* (2019).

²⁷ See generally The Council of State Governments Just. Ctr., *supra* note 26.

2.2 Massachusetts Parole Board

In 1837, Massachusetts became the first state in the U.S. to institute parole.²⁸ Massachusetts is one of thirty-four states to adopt a system of discretionary parole.²⁹ The incarceration rate in Massachusetts stands out internationally at 275 people behind bars out of every 100,000—over double that of the United Kingdom, triple that of Italy, quadruple that of the Netherlands, and eight times that of Iceland.³⁰ The Board has the power to release more incarcerated people and lower this number.

Although it has seen legislative changes over the years, the Board's objective has remained unchanged: (1) granting parole to applicants for whom incarceration “has served its purpose;” (2) mandating release conditions; and (3) prioritizing public safety through “responsible reintegration” of those granted parole back into their communities.³¹ Board members officiate release hearings, dictate parole decisions, supervise those released on parole, and issue decisions to revoke parole.³²

²⁸ Mass. Parole Bd. Ann. Stat. Rep. (2007).

²⁹ “Discretionary parole is a decision to release an offender from incarceration whose sentence has not expired, on condition of sustained lawful behavior that is subject to supervision and monitoring in the community by parole personnel who ensure compliance with the terms of release.” Am. Probation and Parole Ass'n, *Position Statement: Discretionary Parole* (Am. Probation and Parole Ass'n 2002); Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, Prison Pol'y Initiative (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html.

³⁰ *Massachusetts Profile*, Prison Pol'y Initiative, <https://www.prisonpolicy.org/profiles/MA.html> (last visited Jan. 27, 2022).

³¹ Mass. Parole Bd. Ann. Stat. Rep., *supra* note 28.

³² *See Id.*

2.3 The Impact of Select Cases on the Massachusetts Parole Process

Select cases involving violent consequences of granting parole have influenced the Board's present-day policies and regulations. These cases, however, are outliers: in the years they took place, the stories of thousands of others on parole did not capture public attention.³³

In 1986, William Horton, a Black man incarcerated in Massachusetts, raped a white woman and stabbed her boyfriend after escaping from furlough—a program at the time that allowed incarcerated people to leave prison for a set period and return thereafter.³⁴ This provoked a racist attack campaign against then-governor of Massachusetts and Democratic presidential candidate Michael Dukakis—one of the first and most prominent examples of political repercussions for a politician overseeing or supporting the release of an individual who ended up violently reoffending.³⁵ Horton's case also sparked debate on the safety of furlough and other release programs in following years.³⁶

In 1994, Robert Stewart escaped a work-release program, which allowed him to leave the minimum security prison in Lancaster periodically to report to a job in Concord.³⁷ A police officer pulled him over the same weekend of his escape, and Stewart shot him in the chest, dying himself in a car chase soon after.³⁸ As a result of this incident, forty other people on work-release programs

³³ See Bureau of Just. Stat., *Probation and Parole 1986* 3 (U.S. Dep't. of Just. Off. of Just. Programs ed., 1987); See Jodi M. Brown et al., *Correctional Populations in the United States, 1994* 112 (U.S. Dep't of Just. Off. of Just. Programs ed., 1996); See Rsch. and Plan. Div., Mass. Dep't of Corr., *Prison Population Trends 2010* 27 (Mass. Dep't of Corr. ed., 2011); See Ctr. on the Admin. of Crim. L., N.Y. U. L., *supra* note 25.

³⁴ 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/2018/12/03/us/politics/bush-willie-horton.html>.; 103 Mass. Code Regs. 463.00 (2022).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Work-Release is Suspended After Inmate Shoots Officer*, N.Y. Times (April 6, 1994), <https://www.nytimes.com/1994/04/06/us/work-release-is-suspended-after-inmate-shoots-officer.html>.

³⁸ *Id.*

were immediately sent back to prison as concerns arose from the practice of including individuals convicted of violent offenses in populations eligible for early release from prison.³⁹

In 2010, Dominic Cinelli, while on parole, fatally shot a police officer and died himself in the shootout.⁴⁰ This case prompted significant criticism of the Board that released Cinelli; the public and then-governor, Deval Patrick, maintained that the Board failed to take every available measure to protect public safety.⁴¹ Five Board members who took part in the decision to free Cinelli resigned.⁴² Since the Cinelli case, the Board has granted parole infrequently and decreased transparency.⁴³

These three cases illustrate the power of fear in the public narrative. Instead of following success stories of individuals released on parole or publicizing the adverse effects of excessive incarceration, the media, politicians, and the public latch onto select incidents of violence.⁴⁴ For example, Horton's case made headlines as evidence against furlough and other similar temporary leave programs, when ninety-nine percent of incarcerated people returned to prison "without incident" from these programs.⁴⁵ These outlier stories foster a culture of fear, resulting in more punitive policies and practices throughout the criminal legal system.⁴⁶ As law professor Rachel E.

³⁹ *Work-Release is Suspended After Inmate Shoots Officer*, *supra* note 37.

⁴⁰ Associated Press, *5 Parole Board Members Resign in Wake of Decision to Free Dominic Cinelli who Later Killed Woburn Cop John Maguire*, MassLive (Mar. 25, 2019), https://www.masslive.com/news/2011/01/5_parole_board_members_resign.html.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Maria Cramer, *Parole Board Still Slow to Release Inmates 8 Years After Ex-Convict Killed Officer, Critics Say*, Bos. Globe (June 25, 2018), <https://www.bostonglobe.com/metro/2018/06/25/parole-board-still-slow-release-inmates-eight-years-after-convict-killed-officer-critics-say/ztgsu0FWuckJJqbG6LejKK/story.html>.

⁴⁹ See John Pfaff, *Op-Ed: The Never-Ending 'Willie Horton Effect' is Keeping Prisons too Full for America's Good*, L.A. Times (May 14, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html>.

⁴⁵ *Id.*

⁴⁶ *See Id.*

Barkow articulates: “In the political climate of the United States today, it takes just one high-profile mistake to call the entire enterprise of rehabilitation and parole into question.”⁴⁷

2.4 The Shifting Composition of the Parole Board

The Board consists of seven members.⁴⁸ The Governor appoints Board members to five-year terms and approves them with the advice and consent of the Governor’s Council (an elected eight-member body whose responsibilities include voting on judicial nominees.)⁴⁹ When the Board has a vacancy, the Governor can appoint a panel to submit nominees.⁵⁰ Members must have graduated from an accredited four-year college or university and have experience in one or more of the following areas: parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology, and social work.⁵¹ One member must have experience in psychology.⁵² The panel that submits Board member nominees, however, can override these qualifications with a unanimous vote.⁵³

Throughout the 1970s and 1980s, the Board had a diverse membership and included educators, psychologists, sociologists, social workers, ministers, legal aid and government attorneys, and members with law enforcement backgrounds.⁵⁴ But since the 1990s, the Board has drawn its membership almost exclusively from those with backgrounds in policing, prosecution,

⁴⁷ Rachel E. Barkow, *Life without Parole and the Hope for Real Sentencing Reform*, in *Life Without Parole: America’s New Death Penalty?* 190, 201 (Charles J. Ogltree, Jr., & Austin Sarat eds., N.Y. U. Press 2012).

⁴⁸ Mass. Gen. Laws ch. 27, § 4 (2021).

⁴⁹ *Id.*; See *Governor’s Council*, <https://www.mass.gov/orgs/governors-council> (last visited March 8, 2022).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Bos. Bar Ass’n Task Force on Parole & Cmty. Reintegration, *Parole Practices in Massachusetts and Their Effect on Community Reintegration* 34 (2002).

parole, and probation.⁵⁵ This is likely due in part to the culture of fear—and the perceived need to view parole applicants through a punitive lens—that has resulted from the outlier cases highlighted above. As of March 2022, the Board has one vacancy, and four out of the six sitting members have backgrounds in law enforcement.⁵⁶ The current members include a former prosecutor, a forensic psychologist, a criminal defense attorney, a former hearing examiner at the Board, and two former Department of Corrections (DOC) administrators.⁵⁷

While Governor Baker has continued to nominate prospective Board members with law enforcement backgrounds, more recently the Governor’s Council has pushed back against the homogenous composition of the Board.⁵⁸ In July 2021, Governor Baker nominated Sherquita HoSang—a former social worker, former juvenile probation officer, and current member of the Sex Offender Registry Board—to fill the Board’s current vacancy.⁵⁹ The Council rejected her nomination and took the opportunity to criticize the Board in general, calling it “inept and incompetent” and highlighting the lack of commutation hearings, delays in granting release, and

⁵⁵ *Id.* at 35.

⁵⁶ See *Massachusetts Parole Board*, <https://www.mass.gov/orgs/massachusetts-parole-board> (last visited Mar. 8, 2022).

⁵⁷ See Press Release, Office of the Governor, Governor Baker Appoints Gloriann Moroney As Chair Of The Mass. Parole Bd. (Apr. 30, 1998) (on file with author); Mary Markos, *Charlie Baker Nominates Psychologist to Continue Serving on Parole Board*, Bos. Herald (Jun. 24, 2019), <https://www.bostonherald.com/2019/06/24/baker-nominates-psychologist-to-continue-serving-on-parole-board/>; Jean Trounstone, *Meet the Newest Member of the Massachusetts Parole Board: Tonomey Coleman*, Bos. Mag. (Mar. 6, 2013), <https://www.bostonmagazine.com/news/2013/03/06/meet-the-new-massachusetts-parole-board-member-tonomey-coleman/>; Colleen Quinn, *Governor’s Parole Board Nominee gets a Second Look, 11 Years Later*, Bos. Globe (Mar. 20, 2014), <https://www.bostonglobe.com/metro/2014/03/19/governor-parole-board-nominee-gets-second-look-years-later/v0vZSr56xwITFXzp0vyDhN/story.html>; Jean Trounstone, *Special Feature: More Dysfunction than Diversity*, Dig Bos. (Jul. 3, 2019), <https://digboston.com/special-feature-more-dysfunction-than-diversity/>.

⁵⁸ See generally Chris Lisinski, *Sherquita HoSang of Springfield, Gov. Charlie Baker’s pick for Parole Board, rejected by Governor’s Council*, Mass Live (Jul. 28, 2021), <https://www.masslive.com/news/2021/07/sherquita-hosang-of-springfield-gov-charlie-bakers-pick-for-parole-board-rejected-by-governors-council.html>.

⁵⁹ *Id.*

overall low release rate.⁶⁰ In a follow-up email to a reporter, Councilor Eileen Duff reaffirmed: “the MA Parole Board has been put on notice that things need to change dramatically and fast.”⁶¹

2.5 The Lack of Information on People with Disabilities in the Parole System

The Board’s 1988 Strategic Plan noted the increasing number of individuals with mental health disabilities in the criminal legal system due to mass closures of psychiatric institutions, but the Board does not regularly publish demographic data about people with disabilities.⁶² Thus, we could not find specific historical evidence on people with disabilities within the parole system. Data collection is not neutral: institutions and individuals that collect data determine what kind of information to collect and from whom to collect it, so a lack of information available on marginalized groups often reflects a bias towards those deemed important.⁶³ We hope our exploration of the Board’s treatment of people with disabilities will illuminate these issues and encourage future research on parole to capture the experience of those with disabilities.

⁶⁰ See *Id.*; The Editorial Board, *Governor Baker getting what he wants from his Parole Board*, Bos. Globe (Aug. 29, 2021), <https://www.bostonglobe.com/2021/08/29/opinion/baker-getting-what-he-wants-his-parole-board/>.

⁶¹ Jean Trounstein, *Unprepared Nominee Another Example of Dysfunctional Mass Parole Board*, Dig Bos. (Jul. 27, 2021), <https://digboston.com/unprepared-nominee-another-example-of-dysfunctional-mass-parole-board/>.

⁶² See Mass. Parole Bd. Ann. Stat. Rep., *supra* note 28.

⁶³ *Data and Marginalized Populations*, Or. Health & Sci. U., <https://www.ohsu.edu/historical-collections-archives/data-and-marginalized-populations>. (last visited Jan. 29, 2022).

3: The Parole Process and ADA Violations

3.1 Introducing Parole Processes and Discrimination within Massachusetts

Parole serves as an incentive for people to rehabilitate while incarcerated. The Board must balance this objective while aiming to promote public safety. Once parole applicants serve their minimum sentence, the Board considers their rehabilitative efforts while incarcerated to evaluate whether they can return to the community under specified terms and conditions.⁶⁴ The Board's responsibilities include: "face-to-face parole release hearings,⁶⁵ providing notice and assistance to victims, supervising [individuals on parole] in the community, and providing reentry services to those leaving custody with no mandated post-release supervision."⁶⁶ When serving individuals with disabilities, the Board must modify its policies as the ADA and state law require.

When incarcerated people become eligible for parole, several steps occur before they appear in front of the Board for a hearing. The entire process can be complicated and daunting, especially for those with disabilities. At each step of the process, people with disabilities must receive the appropriate accommodations, in accordance with the ADA, to prepare for their hearings. Without these accommodations, people with disabilities go into their parole hearings disadvantaged. The current policies prevent parole applicants with disabilities from successfully obtaining parole. As recently as 2021, the U.S. Attorney's Office investigated the Board's

⁶⁴ Mass. Gen. Laws ch. 27, §5 (2022).

⁶⁵ Web-Ex was used in lieu of in-person hearings for much of 2020-2021, up until July 2021, and for a few days in January 2022.

⁶⁶ *Massachusetts Parole Board*, <https://www.mass.gov/orgs/massachusetts-parole-board>, *supra* note 56.

discriminatory conduct and required it to take specific actions to follow the ADA’s non-discrimination requirements.⁶⁷

In this section, we will split the parole process into six parts: eligibility for parole; requesting a hearing; preparation for the hearing; the hearing; the decision-making process; and appealing and revoking parole. In each subsection, we will lay out the Massachusetts laws and regulations that govern the DOC and the Board. We will also provide an overview of the ADA and relevant Massachusetts State and Federal Constitutional law and analyze statutory language to discuss potential violations of these laws.

3.2 Federal and State Protections for People with Disabilities

The ADA, passed in 1990, prohibits discrimination and ensures equal opportunities for individuals with disabilities.⁶⁸ The ADA defines a disability as: (1) a physical or mental impairment that limits one or more major life activities;⁶⁹ (2) a record of the impairment; or (3) being viewed as having such an impairment.⁷⁰ The ADA covers employment, public services, public accommodations, telecommunications, and other provisions.⁷¹ The various “Titles” of the

⁶⁷ The settlement between the United States and the Board aimed to correct the Board’s practice of requiring individuals on parole with a substance use disorder to take a specific medication—even when their medical provider might suggest something else. However, the Board’s ADA violations here are just as prevalent with regards to those with mental health disabilities. Settlement Agreement Between the United States and the Massachusetts Parole Board, U.S. v. Massachusetts Parole Board, DJ 204-36-241 (Dec. 14, 2021).

⁶⁸ *What is the Americans with Disabilities Act (ADA)?*, <https://adata.org/learn-about-ada> (last visited Jan. 27, 2022).

⁶⁹ “Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102 (2021).

⁷⁰ *Id.*

⁷¹ 42 U.S.C. §§ 12101–12213 (2021).

ADA provide guidance for different areas of life; Title II covers public entities, including the Board.⁷²

Under the ADA, public entities must provide reasonable accommodations to any qualified individual.⁷³ The ADA defines a qualified individual as a person with a disability who meets the essential requirements to be able to participate in the programs or services.⁷⁴ The term “reasonable modification” under Title II means “any change in a policy, practice, or procedure that is necessary for a [qualified individual] with a disability to have equal access.”⁷⁵ Later in this paper, we will discuss how changes to policies, practices, or procedures for parole applicants with disabilities could involve providing expert assistance in preparing for parole hearings, receiving legal representation for hearings, or considering the availability of programming and services to individuals with disabilities when making a parole decision.

Public entities do not need to provide the *exact* accommodation requested if a modification creates a substantial burden or fundamentally alters the nature of the program.⁷⁶ Under these circumstances, the modification provided only needs to be “reasonable and effective ... [and] give[] a qualified person with a disability meaningful access to the benefit or service provided.”⁷⁷ This vague standard makes it difficult to know exactly what the ADA requires of the Board when providing alternative modifications, and courts have yet to provide clarity.⁷⁸ But this unclear

⁷² Disability Law Ctr. Mass., *Self-Advocacy Materials: Equal Access to Public Services Under Title II of the Americans with Disabilities Act (ADA)* 2 (2017).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.*

⁷⁸ See generally Cheryl Anderson, *Making “Meaningful Access” Even Less Meaningful: Judicial Gatekeeping Under Title II of the Americans with Disabilities Act*, 49 U. of Memphis L. Review 635, 635–705 (2019).

standard does not absolve the Board of its responsibility to meet the needs of individuals with disabilities seeking parole.

In addition to the ADA, Massachusetts laws further protect individuals with disabilities. Article 114 of the Massachusetts Constitution requires that “no otherwise qualified handicapped individual shall . . . be subject to discrimination under any program or activity within the Commonwealth” because of the individual’s disability.⁷⁹ Additionally, Mass. Gen. Laws ch. 93 § 10 implements Article 114, which allows people with disabilities to seek the accommodations needed to ensure equal access to services and provides strong protection to hold the Board accountable if it fails to comply, as seen in *Crowell v. Massachusetts Parole Board*.⁸⁰

While courts have heard cases and issued opinions about prison conditions for individuals with disabilities, courts only recently applied the ADA to the parole process. The Massachusetts Supreme Judicial Court decided the *Crowell* case in 2017.⁸¹ An incarcerated person named Richard Crowell⁸² filed a complaint asserting that, because the Board denied his petition for parole due to his disability,⁸³ the Board had violated the ADA, the Massachusetts Constitution, and state statutory law.⁸⁴ During his hearing, the Board decided that Crowell “was unable to offer any concrete, viable release plan that could assure the Board that he would be compliant on parole after his history of defiance and non-compliance” and that he “ha[d] not sought or achieved the

⁷⁹ Mass. Const. art. CXIV.

⁸⁰ See generally *Crowell v. Mass. Parole Bd.*, 477 Mass. 106, 106–116 (2017).

⁸¹ *Id.* at 106.

⁸² “In 1987, Crowell sustained a traumatic brain injury (TBI) that caused deficiencies in his memory, speech, and cognition.” *Id.*

⁸³ In August 2012, Crowell had a review hearing before the Board. At the hearing, a member of the Board noted that the TBI had “caused cognitive functioning and emotional functioning deficits, resulting in uncooperative behavior that was secondary to his brain injury.” *Id.*

⁸⁴ *Id.* at 108.

rehabilitation necessary to live safely in the community.”⁸⁵ But in denying parole, the Board failed to take Crowell’s brain injury into account as state and federal law require.⁸⁶ The court held that the ADA and state laws apply to the Board’s policies and determined that the Board must make some reasonable modifications to its policies to accommodate incarcerated people with disabilities.⁸⁷ The *Crowell* decision highlights the Board’s failure to meet its obligation to ensure a fair parole process for incarcerated people with disabilities. The decision also clarifies that the ADA applies to the Board and parole process.

3.3 An Individual’s Eligibility for Parole

The parole process begins with determining an incarcerated person’s eligibility. Generally, everyone in the Massachusetts prison system is eligible for parole after serving a minimum sentence, except for those incarcerated in the hospitals at Massachusetts Correctional Institution of Bridgewater, serving life sentences for first-degree murder, or serving more than one life sentence for separate convictions.⁸⁸ If eligible and denied parole, applicants may receive a new hearing every five years.⁸⁹

Within fourteen days of an incarcerated person’s arrival at a facility, a mental health professional conducts a mental health assessment.⁹⁰ Professionals may also conduct mental health assessments on an ad hoc basis upon self-referral or referral by a staff member.⁹¹ These assessment reports become part of the incarcerated person’s file. This means that the Board has access to, and should consider, an individual’s history of disabilities throughout the parole process.

⁸⁵ *Id.*

⁸⁶ *See generally Id.*

⁸⁷ *Id.* at 112.

⁸⁸ Mass. Gen. Laws ch. 127, § 133 (2018); Mass. Gen. Laws ch. 127, § 133A (2018).

⁸⁹ *Id.*

⁹⁰ *Mass. Dep’t of Corr., 103 DOC 650.05 Mental Health Services* 10 (Mass. Dep’t of Corr. ed. 2021).

⁹¹ *Id.* at 12.

Incarcerated people may earn deductions to their minimum and maximum sentences for certain behaviors that the commissioner deems “good conduct,”⁹² which they can receive after completing certain programs and activities.⁹³ Alternatively, people may earn good conduct deductions through participation in a vocational training program, work-release program, or any other activity considered valuable to rehabilitation;⁹⁴ these deductions allow for earlier parole eligibility. If programs and activities lack the ADA accommodations necessary for incarcerated people to participate meaningfully—in violation of state and federal law⁹⁵—they deny people with disabilities access to the same opportunities to work towards rehabilitation or good conduct deductions.

3.4 Requesting a Parole Hearing and Reasonable Accommodations

The Board has few available guidelines relating to preparing for a hearing before the Board. The Board’s handbook notes that such guidelines have not yet been determined, stating that “a standardized format is being developed” for collecting and presenting the information most critical to an applicant’s case.⁹⁶ Providing reasonable accommodations throughout the hearing process helps ensure that people with disabilities have a fair opportunity for parole. Incarcerated people in Massachusetts can request reasonable accommodations in three ways: “(1) by verbal or written request to any Department staff member; (2) by a verbal or written request to or from

⁹² Mass. Gen. Laws ch. 127, § 129D (2022).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *What is the Americans with Disabilities Act (ADA)?*, *supra* note 68.

⁹⁶ Paul M. Treseler, Mass. Parole Bd., *Parole Decision Making: The Policy of the Massachusetts Parole Board* 19 (2012).

medical/mental health staff for a medically prescribed accommodation; or (3) by completion of the Request for Reasonable Accommodation Form.”⁹⁷

ADA regulations require a public entity, such as the Board, to designate at least one employee to ensure the entity complies with and provides reasonable accommodations.⁹⁸ In the Massachusetts DOC, the Deputy Superintendent of Reentry acts as the Institution ADA Coordinator (the Coordinator).⁹⁹ The Coordinator decides whether to grant, deny, or alter a reasonable accommodation.¹⁰⁰ When approving an accommodation, the Coordinator must notify anyone they deem “necessary in order to properly implement the accommodation,”¹⁰¹ including the Board and others involved in parole proceedings.¹⁰²

3.5 An Individual’s Preparation to Seek Parole

Institutional Parole Officers (IPOs) play an important role in the parole process but lack the training and skills to successfully support people with disabilities seeking parole.¹⁰³ IPOs are supposed to prepare parole applicants for their hearings, assist in formulating plans for parole, compile information for parole hearings, and schedule hearings.¹⁰⁴ Although IPOs should schedule each hearing at least sixty days prior to the parole eligibility date, they may postpone until thirty days before the eligibility date, “if the interests of justice so require.”¹⁰⁵

⁹⁷ *Mass. Dep’t of Corr., 103 DOC 408.07 Requests for Reasonable Accommodations* 9 (Mass. Dep’t of Corr. ed. 2017).

⁹⁸ 28 C.F.R. § 35.107 (2016).

⁹⁹ *Mass. Dep’t of Corr., 103 DOC 408.05 Institution ADA Coordinator* 7 (Mass. Dep’t of Corr. ed. 2017).

¹⁰⁰ *Mass. Dep’t of Corr., 103 DOC 408.07 Requests for Reasonable Accommodations*, *supra* note 97.

¹⁰¹ *Id.*

¹⁰² *See generally Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002) (holding that the ADA applies to parole proceedings).

¹⁰³ Zoom Interview with Tatum Pritchard, Dir. of Litig., Disability Law Ctr. (Dec. 3, 2021).

¹⁰⁴ *Mass. Dep’t of Corr., 103 DOC 650.16 Mental Health Services* 70 (Mass. Dep’t of Corr. ed. 2021).

¹⁰⁵ Mass. Gen. Laws ch. 127, § 136 (2022).

Scheduling a parole hearing date sets several other processes into motion. Initially, applicants must create a parole plan for the Board to approve.¹⁰⁶ Individuals with documented mental health diagnoses have additional requirements for a successful parole plan. For example, if they “require ongoing services after release,” a residential mental health clinician is supposed to help create a release plan that includes these services.¹⁰⁷ Additionally, IPOs must provide a list of parole applicants with documented mental health issues scheduled for hearings.¹⁰⁸ At their discretion, IPOs can also request that a clinician complete a “Mental Health Parole Board Contact Sheet.”¹⁰⁹

For those who may require institutionalized care, clinicians must coordinate with the Department of Mental Health (DMH) or the Department of Developmental Services.¹¹⁰ Similarly, in cases where clinicians recommend civil commitment, they must consult with Bridgewater State Hospital to determine whether civil commitment is appropriate.¹¹¹ This coordination between the DOC and other agencies can lead to a lack of consensus on where a person might best be served, and which agency should take responsibility. This often leads to a warehousing effect where individuals remain imprisoned long after the Board grants parole, which we will discuss later in the paper.

¹⁰⁶ Mass. Gen. Laws ch. 127, § 130B (2022).

¹⁰⁷ *Mass. Dep’t of Corr., 103 DOC 650.16 Mental Health Services*, *supra* note 104.

¹⁰⁸ *Id.* at 71.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

3.6 Seeking Parole Before the Board

Before incarcerated people become eligible for parole, the Board conducts a “release hearing” to gauge their suitability for release.¹¹² For incarcerated people not serving a life-sentence (non-lifers), release hearings follow a boilerplate administrative formula and take place behind closed doors.¹¹³

The Board conducts public release hearings for incarcerated people serving a life-sentence (lifers).¹¹⁴ At a lifer release hearing, each member of the Board can question the parole applicant and may inquire about “evidence and testimony unfavorable to the [applicant] upon any relevant subject.”¹¹⁵ If a lifer suffers from a “mental, psychiatric, medical, or physical condition” that inhibits the ability to give verbal testimony or comprehend the proceedings, the Board may permit a “qualified individual” to represent that parole applicant.¹¹⁶

The process of appointing counsel—which, in recent years, serves as the only accommodation the Board actually offers—begins when applicants meet with IPOs.¹¹⁷ Because IPOs typically meet with parole applicants close in time to their hearings, when IPOs do perceive a disability that warrants appointment of counsel, the lengthy process of securing and allowing counsel time to prepare results in significant hearing delays.¹¹⁸ Additionally, IPOs appear to receive minimal training in recognizing and accommodating certain disabilities.¹¹⁹ As a result, while IPOs may refer individuals with obvious cognitive or behavioral health disabilities for

¹¹² Alexis Lee Watts et al., *Profiles in Parole Release and Revocation Massachusetts: Examining the Legal Framework in the United States* 4 (Robina Inst. of Criminal Law & Criminal Justice, 2018).

¹¹³ *Id.*

¹¹⁴ Gen. Court of the Commonwealth of Mass., *Special Comm’n on Structural Racism in the Mass. Parole Process: Final Report* 11 (2021).

¹¹⁵ Watts et al., *supra* note 112 at 6.

¹¹⁶ *Id.*

¹¹⁷ Zoom Interview with Tatum Pritchard, *supra* note 103.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

appointment of counsel, parole applicants with significant disabilities that appear less prominent in the brief meeting with their IPO often remain unrepresented, unless outside advocates intervene.¹²⁰

3.7 Inherent Discrimination in the Parole Board’s Decision-Making Process

After conducting a release hearing and reviewing an applicant’s file, the Board votes on whether to grant parole.¹²¹ The Board has three options: it can deny parole, postpone parole for a specified period, or grant parole.¹²²

When making its decision, the Board can only grant parole if “there is a reasonable probability that . . . the [incarcerated person] will live and remain at liberty without violating the law and that release is [compatible] with the welfare of society.”¹²³ To determine this, the Board considers whether the applicant participated in available work opportunities, attended education or treatment programs, and demonstrated good behavior.¹²⁴ The Board must also assess whether the available “risk reduction programs” would minimize the probability of the applicant reoffending if released.¹²⁵ These decision-making considerations, required by statute, do not take into account the availability of accommodations in the work, education, or risk reduction programs offered. Thus, the Board’s entire process of adjudicating parole discriminates against those with disabilities.

Additionally, the Board uses a tool called the Level of Service/Case Management Inventory (LS/CMI) to quantify a parole applicant’s chances of reoffending post-release.¹²⁶ The LS/CMI

¹²⁰ *Id.*

¹²¹ *See* Watts et al., *supra* note 112 at 6.

¹²² *See Id.* at 8.

¹²³ Mass. Gen. Laws ch. 127, § 130 (2022).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See* Watts et al., *supra* note 112 at 5.

measures the risk for each parole applicant by balancing various factors, including criminal history, available support system, substance addictions, pro-criminal attitude, barriers to release, antisocial patterns, and more.¹²⁷ Several of these factors, especially assessments of antisocial patterns, unfairly discriminate against people with disabilities who communicate and develop relationships differently than others.¹²⁸ Antisocial patterns are a well-documented symptom of disabilities.¹²⁹ So, penalizing applicants for exhibiting antisocial patterns means penalizing them for having a disability. Using these metrics, the Board can justify denying parole to applicants with disabilities, despite the moral and legal obligations it has to the contrary. Although legislation mandates that the Board use a risk and needs assessment tool in its consideration, it does not require adequate application of the tool.¹³⁰ The risk-assessment tool is strictly advisory in practice; the Board can ultimately disregard a parole applicant's score. Thus, the statute for evaluating an individual's ability to “live and remain at liberty” essentially serves as the sole mandatory decision-making criteria of the Board.¹³¹

Even with the risk-assessment tool's inherent discriminatory concerns, its lack of enforceability allows the Board's decision making to go unchecked. Additionally, before voting on whether to grant parole, the Board is supposed to consider information such as reports from parole staff, information regarding the applicant's prior criminal record, information from the District Attorney's Office or legal representative for the applicant, or disciplinary reports.¹³² The

¹²⁷ See generally D.A. Andrews, et al., *Level of Service/Case Management Inventory* (Multi-Health Sys. Inc. ed., 2004).

¹²⁸ See generally Nathaniel Hsieh, *Left Behind: Developmental Disability and the Pursuit of Parole* 10–11 (Stanford Intellectual & Developmental Disabilities Law and Policy Project ed., 2018).

¹²⁹ See generally Disability Evaluation Under Social Security, Soc. Sec. Admin., <https://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm> (last visited Mar. 8, 2022).

¹³⁰ See Watts et al., *supra* note 112 at 8; see generally Mass. Gen. Laws ch. 127, § 130 (2022).

¹³¹ See generally Mass. Gen. Laws ch. 127, § 130 (2022).

¹³² Treseler, *supra* note 96 at 11.

Board—when it deems it necessary—can also order a mental health evaluation of an applicant and “may consider the results [of the mental health evaluation] in making a parole release decision.”¹³³ The Board’s Policy Handbook lists factors that Board members *can consider*.¹³⁴ No regulation, however, requires the Board to consider these factors.¹³⁵ Therefore, the Board’s largely arbitrary decision-making process allows for implicit bias that directly impacts those with disabilities. Only broad statutory guidance, consideration of the risk assessment tool, and regulations outlining information to review restrain the Board’s nearly unfettered and discriminatory discretion.

3.8 The “Warehousing” Problem

The Board must provide reasonable accommodations to individuals with disabilities when assessing their eligibility for parole and their post-release terms and conditions.¹³⁶ The Board should also consider the availability of community services for applicants with disabilities, but the Board has not followed this practice after the *Crowell* decision.¹³⁷ Instead, the Board fails to identify available services or effectively collaborate with other agencies to do so.¹³⁸ When services do not exist or have reached their capacity, the Board has denied or rescinded parole.¹³⁹

For example, in 2010, the Board granted parole to Wilfred Dacier, an applicant diagnosed with schizoaffective disorder.¹⁴⁰ However, the Board conditioned his parole on his admittance to

¹³³ 120 Mass. Code Regs. 300.05 (2022); CPCS provides the resources and professional staff to conduct mental health evaluations. *See generally* Comm. for Pub. Counsel Servs., *CPCS Mental Health Proceedings in Massachusetts* (MCLE Inc. ed., 7th ed. 2020), https://www.publiccounsel.net/mh/wp-content/uploads/sites/3/Chapter-05-CE_LE-Final-DRAFT-March-2020.pdf.

¹³⁴ Treseler, *supra* note 96 at 13.

¹³⁵ *See Id.* at 4-13.

¹³⁶ *See Crowell*, 477 Mass. at 112–13.

¹³⁷ *See generally* *Dacier v. Massachusetts Parole Board*, No. 1884CV00932 (Mass. Super. Ct. Sept. 25, 2019) (order granting judgment on the pleadings).

¹³⁸ *Id.*

¹³⁹ *See generally Id.*; *see also Crowell*, 477 Mass. at 106 (2017).

¹⁴⁰ *See Dacier v. Massachusetts Parole Board*, No. 1884CV00932 (Mass. Super. Ct. Sept. 25, 2019) (order granting judgment on the pleadings).

a DMH facility.¹⁴¹ Subsequently, the DMH denied Dacier services because he did not have a “qualifying mental disorder” or “functional impairment that substantially interferes with . . . one or more major life activities.”¹⁴² As a result, the Board rescinded his parole. Dacier’s mental health evaluation concluded that “DMH eligibility criteria . . . did not contemplate the circumstances of persons in the criminal justice system.”¹⁴³ After nearly a decade of appeals, Dacier filed an anti-discrimination claim against the Board and DMH.¹⁴⁴ The court recognized Dacier as “in the midst of a ‘Catch-22,’ caught in a turf war between two state agencies[.]”¹⁴⁵ The court deemed the Board’s denial “arbitrary in light of applicable federal and state anti-discrimination laws,” found that it excluded Dacier from the benefits of a public program, and ordered a new hearing for the Board to determine the reasonable modifications Dacier needed to qualify for parole.¹⁴⁶ Ten years after his initial positive parole vote, Dacier finally received parole.

Dacier’s story illuminates two pervasive and subtle forms of discrimination that parole applicants with disabilities face. These include: (1) the Board’s inability to identify and provide reasonable accommodations when mandating post-release conditions and (2) the deficit of community-based risk reduction services available to incarcerated people with disabilities seeking parole in Massachusetts.¹⁴⁷ If no adequate services for people with disabilities exist, then the Board cannot identify and consider them when assessing eligibility for parole. The Board must address the warehousing problem by identifying, and coordinating with the DMH or other relevant

¹⁴¹ *Id.* at 2.

¹⁴² *Id.*

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *See generally* The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Wilfred Dacier* (Gloriann Moroney et al. eds., 2020).

¹⁴⁷ *See generally* *Crowell*, 477 Mass. at 106.; *see also* *Dacier v. Massachusetts Parole Board*, No. 1884CV00932 (Mass. Super. Ct. Sept. 25, 2019) (order granting judgment on the pleadings).

agencies to find, proper placements for release in a timely manner. If no such programs exist, Massachusetts has an obligation to modify or create programs to eliminate discrimination against those with disabilities.¹⁴⁸

3.9 Discriminatory Language in Parole Decisions

In *Crowell*, the Massachusetts Supreme Judicial Court held that the Board cannot categorically deny a parole applicant because of a disability.¹⁴⁹ Since this 2017 decision, however, decisions denying parole have continued to include language indicating that applicants' disabilities factored negatively into the Board's decision-making process. For example, the Board used the following language in various decisions denying parole from 2020–2022:

Robert Downs: “Overall, his institutional adjustment has been problematic, and he lacks insight into his violent behavior. The Board recognizes that his conduct and adjustment issues may or may not be related to mental health issues and a traumatic brain injury.”¹⁵⁰

Katherine McGlincy: “[S]he has struggled with significant mental health issues since young adulthood. Around the age of 19, Ms. McGlincy noticed periods of mania, depression, and suicidal ideation.”¹⁵¹

Joshua Dudley: “In rendering their decision, the Board considered specific factors to include placement in DCF, long-documented history of mental health issues, and substance abuse . . . [T]he Board believes Mr. Dudley needs to continue to explore how he was capable of acting with such rage.”¹⁵²

Patricia Labossiere: “It is the opinion of the Board that until she can fully engage in mental health treatment and demonstrate stability within the correctional facility,

¹⁴⁸ See *Crowell v. Massachusetts Parole Board: Massachusetts Supreme Judicial Court Observes that Americans with Disabilities Act Applies to Parole*, 131 Harv. L. Rev. 910, 917 (2018).

¹⁴⁹ *Crowell*, 477 Mass. at 113.

¹⁵⁰ The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Robert Downs 3* (Gloriann Moroney et al. eds., 2022).

¹⁵¹ The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Katherine McGlincy 2* (Gloriann Moroney et al. eds., 2021).

¹⁵² The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Joshua Dudley 4* (Gloriann Moroney et al. eds., 2020).

she remains a risk to public safety . . . The Board does recognize that much of her presentment is due to her mental illness. However, Ms. Labossiere’s assertion that her mother deserved to be murdered and [that] she was justified in her actions are alarming.”¹⁵³

Salah Shakoor: “Mr. Shakoor has substantial mental and physical health needs . . . He indicated that his mental health is not under control, which is reflective of his behavior . . . Mr. Shakoor needs to show stability in his overall institutional behavior . . . Mr. Shakoor needs to refrain from engaging in negative behavior.”¹⁵⁴

Importantly, the above parole denials come from a mere sampling of decisions. Moreover, these decisions explicitly discuss mental health conditions; there are likely many other parole applicants with undocumented and undiscussed disabilities that affect their behavior while incarcerated and during parole hearings.

Title II of the ADA requires that “no qualified individual with a disability shall . . . be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁵⁵ At parole hearings, disabilities can impact applicants’ ability to comprehend questions from the Board, explain themselves and their actions, and demonstrate culpability. Thus, the Board’s consideration of social indicators—including behavior while incarcerated and demonstration of emotion at parole hearings—in assessing suitability for release denies parole applicants with disabilities a fair hearing and opportunity for parole since these factors may result from their disabilities.

¹⁵³ The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Patricia Labossiere* (Pamela Murphy et al., 2020).

¹⁵⁴ The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Salah Shakoor* (Pamela Murphy et al., 2021).

¹⁵⁵ Americans with Disabilities Act of 1990 § 202, 42 U.S.C. §12132.

Information that advocates have gathered since the *Crowell* decision, including parole decisions, interviews with parole applicants, and reviews of hearings, indicate that the Board does not actively consult or ensure compliance with Title II ADA requirements.¹⁵⁶ Absent adequate accommodations and the Board's thorough understanding of disabilities and their effects on behavior, parole applicants with disabilities will remain in prison, fail to receive adequate services while incarcerated, and face discrimination due to their disabilities.

3.10 The Cyclical Denial of Parole

In its decision on Mr. James Riva II's parole application in 2020, the Board specified its reasons for denial as: "[Riva] continues to engage in antisocial behavior" and therefore "is not equipped to handle the stress of living outside of the Department of Correction at this time."¹⁵⁷ Riva's case, along with the cases in the previous subsection, demonstrate that the Board often bases its decisions on assessments of an applicant's ability to re-enter society that unlawfully discriminates against people with disabilities.¹⁵⁸ These shortcomings deny parole applicants with disabilities the opportunity to appeal successfully.¹⁵⁹

When the Board denies a parole petition, the applicant may appeal.¹⁶⁰ After an applicant submits a timely appeal in writing, at least two Board members must agree on the appeal decision for the Board to overturn it.¹⁶¹ If the Board denies the appeal, the applicant can file a second appeal

¹⁵⁶ Zoom Interview with Tatum Pritchard, *supra* note 103.

¹⁵⁷ The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of James Riva II* (Pamela Murphy et al., 2020).

¹⁵⁸ *See Id.*; *see generally* Bos. Bar Ass'n Task Force on Parole & Cmty. Reintegration, *Parole Practices in Massachusetts and Their Effect on Community Reintegration* (2002).

¹⁵⁹ *See* The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of James Riva II* (Pamela Murphy et al., 2020); *see generally* Bos. Bar Ass'n Task Force on Parole & Cmty. Reintegration, *Parole Practices in Massachusetts and Their Effect on Community Reintegration* (2002).

¹⁶⁰ 120 Mass. Code Regs. 304.02(1) (2022).

¹⁶¹ 120 Mass. Code Regs. 304.02(1)(a) (2022).

within thirty days,¹⁶² but the second appeal cannot rely on the same grounds as the original appeal.¹⁶³ Grounds for appeal of the entire decision, or of any element of the decision, include: (1) the reasons stated in the decision did not support denial; (2) the Board used erroneous information; (3) the Board followed incorrect procedure; (4) the decision lacked significant relevant information unknown to the Board at the time of the hearing; and (5) the “special conditions of parole no longer further the interest of justice” and thus should be amended.¹⁶⁴ In 2013, the Board granted only eight of the 214 appeals.¹⁶⁵

Despite the Department of Justice (DOJ) stating that it takes about twenty-one days for an applicant to receive notice of the Board’s initial release decision,¹⁶⁶ the timeline of these decisions for lifers in Massachusetts can take several months.¹⁶⁷ The Board’s delayed release of parole approvals reinforces the warehousing problem. Moreover, delayed release of parole denials deprives incarcerated people of opportunities that would otherwise contribute towards the Board’s parole approval.¹⁶⁸ As parole applicants remain incarcerated awaiting the Board’s decision, they spend that time without any instruction on what they could do to increase their chances of receiving

¹⁶² 120 Mass. Code Regs. 304.02(2) (2022).

¹⁶³ 120 Mass. Code Regs. 304.02(2)(b) (2022).

¹⁶⁴ 120 Mass. Code Regs. 304.02 (2022).

¹⁶⁵ Alexia Lee Watts et al., *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Massachusetts* 8 (Robina Inst. of Criminal Law & Criminal Justice ed., 2018).

¹⁶⁶ *Frequently Asked Questions*, U.S. Dep’t of Just. U.S. Parole Comm’n (Sept. 29, 2015),

[https://www.justice.gov/uspc/frequently-asked-](https://www.justice.gov/uspc/frequently-asked-questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20(2)%20parole%20protects%20society.)

[questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20\(2\)%20parole%20protects%20society.](https://www.justice.gov/uspc/frequently-asked-questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20(2)%20parole%20protects%20society.)

¹⁶⁷ “Record of decision refers to the document issued to incarcerated individuals who’ve received a parole hearing detailing the Parole Board’s decision and their explanation for the decision. In June of 2020, the Parole Board began offering expedited decisions for lifers upon completion of their hearings. Expedited decisions come in the form of an abbreviated decision document, which describes the reasoning behind the Parole Board’s decision to grant or deny parole.” *Special Comm’n on Structural Racism in the Mass. Parole Process: Final Report*, *supra* note 114, at 34.

¹⁶⁸ Letter from Coalition for Effective Public Safety (CEPS) Steering Committee et al., to Charlie Baker, Off. of the Governor (Jan. 5, 2021) (on file with author).

a positive parole vote, such as participating in more rehabilitative programs, gathering more witness testimonials, or working to stabilize their release plan.¹⁶⁹

Even when the Board releases decisions, they rarely contain explicit reasons for denial. The decisions the Board issued in lifer cases from 2018–2020 are “largely word-for-word identical save for the name of the lifer and the length of the setback.”¹⁷⁰ Some of the Board’s most common phrases in its decisions include “needs [a] longer period of adjustment” and “mental health issues.”¹⁷¹ The Board offers little to no guidance on what applicants denied parole should address.¹⁷² If parole applicants—especially those with disabilities—cannot understand the reasons for their denial, they will remain in prison with no opportunity for release.

3.11 Temporariness of Parole: The Revocation Hearings

Once the Board releases applicants granted parole from prison, it may revoke their parole, arrest them, and return them to prison under their original sentence.¹⁷³ A designated official submits a recommendation to the Board, which must contain an evaluation of (1) the reasonable belief a violation occurred and (2) whether probable cause to revoke parole exists.¹⁷⁴ When the Board grants parole, individuals on parole must follow the Board’s numerous conditions that often become traps to send them back to prison.¹⁷⁵

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Gordon Haas, *Parole Decisions for Lifers for the Year 2020* (Lifer's Group Inc. ed., 2021).

¹⁷² Letter from Coalition for Effective Public Safety (CEPS) Steering Committee et al., to Charlie Baker, Off. of the Governor, *supra* note 168.

¹⁷³ Mass. Gen. Laws ch. 127, § 149 (2022).

¹⁷⁴ 120 Mass. Code Regs. 303.12(2) (2022).

¹⁷⁵ Rep. Miranda & Sen. Jehlen, 192d Cong., *Reduce Reincarceration for Technical Violations of Parole* (Comm. Print 2020).

Individuals violate a technical condition of their parole when they do not comply with the terms and conditions of their release, such as not checking in with their parole officer or failing a toxicology screen.¹⁷⁶ Other reasons for revocation can include alleged engagement in crime, failure to comply with parole officers' requests, or suspicion of fraud.¹⁷⁷ While technical violations are non-criminal, they can lead to serious punishment. Despite the futility of returning someone to prison for a non-criminal offense, “technical violations accounted for 87% of parole revocations in 2017, 88% of revocations in 2018, and 89% in 2019.”¹⁷⁸ The Board has a responsibility to limit the impact of mere technical violations in parole revocations, especially as they pertain to people with disabilities, to prevent needless incarceration.

Several aspects of the revocation process raise concerns for the rights of people with disabilities on parole. The Board grants parole if it believes applicants “will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society.”¹⁷⁹ But the Board often argues that disabilities—which can include a wide range of diagnoses and behaviors—endanger the welfare of society.¹⁸⁰ Parole officers can issue a warrant for temporary custody for merely *believing* someone might lapse into criminal activity.¹⁸¹ At the discretion of parole officers, people “can wait for [months] in custody only to find out they did not violate

¹⁷⁶ Amanda Essex, *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#:~:text=A%20technical%20violation%20means%20that,or%20failing%20a%20drug%20test>.

¹⁷⁷ 120 Mass. Code Regs. 303.01(1) (2022).

¹⁷⁸ Rep. Miranda & Sen. Jehlen, *supra* note 175.

¹⁷⁹ Mass. Gen. Laws ch.127, § 130 (2022).

¹⁸⁰ See generally various parole decisions on mass.gov, including, but not limited to: The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Katherine McGlimcy "Katherine Dickinson"* (Pamela Murphy et al. eds., 2021); The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd. *Decision in the Matter of Salah Shakoor* (Pamela Murphy et al. eds., 2021).

¹⁸¹ Mass. Gen. Laws ch. 127, § 149(a) (2022).

parole.”¹⁸² This discretion enables the Board’s biases—with harsh repercussions for those with disabilities.

With no judicial oversight, the Board has full autonomy to revoke parole.¹⁸³ Unchecked, this practice results in discriminatory parole revocations. For example, after receiving parole in 2008, Wilson Morales suffered a mental health crisis resulting in his admittance to a psychiatric ward after claiming that his peers tried to put tracking devices in his head.¹⁸⁴ Despite having incurred no disciplinary infractions since his last hearing—and having a severe mental health diagnosis—the Board revoked Morales’s parole and denied two subsequent appeals.¹⁸⁵

The DOJ states that the purpose of parole is to “prevent needless imprisonment of those who are not likely to [re-offend.]”¹⁸⁶ Yet, individuals in Massachusetts return to prison consistently for violations of parole that alone would not be criminalized.¹⁸⁷ Dion Young, a fifty-one-year-old man who was on parole for over fourteen years, stated, “No one that’s on parole in society is free. You always have the inclination that they can knock on your door and take you back to prison at any time.”¹⁸⁸

¹⁸² Samuel Goldberg, *Massachusetts Parole Board is Having Some Predictable Problems*, Bos. Crim. Law. Blog (Mar. 27, 2012), https://www.bostoncriminallawyerblog.com/massachusetts_parole_board_is_1/.

¹⁸³ 120 Mass. Code Regs. 303.01(1) (2022).

¹⁸⁴ The Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., *Decision in the Matter of Wilson Morales* (Gloriann Moroney et al. eds., 2018).

¹⁸⁵ *Id.*

¹⁸⁶ *Frequently Asked Questions*, U.S. Dep’t of Just. U.S. Parole Comm’n (Sept. 29, 2015), [https://www.justice.gov/uspc/frequently-asked-questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20\(2\)%20parole%20protects%20society.](https://www.justice.gov/uspc/frequently-asked-questions#:~:text=Parole%20has%20a%20three%2Dfold,%3B%20(2)%20parole%20protects%20society.)

¹⁸⁷ Ashley Nellis & Breanna Bishop, *A New Lease on Life 7* (The Sentencing Project: Rsch. and Advoc. for Reform 2021).

¹⁸⁸ Deborah Becker, *Suit Alleges Parole Board has 'Blanket Practice' of Denying Requests to End Supervision*, WBUR (Nov. 30, 2021), <https://www.wbur.org/news/2021/11/30/lawsuit-massachusetts-sjc-parole-termination-denials>.

4: Multi-State Survey: What Can We Learn from Other States' Parole Systems?

4.1 State Analyses: Best and Worst Practices

This multi-state survey compares themes, actions, and values across parole systems in Rhode Island, New Hampshire, Maine, Puerto Rico, New Jersey, and Wyoming. The U.S. Court of Appeals for the First Circuit includes Rhode Island, New Hampshire, Maine, and Puerto Rico, which are in the same federal jurisdiction as Massachusetts. We believed looking at states in the same federal jurisdiction might highlight similar trends and perspectives on parole. We also reviewed New Jersey and Wyoming in hopes of finding the best practices for parole reform, as they received higher-than-average grades for their parole systems from the Prison Policy Initiative (PPI).

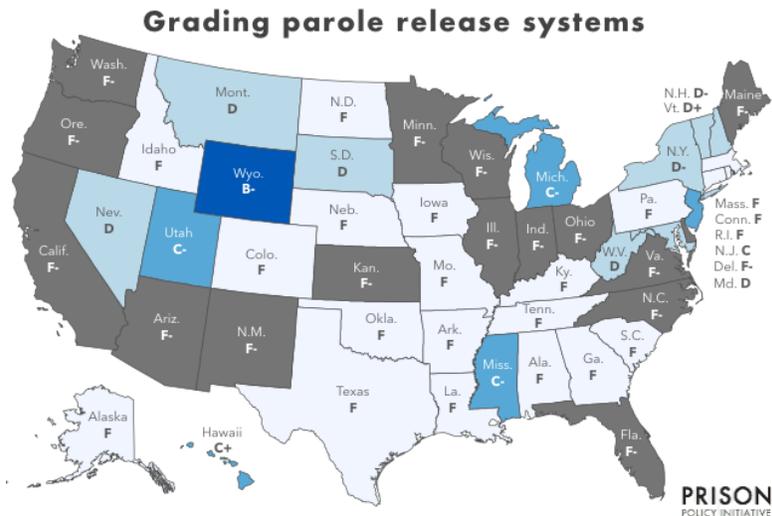
PPI is a non-partisan, non-profit organization focused on criminal justice reform.¹⁸⁹ PPI grades parole release systems, evaluating the fairness, equity, preparedness, and transparency of each state's parole system.¹⁹⁰ PPI converts qualitative data into a quantitative point value to generate a letter-grade ranking of "F-" to "A+" for each state's parole system.¹⁹¹ Massachusetts received an "F" in the most recent rankings.¹⁹²

¹⁸⁹ Jorge Renaud, *About the Prison Policy Initiative*, Prison Pol'y Initiative (Feb. 26, 2019), <https://www.prisonpolicy.org/about.html>.

¹⁹⁰ Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, Prison Pol'y Initiative (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html.

¹⁹¹ *Id.*

¹⁹² *Id.*



Jorge Renaud, Grading the Parole Release Systems of All 50 States, Prison Pol'y Initiative (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html.

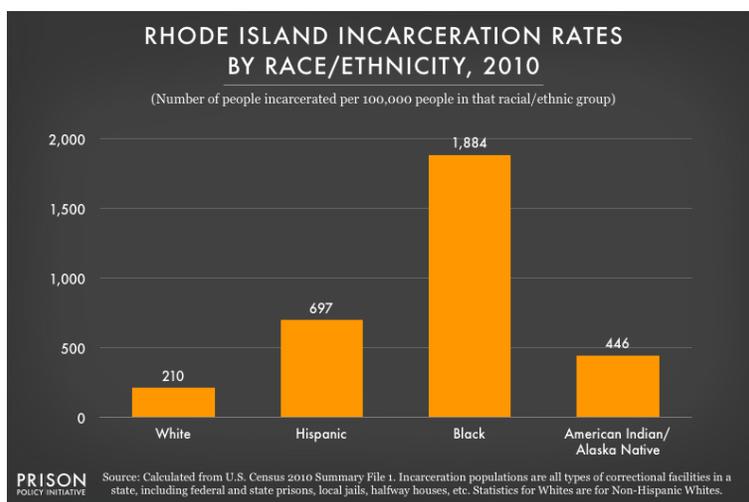
This section will explain the methodology and purpose of this survey, including exclusion and inclusion criteria. Next, we will provide an overview of each state, its parole system strengths and weaknesses, and comparisons between its system and the Massachusetts parole system. Finally, we will summarize the key findings.

Massachusetts can learn valuable lessons from these states. Rhode Island and New Hampshire both highlight the value of diversity in Board membership as a tool for increasing awareness of disabilities within the parole system. Wyoming, Rhode Island, and New Jersey each offer procedural mechanisms to identify and support vulnerable populations prior to and after parole. These practices provide people with disabilities tailored support networks while increasing their access to care. Puerto Rico and Maine, however, do not highlight any improved practices that Massachusetts should adopt.¹⁹³

¹⁹³ Puerto Rico does not provide any data on its parole system aside from one statutory requirement. Maine does not currently allow parole.

4.2 Rhode Island

PPI's Parole Release System awarded Rhode Island an "F."¹⁹⁴ Rhode Island shares a similar demographic makeup to Massachusetts, but it incarcerates a disproportionately higher number of Black and Brown residents.¹⁹⁵



Rhode Island law requires diverse membership for its Parole Board, including a psychologist or a physician, a licensed attorney, a corrections professional, and a law enforcement officer.¹⁹⁶ Greater professional diversity on a parole board means that parole applicants with disabilities benefit from a more holistic review. Diverse parole board members use their unique perspectives to consider each parole applicant through different lenses and to identify tailored post-release programming.¹⁹⁷ While Massachusetts has a similar statute, Rhode Island actually enforces

¹⁹⁴ Renaud, *supra* note 190.

¹⁹⁵ See *Quick Facts: Rhode Island*, U.S. Census Bureau, <https://www.census.gov/quickfacts/table/PST045215/44> (last visited Jan. 28, 2022); Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Pol’y Initiative (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>; *Rhode Island Profile*, Prison Pol’y Initiative, <https://www.prisonpolicy.org/profiles/RI.html> (last visited Jan. 29, 2022).

¹⁹⁶ R.I. Gen. Laws § 13-8-2 (2020).

¹⁹⁷ See Parole Bd. of Canada, *Op-Ed - Diversity of Parole Board Members Critical in Parole Decision-making*, Moncton Times and Transcript (Oct. 6, 2020), <https://www.canada.ca/en/parole-board/corporate/media/importance-of-board-member-diversity.html>.

these requirements.¹⁹⁸ Most notably, a formerly incarcerated person currently serves on the Rhode Island Parole Board, a reflection of shifting public norms.¹⁹⁹

Rhode Island has holistic parole eligibility factors that offer an empathetic approach to parole applicants with disabilities. Like Massachusetts, Rhode Island uses a risk assessment tool that focuses on the danger parole applicants may pose to the community.²⁰⁰ Unlike Massachusetts, however, Rhode Island also uses other tools to address personal, societal, or community-level gaps in the survey.²⁰¹ These tools capture multiple factors that impact decision-making; the Rhode Island Parole Board recognizes that no uniform plan for rehabilitation exists and examines each applicant's background and needs. After Rhode Island implemented these comprehensive assessments in 2014, recidivism rates fell from fifty-two percent in 2012 to forty-seven percent in

¹⁹⁸ Currently, three members of the Board have a legal or law enforcement background, two are trained in psychology or medicine, and two individuals are involved in community non-profits and businesses. *See* R.I. Parole Bd., *Rhode Island Parole Board Members*, <http://www.pparoleboard.ri.gov/board/> (last visited Jan. 28, 2022). Each member of the Board also has either a professional or volunteer-based interest in various aspects of community life, such as immigration, homeless services, family and child support groups, and more. *Id.*

¹⁹⁹ Peter J. Tomasek, *Rhode Island Appoints Formerly Incarcerated Person to Parole Board*, Interrogating Just. (2021), <https://interrogatingjustice.org/emphasizing-rehabilitation/rhode-island-appoints-formerly-incarcerated-person-to-parole-board/> (last visited Mar. 8, 2022).

²⁰⁰ R.I. Parole Bd., *Rhode Island Parole Board Guidelines* 6-8 (2018).

²⁰¹ One tool is the Assessment of Mitigating Factors, which evaluates an individual's community support, re-entry plans, and recommended programming success. *Id.* at 8. Another is the Level Service Needs Inventory (LSI-R), which uses ten categories to identify influences on individuals that affect their decision-making abilities (these domains include the following categories: criminal history; education/employment; financial; family/marital/accommodation; leisure/recreation; companions; alcohol/drug problems; emotional/personal; and attitudes/orientation). *See generally* Danielle Barron & Bree Derrick, *Level of Service Inventory - Revised: A Portrait of RIDOC Offenders* (R.I. Dep't of Corr. Plan. and Rsch. Unit 2011). For example, a study conducted on the Rhode Island LSI-R reports in 2011 revealed that 40 percent of those assessed had mental health issues that "moderately interfered" with their lives. However, less than half of these individuals had ever received mental health treatment. Thus, these surveys revealed a large gap in the needs of those within the prison system that those ordinary assessments had not detected. *Id.* Similarly, the WRNAS is a risk assessment that addresses gender-based disparities that limit female-identifying individuals' capacity to thrive after incarceration. Danielle Barron & Bree Derrick, *Gender Responsiveness at the RIDOC* (R.I. Dep't of Corr. Plan. and Rsch. Unit 2012).

2015.²⁰² This data demonstrates that Rhode Island’s assessment tools provide parole applicants with disabilities the access to services they need to prepare for life after incarceration.

Despite these advancements, Rhode Island’s parole system fails to achieve full equity in its processes. At parole hearings, Parole Board members partially rely on reports and notes from arresting officers, guards, or other agencies to characterize the acts of parole applicants. The Parole Board uses these documents to determine if parole applicants pose emotional, physical, or intellectual risks to the community, and, therefore, if the Parole Board should grant or deny parole. However, parole applicants in Rhode Island cannot challenge any incorrect information in their files.²⁰³ Therefore, if the Parole Board assumes negative traits about applicants based on untrue statements, it is less likely to grant parole.²⁰⁴

Additionally, Rhode Island’s parole system forbids attorneys to “speak for” the applicant.²⁰⁵ This requirement disadvantages parole applicants with disabilities who may struggle to understand speech and articulate themselves to the Parole Board, effectively denying them equitable and fair accommodations to participate in parole hearings. This discrimination has stark consequences: parole applicants without a history of psychiatric hospitalization during their

²⁰² R.I. Dep’t of Corr., *Fiscal Year 2019 Annual Population Report* (R.I. Dep’t of Corr. 2019). *See also* R.I. Dep’t of Corr., *CY14 Recidivism Brief* (R.I. Dep’t of Corr. 2018).

²⁰³ *See generally* Jorge Renaud, *Grading the Parole Release Systems of All 50 States: Appendix A*, Prison Pol’y Initiative, https://www.prisonpolicy.org/reports/parole_grades_table.html (last visited Mar. 9, 2022).

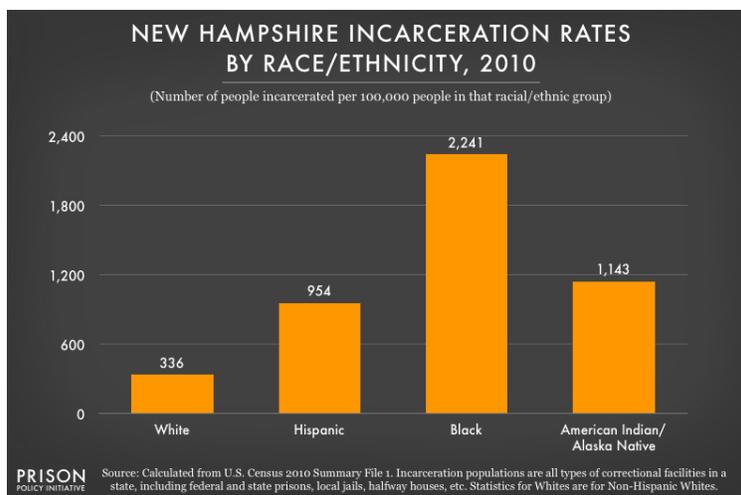
²⁰⁴ *See generally Id.* (explaining the importance of information correction during the parole process as a factor for evaluating overall parole equity).

²⁰⁵ *Frequently Asked Questions*, State of R.I. Parole Bd. & Sex Offender Commc’n Notification Unit, <https://web.archive.org/web/20160322064818/http://www.pparoleboard.ri.gov:80/faq/> (last visited Jan. 28, 2022).

incarceration were thirty times more likely to receive parole than their counterparts with a history of psychiatric hospitalization.²⁰⁶

4.3 New Hampshire

New Hampshire received a “D-” from PPI.²⁰⁷ Although smaller in population, New Hampshire, like Massachusetts, has a largely white population: just under seven percent of residents identify as non-white.²⁰⁸ New Hampshire also disproportionately incarcerates Black and Brown people.²⁰⁹



Historically, New Hampshire and Massachusetts’s Parole Boards have been predominately comprised of law enforcement professionals.²¹⁰ New Hampshire, however, now requires that two licensed attorneys sit on its Parole Board; ideally, membership should also include a licensed

²⁰⁶ Joel Caplan, *What Factors Affect Parole: A Review of Empirical Research*, *Federal Probation*, 71 *J. Corr. Phil. and Prac.* 16, 16-19 (2007).

²⁰⁷ Renaud, *supra* note 190.

²⁰⁸ *Quick Facts: New Hampshire*, U.S. Census Bureau, <https://www.census.gov/quickfacts/NH> (last visited Jan. 28, 2022).

²⁰⁹ *New Hampshire Profile*, Prison Pol’y Initiative, <https://www.prisonpolicy.org/profiles/NH.html> (last visited Jan. 28, 2022).

²¹⁰ Telephone Interview with Amy Vorenberg, Former Member, N.H. Parole Bd. (Dec. 2, 2021); Trounstein, *supra* note 57.

mental health professional.²¹¹ Presumably, these attorneys use their expertise to ensure that the Parole Board follows the law, including the ADA. The presence of a mental health professional on the Parole Board would ensure that applicants with disabilities receive accommodations and appropriate treatment plans upon release. Broadly, professional diversity means that the Parole Board examines each parole application from several different perspectives, enhancing overall equity.

Nevertheless, New Hampshire often struggles to support parole applicants with disabilities. Case managers are supposed to work with parole applicants to develop post-release housing, employment, and treatment plans, but the Parole Board routinely releases applicants without these plans.²¹² Applicants with disabilities often need these post-release services; when the Parole Board releases incarcerated people on parole without plans in place, it sets them up for failure. As a result, a staggering forty-seven percent of people have their parole revoked within three months of release.²¹³

The New Hampshire Parole Board uses discriminatory criteria when deciding whether to grant parole. For example, parole applicants must demonstrate self-improvement through programming, but institutional barriers to entry can prevent people with disabilities from accessing this programming while incarcerated.²¹⁴ Additionally, Parole Board members weigh factors inconsistently based on personal values and preferences, leading to arbitrary decisions.²¹⁵ Because

²¹¹ N.H. Rev. Stat. Ann. § 651-A (2022).

²¹² See Off. of Legis. Budget Assistant, *New Hampshire Adult Parole Board Performance Audit Report 37* (2019), http://www.gencourt.state.nh.us/LBA/AuditReports/PerformanceReports/DOC_NH_Adult_Parole_Board_2019.pdf; see *Id.* at 20.

²¹³ *Id.* at 2.

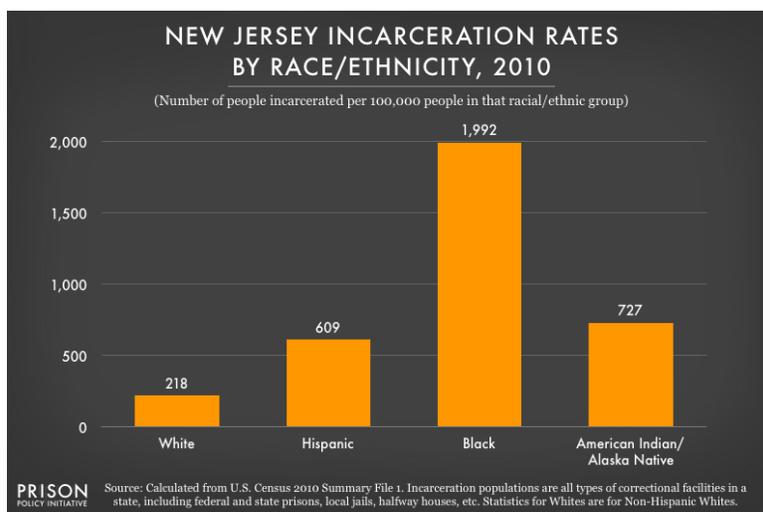
²¹⁴ See generally N.H. Code Admin. R. Ann. Parole Bd. 301.02 (2017).

²¹⁵ Off. of Legis. Budget Assistant, *supra* note 232 at 27.

only three of five members preside over each hearing, the final parole decision depends on the Parole Board makeup that day.²¹⁶

4.4 New Jersey

New Jersey improved its prison system ranking to “C” in 2019²¹⁷ in part due to its COVID-19 response.²¹⁸ Considerably larger than Massachusetts, New Jersey is also primarily white.²¹⁹ Data from New Jersey indicates a familiar trend: Black and Brown populations are overrepresented in prisons.²²⁰



²¹⁶ Off. of Legis. Budget Assistant, *supra* note 232 at 68.

²¹⁷ Renaud, *supra* note 190.

²¹⁸ Lauren del Valle & Leah Asmelash, *New Jersey Releases More Than 2,200 Eligible Inmates Under Nation's First Public Health Crisis Sentencing Law*, CNN (Nov. 4, 2020) <https://www.cnn.com/2020/11/04/us/new-jersey-prisoners-covid-trnd/index.html>. See also Dana Difilippo, *N.J. Prisons Get So-so Grade on Pandemic Response – But Still the Best in the U.S.*, New Jersey Monitor (Sept. 1, 2020), <https://newjerseymonitor.com/2021/09/01/n-j-prisons-get-so-so-grade-on-pandemic-response-but-still-the-best-in-the-u-s/>. (By releasing over 2,000 incarcerated people and vaccinating 89% of its population, the factors of reduced prison population, earlier releases, lower COVID-19 infections and death rates, and support for pandemic-related precautions weighed in favor of a higher ranking).

²¹⁹ U.S. Census Bureau, *Quick Facts: New Jersey*, <https://www.census.gov/quickfacts/fact/table/NJ/PST045221> (last visited Jan. 28, 2022).

²²⁰ Prison Policy Initiative, *New Jersey Profile*, <https://www.prisonpolicy.org/profiles/NJ.html> (last visited Jan. 28, 2022).

Under New Jersey law, the Parole Board must release parole applicants unless they have “failed to cooperate in [their] own rehabilitation” or will likely violate their parole conditions.²²¹ When denying parole, the Parole Board must affirmatively show “sufficient, credible evidence” to support its denial,²²² the Parole Board cannot selectively and arbitrarily rely “on those portions of the records that could . . . support the Board’s conclusion.”²²³ Parole applicants can also use expert opinions and psychological reports to refute the Parole Board’s assessment.²²⁴ In *Trantino v. New Jersey State Parole Board*, the court held that the Parole Board cannot deny parole due to “subjective impressions” of parole applicants.²²⁵ An appeals system that reinforces the completeness of records and evaluations can reduce discriminatory burdens on parole applicants.

In New Jersey, parole applicants do not have the right to access documents containing confidential information—including psychological reports affecting access to institutional programs, counseling, and treatments.²²⁶ Even the Parole Board’s psychologist often receives incomplete records.²²⁷

Decision-making is highly subjective in both Massachusetts and New Jersey. New Jersey, along with many states, considers the factors below when deciding whether to grant parole.²²⁸

²²¹ N.J. Rev. Stat. § 30:4-123.53 (2016).

²²² See generally *Trantino v. New Jersey State Parole Bd.*, 154 N.J. 19, 24 (1998).

²²³ See generally *Price v. New Jersey State Parole Bd.*, 2002 N.J. Super. Unpub. LEXIS 1 (App. Div. Apr. 26, 2002).

²²⁴ *Id.*

²²⁵ *Trantino v. New Jersey State Parole Bd.*, 154 N.J. 19, 24 (1998).

²²⁶ Telephone Interview with Eric Marcy, Criminal Defense Attorney, Wilentz, Goldman & Spitzer P.A. (November 4, 2021).; See N.J. Rev. Stat. § 30:4-123.54 (2016).

²²⁷ “To prevent an unfair assessment, attorneys can request that the psychologist withhold conducting evaluations until the parole plan is complete.” Eric Marcy, *The Use and Abuse of the LSI-R in Parole Evaluations Challenging So-Called “Objective” Testing*, Wilentz Attorneys at Law (Apr. 15, 2015).

²²⁸ Pamela M. Casey, et al., *Offender Risk & Needs Assessment Instruments: A Primer for Courts*, National Center for State Courts A30-A33, https://www.ncsc.org/__data/assets/pdf_file/0018/26226/bja-rna-final-report_combined-files-8-22-14.pdf (2014).

Table 1. LSI-R and LS/CMI Subcomponents

Subcomponent	# of Items	
	LSI-R	LS/CMI
Criminal History	10	8
Education/Employment	10	9
Financial	2	
Family/Marital	4	4
Accommodation	3	
Leisure/Recreation	2	2
Companions	5	4
Alcohol/Drug Problems	9	8
Emotional/Personal	5	
Attitudes/Orientation	4	4*
Antisocial Pattern		4

*Renamed Procriminal Attitude/Orientation in LS/CMI

This assessment tool often fails to capture a parole applicant’s personal growth and discredits maturity, rehabilitative programs, and other individual indicators that would otherwise paint the parole applicant in a more positive light.²²⁹ Therefore, this assessment tool immediately places parole applicants with disabilities, who may have been denied access to equitable programming before and during their incarceration, at a disadvantage.²³⁰

4.5 Wyoming

Wyoming received a "B-," the highest grade of any state in the PPI rankings.²³¹ As a much smaller state, Wyoming only incarcerates about 5,400 people within its prison system.²³² Massachusetts, on the other hand, incarcerates 22,000 people.²³³ Although its population is nearly

²²⁹ Telephone Interview with Eric Marcy, Criminal Defense Attorney, Wilentz, Goldman & Spitzer P.A. (November 4, 2021).

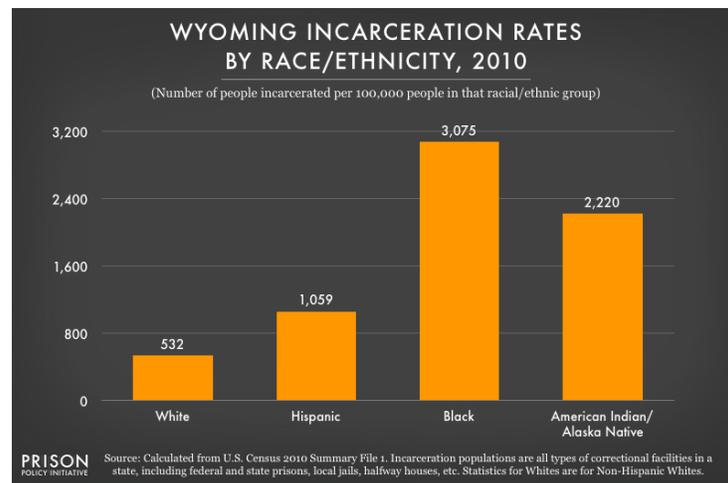
²³⁰ *Id.*

²³¹ Renaud, *supra* note 190.

²³² Prison Pol’y Initiative, *Wyoming Profile*, <https://www.prisonpolicy.org/profiles/WY.html> (last visited Mar. 8, 2022).

²³³ Prison Pol’y Initiative, *Massachusetts Profile*, <https://www.prisonpolicy.org/profiles/MA.html> (last visited Feb. 27, 2022).

ninety-three percent white, Wyoming also disproportionately incarcerates Black and Brown residents.²³⁴



Like many parole boards, the Wyoming Parole Board sometimes grants parole on the condition that applicants live in a halfway house or participate in some other form of programming upon release. But, if the halfway house or program denies them admission, the Board does not automatically rescind parole.²³⁵ Wyoming has a smaller prison population, but its practices demonstrate that the warehousing issue is not inevitable.

While Massachusetts struggles to retain diverse Board membership, Wyoming’s policies ensure diversity. For example, Wyoming prohibits any one political party from representing more than a slight majority on its Parole Board.²³⁶ Under this model, parole applicants with disabilities benefit from a wide range of perspectives and a broader culture of equity.

²³⁴ Vera Institute of Justice, *Incarceration Trends in Wyoming* (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-wyoming.pdf>; U.S. Census Bureau, *Quick Facts: Wyoming*, <https://www.census.gov/quickfacts/WY> (last visited Mar. 7, 2022).

²³⁵ Telephone Interview with Christopher G. Humphrey, Adult Community Corrections Bd. (Nov. 2, 2021).

²³⁶ Daniel M. Fetsco, *Early Release from Prison in Wyo.: An Overview Of Parole In Wyo. And Elsewhere and An Examination Of Current And Future Trends* 11 Wyo. L. Rev. 99, 104 (2011).

Despite requiring that the Parole Board maintain diversity along political party lines, Wyoming does not have any other composition requirements. Wyoming has no qualification requirements for its Parole Board members; they do not even have to be Wyoming residents.²³⁷ This policy risks replicating the issues that exist in Massachusetts due to a lack of diversity on the Parole Board.

4.6 What Can Massachusetts Take Away from Other States' Parole Practices?

The states we examined reveal themes and practical solutions applicable to Massachusetts. Both Rhode Island and New Hampshire underscore the importance of diverse parole boards.²³⁸ New Jersey safeguards parole applicants from subjective, arbitrary decision-making.²³⁹ Wyoming ensures that continued incarceration does not have to be the default when parole applicants with disabilities cannot access post-release programming.²⁴⁰ Broadly, these states' successes and failures help inform the following recommendations.

²³⁷ Daniel M. Fetsco, *No Credit for Time Served* 8 (Nov. 11, 2021) (unpublished manuscript) (on file with authors).

²³⁸ See R.I. Parole Bd., *supra* note 200.

²³⁹ *Trantino*, *supra* note 222 at 24.

²⁴⁰ Fetsco, *supra* note 236 at 8.

5. Recommendations: Shifting Massachusetts to a More Equitable and Just Parole Process

The following recommendations aim to eliminate the Board’s discriminatory practices towards parole applicants with disabilities. We developed these recommendations after examining the history of parole in Massachusetts, the Board’s violations of the ADA, identifying gaps in the Board’s processes that disproportionately impact parole applicants with disabilities, and reviewing best practices from other states. This population deserves—and is legally entitled to—equity and justice in the parole process.

Recommendation #1: The Massachusetts Legislature should pass legislation to institute a system of presumptive parole.

In a presumptive parole system, incarcerated people have a right to parole after serving a specific portion of their sentence in prison or participating in and completing an individualized program plan while incarcerated—unless the parole board finds explicit reasons not to release them.²⁴¹ This shift in favor of release reduces the burden on parole applicants to advocate for their release and fosters a more efficient and fair parole process. A system of presumptive parole would help all parole applicants, and especially those with disabilities—who often face greater barriers in navigating the parole process—prepare for their hearings and articulate their right to release.

Multiple states (including Colorado, Michigan, Mississippi, Pennsylvania, and Vermont) have recently adopted principles of presumptive parole,²⁴² and several experts and advocates have

²⁴¹ Leslie Walker et al., White Paper: The Current State of Parole in Massachusetts (2013).

²⁴² Ellen Whelan-Wuest, *States Taking Action: Flipping the Script on Parole*, The Council of State Governments Justice Center (Sept. 29, 2020), <https://csgjusticecenter.org/2020/09/29/flipping-the-script-on-parole/>.

already recommended its implementation in Massachusetts.²⁴³ For example, in 2002, the Boston Bar Association’s Task Force on Parole and Community Reintegration suggested the Board implement a system of presumptive parole.²⁴⁴ Over a decade later, a group of legal advocates recommended presumptive parole as a tool for allowing incarcerated people to transition back into their communities.²⁴⁵

Recommendation #2: The Massachusetts Legislature should amend Mass. Gen. Laws ch. 27 § 4 to eliminate the loophole that allows the appointment panel to override the diversity requirement of the Board.

Massachusetts law requires that Board members have diverse backgrounds in “parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology, or social work.”²⁴⁶ However, this same statute allows the appointment panel to override this requirement, resulting in a vast overrepresentation of law enforcement backgrounds on the Board.²⁴⁷ Just one of the current Board members has a background in psychology.²⁴⁸ More professional diversity on the Board—and greater awareness of the nuances of disabilities—would minimize subconscious bias and provide for more meaningful debate among the Board at parole hearings. Rhode Island

²⁴³ Leslie Walker et al., White Paper: The Current State of Parole in Massachusetts (2013).

²⁴⁴ Bos. Bar Ass’n Task Force on Parole and Comty. Reintegration, *Parole Practices in Massachusetts and Their Effect on Community Reintegration* 16 (2002), <https://static.prisonpolicy.org/scans/FinalReport08-14-02.pdf>.

²⁴⁵ Leslie Walker et al., White Paper: The Current State of Parole in Massachusetts (2013).

²⁴⁶ Mass. Gen. Laws. ch. 27 § 4 (2022).

²⁴⁷ “. . . 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.” Mass. Gen. Laws. ch. 27 § 4 (2022); The Editorial Board, *State Parole Board, Clemency Process Need Reform*, Bos. Globe (Apr. 5, 2021).

²⁴⁸ *State Parole Board, Clemency Process Need Reform*, The Bos. Globe (last updated Apr. 5, 2021), <https://www.bostonglobe.com/2021/04/05/opinion/state-parole-board-clemency-process-need-reform/>.

and New Hampshire both require professional diversity of their parole boards; Massachusetts should follow their lead.²⁴⁹

Recommendation #3: The Massachusetts Legislature should amend Mass. Gen. Laws ch. 27 § 4 to expand the diversity requirement of the Board to include a geographic diversity and a lived experience requirement.

The Massachusetts Legislature should institute a geographic diversity requirement, whereby each Board member would come from a different part of Massachusetts. Parole applicants, especially those with disabilities, often require intensive community support as they re-enter society. The Board may grant parole to certain applicants with disabilities but not actually release them from custody because they cannot enter Board-mandated treatment programs through the DMH.²⁵⁰ Geographically diverse Board members could leverage their unique knowledge of local treatment and programming options to ensure parole applicants with disabilities receive support in their communities when released.

In line with a recent recommendation from the Special Commission on Structural Racism in the Massachusetts Parole Process, the Legislature should institute a lived experience requirement. This would require at least one member of the Board to have personally completed the parole process.²⁵¹ Rhode Island recently appointed a formerly incarcerated person to serve on its Parole Board.²⁵² Drawing on lived experience, this member would bring an invaluable

²⁴⁹ R.I. Gen. Laws § 13-8-2 (2019); N.H. Rev. Stat. Ann. § 651-A3 (2022).

²⁵⁰ Jenifer B. McKim, *Parole in Massachusetts: Free to go, but not to Leave*, GBH (July 8, 2020), <https://www.wgbh.org/news/local-news/2020/07/08/parole-in-massachusetts-free-to-go-but-not-to-leave>.

²⁵¹ Gen. Court of the Commonwealth of Mass., Special Comm'n on Structural Racism in the Mass. Parole Process, *Final Report* 30 (2021).

²⁵² Bre Richey, *Peter Slom Makes History as First Formerly Incarcerated Member of RI Parole Board*, WPRI (Dec. 9, 2021), <https://www.wpri.com/news/local-news/providence/peter-slom-makes-history-as-first-formerly-incarcerated-member-of-ri-parole-board/>.

perspective to the decision-making process and help identify key indicators of success for parole applicants in Massachusetts.²⁵³

Recommendation #4: The DOC should amend policy 103 DOC 650.16 to give IPOs, clinicians, and parole applicants with disabilities additional time to prepare a release plan prior to their parole hearing in order to prevent needless incarceration.

As we have noted, the Board emphasizes whether parole applicants have adequate plans for release in its decision-making. Currently, the DOC requires the completion of release plans forty-five days prior to anticipated release dates.²⁵⁴ But release dates often occur long after hearing dates,²⁵⁵ making release dates a faulty metric for ensuring adequate time to prepare release plans before parole hearings. Instead, the DOC should require IPOs and clinicians to work with parole applicants to complete discharge plans at least sixty days prior to parole hearing eligibility dates. Applicants with disabilities may require more coordination of services, such as specialty housing and ongoing treatment, warranting this additional planning time. Changing this DOC policy would give parole applicants—especially those with disabilities—the necessary time to prepare for a successful parole hearing.

Recommendation #5: The Massachusetts Legislature should pass a statute requiring the Board to provide complete records of proceedings to parole applicants, their legal representation, and their clinicians.

The Board has wide discretion when providing documents surrounding its decision-making process to parole applicants and their legal representatives. This crucial information helps parole

²⁵³ *Id.*

²⁵⁴ *Mass. Dep't of Corr., 103 DOC 650.16 Mental Health Services 5* (Mass. Dep't of Corr. ed. 2021).

²⁵⁵ *See Gen. Ct. of the Commonwealth of Mass., Special Comm'n on Structural Racism in the Mass. Parole Process: Final Report 34* (2021).

applicants prepare for their hearings and have a meaningful opportunity for release. Although the public has access to lifer hearings, we know very little about what happens in non-lifer hearings. When the Board denies parole, the lack of access to complete records makes parole denials difficult to understand, which in turn delays applicants' release timelines. The *Crowell* decision further emphasizes the need for people with disabilities to have full access to their records to increase their chance of receiving parole.²⁵⁶

Recommendation #6: The Board should amend 120 CMR 300.8(2)(b) to permit a qualified individual to represent a parole applicant with disabilities who may not be able to offer testimony or understand the scope of parole proceedings.

While lifers have a right to legal representation, non-lifers do not have that same guarantee. This disproportionately impacts people with disabilities who may need additional help navigating the parole process. Current guidance gives the Board wide discretion to permit non-lifers with disabilities to have legal representation. It is unclear how often the Board uses this discretion to provide reasonable accommodations to these eligible parole applicants. The Board should change this permissive language to explicitly require that legal representation be allowed for all parole applicants with disabilities regardless of their sentence status. Doing so builds in a critical reasonable accommodation for parole applicants with disabilities who may need additional assistance in the parole process.

²⁵⁶ See *Crowell*, 477 Mass. at 106.

Recommendation #7: The Board must amend its guidance to explicitly consider parole applicants' disabilities when assessing their participation in rehabilitative programs.

Individuals cannot always meet parole conditions because of DOC limitations on program accessibility for people with disabilities. For example, people with disabilities may not attend certain rehabilitative programs while incarcerated because of the DOC's failure or structural inability to provide reasonable accommodations. Because the Board acts independently of the DOC, the Board may not know which programs were available to parole applicants and which ones were inaccessible. This puts parole applicants with disabilities at a disadvantage when the Board heavily weighs program participation as a reason for release. The DOC should provide information, prior to the parole hearing, about services and reasonable accommodations available for those services. The Board must then consider those limitations when making decisions in order to eliminate bias against people with disabilities based on their program participation.

Recommendation #8: The Massachusetts Legislature should enact a requirement for the Board to coordinate with the DMH and other relevant state agencies to identify appropriate post-release services and follow a strict timeline for release.

The Board discriminates against approved parole applicants with disabilities when it fails to identify adequate post-release programming, resulting in unnecessary imprisonment.²⁵⁷ To prevent discrimination against parole applicants with disabilities, the Board should provide an

²⁵⁷ See *Commonwealth of Mass. Exec. Office of Pub. Safety and Sec. Parole Bd., Decision in the Matter of Wilfred Dacier* (Charlene Bonner et al. eds., 2015).

expert to work with applicants in identifying appropriate programming to incorporate into post-release terms and conditions.²⁵⁸

In addition to providing an expert, the Legislature should mandate that the Board coordinate with the DMH, and other relevant state agencies, to develop and maintain a database of services available for people with disabilities seeking parole—including community-based risk reduction programs. If no such programs exist, Massachusetts has an obligation to modify existing programs or create new ones to prevent discrimination against parole applicants with disabilities.²⁵⁹ The reduced cost of needlessly incarcerating fewer parole-eligible people would offset the investments required to modify or develop new programs.²⁶⁰ The Legislature should also require the Board to identify appropriate services and release parole applicants within sixty days of approval.

Recommendation #9: The Board must enact explicit guidelines that establish decision-making processes with formal criteria to limit the subjective—and potentially discriminatory—judgments of individual board members.

The Board avoids setting strict standards to guide its decision-making process.²⁶¹ The Board created a list of factors to guide its decision-making process, including: an applicant’s institutional behavior, post-release plan, participation in institutional programs, and risk of reoffending.²⁶² But nothing in that guidance requires consideration of these factors. Without a clear

²⁵⁸ See *Dacier v. Massachusetts Parole Board*, No. 1884CV00932 (Mass. Super. Ct. Sept. 25, 2019) (order granting judgment on the pleadings).

²⁵⁹ *Crowell v. Massachusetts Parole Board: Massachusetts Supreme Judicial Court Observes that Americans with Disabilities Act Applies to Parole*, 131 Harv. L. Rev. 910, 917 (2018).

²⁶⁰ As of 2020, the annual cost per inmate in Massachusetts ranged from \$58,460 up to \$234,668. See Research and Planning Division, Mass. Dep’t of Corr., *Prison Population Trends* (2020).

²⁶¹ Mass. Parole Bd., *Parole Decision Making: The Policy of the Massachusetts Parole Board* (2012) at 4.

²⁶² Mass. Parole Bd., *Parole Decision Making: The Policy of the Massachusetts Parole Board* (2012) at 18–19.

basis for decision-making, the Board can arbitrarily and subjectively grant or deny parole. The Board must explicitly require consideration of the list of factors to ensure that it conducts a thorough review for each parole applicant. While some level of discretion helps accommodate parole applicants with disabilities, the Board's steadfast lack of transparency in its decision-making process is alarming. Failing to establish clear guidelines leaves parole applicants with disabilities vulnerable to undetectable discrimination.²⁶³ Requiring consideration of these factors would encourage the Board to move away from using boilerplate language in decisions and increase overall transparency.

²⁶³ See generally Emily Halnon, *UO Law Prof on Quest to Root out Injustices in Parole Decisions*, *AroundtheO*, (Jan. 29, 2022) <https://around.uoregon.edu/content/uo-law-prof-quest-root-out-injustices-parole-decisions>.

6: Conclusion

As it stands, the Board fails to accommodate the needs of incarcerated people with disabilities seeking parole. As Massachusetts and the United States continue to address the harms of mass incarceration, the parole process must improve for individuals with disabilities and the broader population of incarcerated people. Massachusetts can start by incorporating the recommendations of this paper, which follow strong practices that many other jurisdictions have already implemented. In doing so, Massachusetts can prioritize investments in community-based services that meet the needs of people on parole and communities at large. Improving the parole system and shifting priorities will reduce the prison population, improve public safety, and support thriving communities.