



Institute for Policy Integrity

new york university school of law

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VIA ELECTRONIC COMMUNICATION

Rockne Chickinell, General Counsel
Department of Justice
United States Parole Commission
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Re: Proposed Regulation for Revising the Reparole Guidelines for Releasing Parole Violators.
RIN: 1104-AA02 (Fall 2011 Unified Agenda)

Preliminary Plan for Retrospective Review Under E.O. 13,579, 76 Fed. Reg. 242, 78183 (Dec. 16, 2011), Docket No. USPC—2011—01

Dear Mr. Chickinell,

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law respectfully submits these comments to the United States Parole Commission, Department of Justice (“Parole Commission”) in response to two separate yet related Commission initiatives: (1) the Commission’s proposal, included in the Fall 2011 Unified Agenda, to revise reparole guidelines;¹ and (2) the Commission’s “Preliminary Plan for Retrospective Review Under E.O. 13,579” published in the *Federal Register* on December 16, 2011 (“Preliminary Plan”). Policy Integrity is a nonpartisan think-tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy.

In its Preliminary Plan, the Commission announced that its initial retrospective review efforts will focus on “those rules and procedures that pertain to imposing conditions of release for an offender.”² In accordance with this priority, these comments focus primarily on the Commission’s parole revocation procedures, and how they could be revised to better ensure that revocation decisions are made and evaluated using evidence-based methods. These comments then turn to the broader issue of the Commission’s Preliminary Plan for conducting retrospective review, suggesting ways the Plan can be improved to better fulfill the mandate of E.O. 13,579.

In sum, Policy Integrity puts forth the following recommendations for regulatory changes to the

¹ The Parole Commission’s rulemaking will affect the following regulations covering parolees who have violated federal law and the D.C. Code: 28 C.F.R § 2.20 (covering federal offenders), 28 C.F.R § 2.21 (covering federal offenders), 28 C.F.R. § 2.81 (covering D.C. Code violators), and 28 C.F.R. § 2.218 (covering D.C. Code violators).

² Parole Commission, Department of Justice, *Preliminary Plan for Retrospective Review Under E.O. 13579*, 76 Fed. Regis. 242, 78183, 78184 (Dec. 16, 2011) [hereinafter Preliminary Plan].

Commission's parole revocation procedures:

- The Parole Commission should look critically at evidence-based programs and studies implemented throughout the United States.
- The Parole Commission should implement a program of "swift, certain, and proportional responses" to respond to technical and drug-based parole violations.
- The Parole Commission's regulations should be complemented by a holistic approach that assists in the transition from prison to society and is based on the success of similar programs in other jurisdictions.
- The Parole Commission should utilize pilot programs to test the efficiency of its regulatory programs.
- The Parole Commission should implement data-management systems to match the most effective response to each parolee.

With respect to the Preliminary Plan for retrospective review, these comments recommend that the Commission specify, in greater detail, the criteria it will use to select rules for retrospective review and the mechanisms by which retrospective review will become integrated in the Commission's rulemaking process and maintained on an ongoing basis.

I. THE IMPORTANCE OF COST-BENEFIT ANALYSIS AND EVIDENCE-BASED PRACTICES IN CRIMINAL JUSTICE

Cost-benefit analysis and evidence-based decision-making can ensure the optimal operation of many regulatory systems, and the criminal justice system is no exception. In *Balanced Justice*, a recent report by Policy Integrity, cost-benefit analysis is defined as follows:

Cost-benefit analysis engages in the quantification of the costs and benefits of different policies, which allows for direct comparisons along a common scale. Both costs and benefits are monetized in dollar terms. The total expected costs of a particular intervention or program are then subtracted from the total expected benefits, and the policy with the greatest net benefits is selected. Stated more simply, the results show which interventions or programs provide taxpayers the biggest bang for their buck.³

The use of cost-benefit analysis, therefore, ensures that the maximum benefits from crime reduction are obtained at the lowest cost, allowing policymakers to determine the expected benefits and return-on-investment in advance of implementation.⁴ Evidence-based decision-making requires that where possible, policymakers rely on cost-benefit analysis and the best available empirical evidence in making policy choices.⁵ This type of analysis demonstrates the effectiveness of particular policies and allows policymakers to make informed choices about

³ Jennifer S. Rosenberg & Sara Mark, *Balanced Justice: Cost-Benefit Analysis and Criminal Justice Policy 2* (Inst. for Policy Integrity and Ctr. on the Admin. of Criminal Law, Policy Brief No. 11, 2011) [hereinafter *Balanced Justice*].

⁴ *Id.* at 3.

⁵ U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRECTIONS, NIC ACCESSION NO. 024198, EVIDENCE-BASED POLICY, PRACTICE, AND DECISIONMAKING: IMPLICATIONS FOR PAROLING AUTHORITIES 1 (2011), available at <http://nicic.gov/Library/024198> (hereinafter EVIDENCE-BASED POLICY).

selecting similar approaches for their own jurisdiction. Many states have begun to employ cost-benefit analysis during the economic downturn in order to ensure that their more limited budgets would be spent efficiently.⁶

Several other organizations advocate the use of cost-benefit analysis and evidence-based decision-making in criminal justice policy, including the Center on the Administration of Criminal Law at New York University School of Law, Right on Crime, the Pew Center on the States, and the American Civil Liberties Union. In addition, the Washington State Institute for Public Policy (WSIPP) and the Cost-Benefit Analysis Unit of the Vera Institute for Justice conduct independent analyses of the efficacy of specific criminal justice programs, and their findings can be used to inform decision-making at the federal, state, and local levels.

The Parole Commission and the Department of Justice already recognize the importance of evidence-based decision-making.

In recent years, the National Institute of Corrections (NIC), an agency within the U.S. Department of Justice, Federal Bureau of Prisons, has recognized the importance of relying on evidence-based decision-making in state level parole determinations and policy. The NIC's report, *Comprehensive Framework for Paroling Authorities in an Era of Evidence-Based Practices*, detailed an "overarching visionary plan that paroling authorities need to lead them to a desired future of well-trained board members, using *evidence-based practices* within agencies that have sufficient staff and other resources to effectively support the release and, when necessary, revocation of offenders."⁷ The report recognizes the importance of using evidence-based decision-making at every step of the parole process, from planning for possible release to implementing punishments. Importantly, in delineating its recommendations, NIC acknowledges that programs cannot implement evidence-based parole practices in a vacuum. Rather, NIC notes that "paroling authorities that are successfully introducing evidence-based practices have the leadership and management, information systems, and planning and evaluation capacity needed" to implement these policies.⁸

In addition to the Department of Justice, the Parole Commission itself has recognized the importance of evidence-based program evaluation. In implementing new guidelines and rules, the Parole Commission notes that it "is continually evaluating its programs and operations with the goal of achieving across-the-board economies of scale that result in increased efficiencies and cost savings."⁹ These savings, however, often come in the form of administrative savings, such as printing and publication changes. While finding ways to save through administrative cuts is helpful,¹⁰ the Parole Commission also seems to recognize the need for more substantive changes.¹¹

Finally, Congress and the Department of Justice have demonstrated an increased awareness of the importance of using evidence-based decision-making in corrections decisions. Specifically, Congress has demonstrated a commitment to ensuring that offenders are given all necessary support when reentering society so they do not recidivate. The Second Chance Act of 2007 "was

⁶ *Balanced Justice*, *supra* note 2, at 5.

⁷ U.S. DEPARTMENT OF JUSTICE, NAT'L INST. OF CORRECTIONS, *COMPREHENSIVE FRAMEWORK FOR PAROLING AUTHORITIES IN AN ERA OF EVIDENCE-BASED PRACTICE* (2008) (emphasis added).

⁸ *Id.* at 29.

⁹ U.S. PAROLE COMM'N, FY 2012 BUDGET REQUEST AT A GLANCE.

¹⁰ *Id.*

¹¹ See generally U.S. PAROLE COMM'N, REP. NO. 45, *THE UNITED STATES PAROLE COMMISSION'S EXPEDITED REVOCATION PROCEDURE* (2004).

created to help break the cycle of criminal recidivism, increase public safety, and help states, units of local government, and Indian tribes better address the growing population of offenders who return to their communities.”¹² Grants are made available to localities to provide services to offenders re-entering society to assist these released prisoners in making a successful transition from jail. Grantees are required to use evidence-based assessment tools “to assess the risk factors and treatment needs of returning inmates and developing or adopting procedures to ensure that dangerous felons are not released from prison prematurely.”¹³

II. EVIDENCE-BASED POLICY RECOMMENDATIONS

Based on available empirical research, the Parole Commission should focus on two types of reforms for drug use and administrative parole violations: (1) definite but less severe punishments; and (2) a greater focus on reentry to reduce released prisoners’ propensity to commit such violations. These strategies have proven effective in several states and therefore have a strong likelihood of success. However, the available empirical studies of these state efforts do not include thorough cost-benefit analyses, and the Parole Commission may significantly differ from the states in the operation of its parole system and its released prisoner population. To the extent possible, we suggest that the Parole Commission conduct its own cost-benefit analysis to tailor the below policies to its own characteristics.

The Parole Commission Should Implement “Swift, Certain, and Proportional” Responses to Parole Violations.¹⁴

A number of studies have found that parolees are more compliant with the terms of their release if they know that proportional consequences for violations will definitely be applied shortly after a violation occurs.¹⁵ In the case of technical violations or failed drug tests, the risk posed by the released prisoner to public safety is relatively low, which justifies a small sanction rather than significant prison time or revocation of parole altogether.¹⁶ Such sanctions could include drug treatment, a higher degree of supervision by a parole officer, or short prison stays.¹⁷ A more severe (and costly) punishment may not be necessary if the released prisoner knows in advance and with near certainty that these sanctions will be applied. Of the three factors typically considered to deter—swiftness, certainty, and the severity of punishment—recent studies indicate that severity has the least impact.¹⁸ Finally, quick institution of punishment following parole violations has also

¹² U.S. Dep’t of Justice, Office of Justice Programs, *Second Chance Act, Prisoner Reentry Initiative, FY 2009 Competitive Grant Announcement*, available at <http://www.ojp.usdoj.gov/BJA/grant/09SecondChanceReentrySol.pdf>.

¹³ *Id.* at 3.

¹⁴ EVIDENCE-BASED POLICY, *supra* note 5, at 8.

¹⁵ *See id.*; ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE 9 (NCJRS No. 229023, 2009) [hereinafter HOPE EVALUATION], available at <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

¹⁶ MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 156-157 (2005).

¹⁷ *Id.* at 156-157, 169.

¹⁸ *See* David Farabee, RETHINKING REHABILITATION: WHY CAN’T WE REFORM OUR CRIMINALS? at 57-60 (2005) (citing Scott Decker, Richard Wright, & Robert Logie, *Perceptual Deterrence Among Active Residential Burglars: A Research Note*, CRIMINOLOGY, Feb. 1993, at 135-47); Todd R. Clear, Patricia M. Harris, & S. Christopher Baird, *Probationer Violations and Officer Response*, 20 J. CRIM. JUST. 1 (1992).

been shown to reduce parole violations and costs.¹⁹

While several states have adopted these goals for their parole and probation systems, the most rigorously analyzed program is Hawaii's Opportunity Probation with Enforcement (HOPE) program. The HOPE program began as a pilot program for probationers with a high risk of failure; in order to assess the efficacy of the program, analysts tracked not only the outcomes of program participants, but also non-participants serving as a control group.²⁰ All of these probationers had been previously identified by their probation officers as having a high risk of failing probation, based on their scores on the Level of Service Inventory and prior behavior; they were assigned randomly to either the HOPE or control group.²¹ For the control group, punishments for drug use violations varied from a warning to a revocation hearing at the discretion of the probation officer, typically resulting in multiple warnings before revocation for repeat violations.²² By contrast, if a HOPE probationer failed a random drug test, the probation officer would file a Motion to Modify Probation to be heard before a judge within 72 hours.²³ The probationer would be sentenced to prison time at the hearing; the length of prison stay was always at least a few days, but increased for repeat violations.²⁴ HOPE probationers received a clear explanation of the program by a judge prior to the start of their probation.²⁵ Analysts funded by the National Institute of Justice found that outcomes for the HOPE probationers were, on all counts, better than those for the control group three months and six months after entering the program.²⁶ HOPE probationers failed fewer drug tests, missed fewer appointments with probation officers, were less likely to have their probation revoked, and spent less time in jail than the control group.²⁷

As suggested by the HOPE program, short, speedy, and certain punishments for drug use violations of parole can reduce costs of returning violators to prison and increase the likelihood that released prisoners will abide by the conditions of their parole. Hawaii is one of several states that use such programs for technical or all violations of parole. Ohio uses a predetermined matrix of graduated penalties for parole violations that incorporates the released prisoner's risk level as a factor.²⁸ A study funded by the National Institute of Justice that compared parolees under the matrix system to a historical control group found that Ohio's system did not have a significant impact on recidivism, but was cost-effective because it reduced expenditures on revocation hearings, revocation sanctions, and detention.²⁹ South Dakota³⁰ and Oregon³¹ are also examples of states that use a graduated

¹⁹ HOPE EVALUATION, *supra* note 17, at 11-12 .

²⁰ *See generally* HOPE EVALUATION, *supra* note 17.

²¹ *Id.* at 11. A randomized, controlled trial was conducted in 2007, confirming this study's results. *Id.* at App'x 3.

²² *Id.* at 29.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 13.

²⁶ *Id.* at 17-27.

²⁷ *Id.*

²⁸ *See* BRIAN MARTIN, EXAMINING THE IMPACT OF OHIO'S PROGRESSIVE SANCTION GRID, FINAL REPORT 6-7 (NJCRS No. 224317, 2008).

²⁹ *Id.* at 55. The researchers cite several possible reasons for the constant recidivism rate, including the recent nature of the matrix's implementation, absence of attitudinal data, and a theory that reform in the case management process is required in order for the graduated sanctions programs to reduce violations. *Id.* at

penalty system. The Parole Commission should consider a similar system for administrative and drug use parole violations and use evidence-based decisionmaking to determine the appropriate levels of sanctions.

The Parole Commission Should Shift Its Focus Toward Reintegration.

As NIC recognizes, a parole system will be more effective—and therefore see fewer violations—if the program works towards helping offenders reenter society. Studies have shown that “[c]onditions related to drug-testing, fines, fees, and the general culture of supervision often make it difficult to successfully transition to communities.”³² Working with grant funds provided by NIC and other agencies, several state parole commissions have conducted studies and developed pilot programs to evaluate the costs and benefits of distinct efforts to reintegrate released prisoners into society. On the basis of these studies, we recommend that the Parole Commission: (1) work directly with offenders to structure individualized reentry plans; (2) work closely with other agencies to develop training and reentry strategies; and (3) create a pilot program to determine the costs and benefits of implementing transition housing in Washington, D.C. However, while these recommendations have worked in other contexts, each locality has different needs. It is important that the Parole Commission continue to monitor, collect data, and conduct evaluations of any program it implements. In addition, successful programs—such as the ones discussed below—have implemented all of these suggestions, rather than choosing among them.

Parole officers should work directly with offenders and support providers to structure individualized reentry plans.

The Parole Commission should incorporate the goal of “swift, certain, and proportional responses” into a more holistic program in which released prisoners plan for their own release and set scaled punishments with the assistance of parole officers. In Maryland, the parole commission created the Proactive Community Supervision Program, a pilot program which brought prisoners soon to be released and parole officers together to develop a detailed release plan, including a “system of graduated responses to parole behaviors” and positive incentives for following the individualized plan. A study of the program predicts that had all of Maryland’s parolees been included in the program, 1,313 fewer parolees would have been rearrested, representing about \$19 million in cost savings.³³ Similarly, in Pennsylvania, a new Bureau of Offender Reentry³⁴ developed Transitional Accountability Plans for each offender before release on parole. Parole officers work with offenders

56. In addition, the Ohio matrix is used for all types of parole violations, not just drug use or technical violations.

³⁰ See Ed Ligtenberg & Doug Clark, South Dakota Board of Pardons and Paroles, *Taking a System Approach to Reducing Parole Violations: “Because It’s Not Just a Parole Issue”*, TOPICS IN COMMUNITY CORRECTIONS, 2006, at 11-12 (South Dakota’s Policy Driven Responses to Technical Parole Violations initiative).

³¹ *Administrative Structured Sanctions*, OREGON DEPARTMENT OF CORRECTIONS, http://www.oregon.gov/DOC/TRANS/CC/structured_sanctions.shtml.

³² THE RELEASE VALVE: PAROLE IN MARYLAND 19, JUSTICE POLICY INSTITUTE (2009).

³³ THE RELEASE VALVE: PAROLE IN MARYLAND, JUSTICE POLICY INSTITUTE (2009). Of course, in evaluating cost savings under these programs, it is important to keep in mind both the differential costs of jail in each state and the importance of a decision simply not to return offenders to jail for certain new, non-violent crimes, including drug use. The Maryland PCS study, for example, did not find a statistically significant change in drug use as a result of the program.

³⁴ Sherry Tate and Catherine C. McVey, *Rising to the Challenge of Applying Evidence-Based Practices Across the Spectrum of a State Parole System*, TOPICS IN COMMUNITY CORRECTIONS 11 (2011).

to develop the plan, which is a “comprehensive analysis of an offender’s education, employment, medical, financial, family, emotional, criminal history, substance abuse, housing, and other needs and issues.”³⁵ Pennsylvania thus ensures that the offender understands both the tremendous challenges that he will face on parole and what he needs to do to avoid revocation. As part of this program, Pennsylvania created a technical violator management plan, using incarceration as a last resort only.³⁶ After implementing these various programs, Pennsylvania saw a 13% decline in average admissions to prison for parole violations.³⁷ Recognizing that the decline in prison re-entry could be a result of the decision not to send technical parole violators to prison, the State of Pennsylvania is currently studying forty-five “performance measures” of the programs; the state has designated parole completions, employment rate, reductions in technical parole violations, and supervision fee collection as the four primary performance measures to evaluate.³⁸ Of course, offenders and parole officers cannot develop these plans in a vacuum; as discussed in more detail below, it is necessary that the Parole Commission work with other local agencies and organizations to ensure that all released prisoners receive necessary support to ensure a successful release.

In developing reforms, the Parole Commission will find it helpful to look to the Michigan Prisoner Reentry Initiative (MPRI)³⁹ as one example of an effective state-level program. In doing so, however, the Parole Commission should consider whether elements of other programs, such as the Maryland or Pennsylvania programs above, or other alterations would help to focus the Michigan program on the specific concerns of D.C. Code violators. Under MPRI, an individualized program for each offender begins the moment the prisoner enters the Department of Corrections through an evaluation of the individual’s risks, needs, and strengths. MPRI then enters this information into a data-management program, Offender Management Profiling for Alternative Sanctions (COMPAS)⁴⁰, which details recommendations for the prisoner’s initial treatment, placement, and supervision. Personnel at the corrections facility and the prisoner him or herself then work together to develop a plan to guide interventions and services. Sixty days prior to the prisoner’s first expected parole date, the MPRI program begins to focus on ensuring that programs such as housing, employment, and any necessary addiction or mental illness services are in place for the offender’s release.⁴¹ Importantly, this phase also includes planning for the specific risks that the offender may present to the community as well as risks that the community may pose to the offender, such as homelessness and unemployment. By the time the prisoner is released, services are already in place in the community, as well as an individualized plan for graduated sanctions for breach of any of the terms of release. The MPRI program has been very successful in Michigan; the “numbers of parolees returning to prison with new sentences as well as the numbers of parolees returned to prison for technical violations have both fallen, with the overall parole revocation rate at the lowest rate since these data were tracked.”⁴²

³⁵ *Id.*

³⁶ *Id.* at 15.

³⁷ *Id.*

³⁸ *Id.* at 16-17.

³⁹ Elizabeth Alexander, *Michigan Breaks the Political Logjam: A New Model For Reducing Prison Populations*, ACLU (2009).

⁴⁰ *Id.* at 12.

⁴¹ *Id.*

⁴² *Id.* at 13.

In each of the studies discussed above, coordination with agencies and community organizations providing education, homelessness prevention, and healthcare related services were an essential element of success. MPRI, for example, relies heavily on available community programs in creating individualized plans; re-entry teams then work with these local programs to ensure that assistance is fully in place prior to release. The California Department of Corrections focuses primarily on connecting parolees with support in the four “life domains” of employment, substance abuse, education (including mathematics and literacy), and housing.⁴³ A 2006 cost-benefit analysis of the program found that it both reduced recidivism and saved more money than it cost to implement.⁴⁴ Even those offenders who did not complete the entire program saw incremental benefits in reduced recidivism based on the length of time he or she remained in the program.⁴⁵

The Parole Commission should administer a pilot program to test the cost-effectiveness of transition housing for Washington, D.C. Code violators.

While working with the released prisoner and local organizations is an important step towards focusing parole on reintegration, the Parole Commission should consider going further and designating separate housing for prospective released prisoners to begin integration into society. Missouri, for example, created Transitional Housing Units, which, as of 2010, were implemented in 12 institutions across the state. Offenders enter a Transitional Housing Unit six months prior to release and receive significant services including education, medical care, substance abuse treatment, employment and life skills, and a class on the impact of crime on victims. The Department of Corrections Research Unit conducted an analysis of offenders spending at least five months in the Transitional Housing Unit, finding that two years after release these offenders have a recidivism rate 8-10% lower than other offenders.”⁴⁶

The same or similar centers can be used to implement punishment for technical parole violators, short of returning to prison. Because these facilities will already have training and support in place to assist prisoners prior to release, the Commission may be able to work with technical violators on any underlying problems that prevent the prisoner from complying with the terms of release. States implementing a housing alternative to incarceration have found that the programs are cost-effective. New Jersey’s Halfway Back program, for example, “seeks to address the needs of technical parole violators through intensive programming and skill development during stays of 90 to 180 days at a residential facility.”⁴⁷ Although the program does not appear to affect whether or not a parolee will be rearrested, it has an effect on the number of times that a parolee will be rearrested; a study found that the program provides net savings of about \$1.31 million for each 100 participants.⁴⁸ However, since the study looked only at parolees who completed the Halfway Back program, savings may decrease once those who begin but do not complete the program are included in the analysis.

⁴³ Sheldon X. Zhang et al., *The Cost Benefits of Providing Community-Based Correctional Services: An Evaluation of a*

Statewide Parole Program in California, 34 J. CRIM. JUSTICE 341 (2006).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ MISSOURI REENTRY PROCESS, 2010 REPORT TO THE GOVERNOR (2010).

⁴⁷ Michael D. White, et al., *Halfway Back: An Alternative to Revocation for Technical Parole Violators*, CRIM. JUST. POL’Y. REV. 141 (2011).

⁴⁸ *Id.*

Given the disparate impact that many of these programs can have on the likelihood of parole revocation for technical violations, it is important for the Parole Commission to conduct its own analysis of the costs and benefits of implementation. There are a variety of ways to implement similar policies, ranging from building independent transitional housing facilities to designating a wing or portion of a preexisting facility for transitional housing. The Parole Commission should choose among these options through consideration of the marginal costs and benefits of each.

III. THE PAROLE COMMISSION SHOULD IMPLEMENT DATA-MANAGEMENT SYSTEMS TO DEVELOP POLICY AND MATCH RELEASED PRISONERS WITH THE MOST EFFECTIVE RESPONSES.

The Parole Commission should use evidence-based decisionmaking for both broad policy decisions and individual released prisoner-level applications. Ideally, the Parole Commission would have the funds available to conduct its own cost-benefit analysis for all broad policy decisions. Recognizing that this is not possible,⁴⁹ the Parole Commission should utilize a data-management program, such as the program being developed by the Washington State Institute for Public Policy (WSIPP) in conjunction with the Pew Center on the States. In creating sentencing software, WSIPP and the PEW Center are developing a program that will “allow users to enter state-specific input factors endorsed by each state, and then test bottom-line results on crime levels and taxpayer savings for different combinations of public policy choices.”⁵⁰ Ultimately, the tool could apply macrodata from throughout the country to the specific problems facing Washington, D.C. This will allow the Parole Commission to apply evidence-based decisionmaking to broad policy choices with little initial data collection, significantly minimizing the costs of conducting cost-benefit analysis.

The Parole Commission should not, however, limit its use of data analysis to broad-based policy decisions. It can also integrate evidence-based practices into case-level decisionmaking by implementing a data-based system to guide parole officers in selecting sanctions for each violation of the terms of release. States that have implemented data-based parole programs have found significant decreases in recidivism. In Georgia, for example, the local parole commission implemented the Field Log of Interactive Data (FLOID), a data-management system that tracks each interaction that a parole officer has with his or her clients as well as the validated and automated risk assessments and social histories of each parolee.⁵¹ FLOID matched demographic, initial offense, violation, and all other data with forms of recidivism. Researchers funded by the NIC were then able to use FLOID data to determine which sanctions and positive interactions affect recidivism and technical parole violation rates.⁵² Through use of this analysis, the program seeks to reduce costs by targeting parolees most likely to return to prison and matching them with intervention programs proven to reduce recidivism.

The Parole Commission’s Trak System,⁵³ currently in place for federal parolees only, collects data on each offender’s criminal conduct resulting in his present sentence, past criminal activity, hearing

⁴⁹ The Parole Commission’s budgetary request for 2012 is only \$12.9 million. U.S. PAROLE COMM’N, FY 2012 BUDGET REQUEST AT A GLANCE.

⁵⁰ WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, WSIPP’S BENEFIT-COST TOOL FOR STATES: EXAMINING POLICY OPTIONS IN SENTENCING AND CORRECTIONS 4 (2010).

⁵¹ *Georgia: Results Driven Supervision*, REENTRY POLICY COUNSEL, available at http://reentry.microportals.net/program_examples/results_driven_supervision.

⁵² TAMMY MEREDITH AND JOHN PREVOST, DEVELOPING DATA DRIVEN SUPERVISION PROTOCOLS FOR POSITIVE PAROLE OUTCOMES (Doc. No. 228855, 2009) (hereinafter DATA DRIVEN SUPERVISION PROTOCOLS).

⁵³ Trak System, UNITED STATES PAROLE COMMISSION, UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/uspc/trak.htm>

applications, judicial and prison orders and warrant applications, and any correspondence between the office and the parolee.⁵⁴ Presently, however, the Parole Commission uses this data as a records-maintenance system only. Given Trak’s stated goal of assisting with files, which are maintained “in order to make fair and fully informed release determinations in each case,”⁵⁵ the Parole Commission should expand Trak or develop another program to include data on all interactions with parolees. Doing so will allow the Parole Commission to conduct an effectiveness analysis of each type of intervention, along with demographic and background information of each offender. Similar to the FLOID study above, the Parole Commission should use the results of its analysis to determine appropriate case-specific responses to violations. In addition, the Parole Commission should strongly consider expanding the Trak system to non-federal cases under its jurisdiction.

Of course, in implementing any case-level data management system, the Parole Commission should be cognizant of privacy concerns related to the collection and use of prisoner information for research. Researchers evaluating the FLOID program assigned a randomized six-digit identification number to all incoming prisoners; although these identification numbers were assigned for research, rather than privacy purposes,⁵⁶ a similar system could be used to help address privacy concerns as well.

IV. THE COMMISSION SHOULD FLESH OUT ITS PRELIMINARY PLAN FOR ENGAGING IN RETROSPECTIVE REVIEW UNDER E.O. 13,563.

Overall, the current version of the Commission’s Preliminary Plan reflects a thoughtful initial approach to retrospective review, which is especially notable given that the Commission does not promulgate rules with the regularity of other federal agencies. For instance, the Commission’s commitment to maintaining a high-level working group that will continually and periodically review its rules and manual provisions is a sign that the Commission is serious about the goals E.O. 13,563 aims to achieve. Additionally, by committing to sending out notices to interested organizations, the plan facilitates a review process that will be open to continuous improvement, both from within the agency and through public comment.

At the same time, the plan offers only a skeletal outline of how the Commission will implement retrospective review, offering largely vague descriptions of the procedures and methodologies that will be utilized. The plan should be fleshed out with greater detail regarding what variables will be used in evaluating a rule’s effectiveness, and what factors will be used in prioritizing rules for review. For instance, the plan notes that the working group will “pay particular attention to those rules and procedures” that meet various criteria, including those which “place high costs or burdens on the public” or which have become “obsolete given changes in laws or other circumstances.”⁵⁷ These are legitimate criteria, however the plan should be revised to emphasize the overarching goal of maximizing net benefits, and the critical role of empirical analysis in shaping regulatory look-backs. In addition, the Commission should commit to designing rules *ex-ante* so that they can be effectively monitored and evaluated, and also to setting forth more concrete procedures for ensuring that a transparent retrospective review process continues at the Commission long after the initial review project—which focuses on rules and procedures that pertain to imposing conditions of release—has ended.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ DATA DRIVEN SUPERVISION PROTOCOLS, *supra* note 54, at 11.

⁵⁷ Preliminary Plan, *supra* note 2, at 78184.

The Commission’s Retrospective Reviews Should Focus on Changed Circumstances, Updated Data, and Inaction.

The Commission’s plan provides a list of selection criteria for the rules its working group will review retrospectively. Included within this list are those rules that “affect a large group of persons or entities, overlap with or duplicate other rules, or...have been the subject of requests for rulemaking.”⁵⁸ Certainly, public requests for rulemakings are key to understanding the on-the-ground benefits and burdens of regulations and gauging whether circumstances have changed. However, only if a request points to specific changed circumstances or updated data or empirical studies, or points out an area of regulatory inaction, should the request be used to justify a review. New circumstances, updated data, and areas of agency inaction provide the Commission with new information that it could not or did not have the opportunity to consider when an original regulation was passed. New information alone can justify the expense of conducting a comprehensive look-back. By comparison, intense lobbying or other public calls for review that are unsupported by such information should not be given weight for the purposes of retrospective review.

Some of the plan’s other criteria are also less optimal and useful than others. For example, rules that “place high costs or burdens on the public” are to be selected for retrospective review, but the plan does not specify how “high costs or burdens” will be defined: high in comparison to what? Similarly, rules that “affect a large group of persons or entities” are to be selected, but not only does the plan not define this term either, but the number of entities effected should not be as important as the total magnitude of the effect. Moreover, a rule can affect a large number of entities and still optimize net benefits. Therefore, rule selection should concentrate on regulations where there has been a change in circumstance or updated data on costs and benefits, as well as areas of Commission inaction where opportunities to generate net benefits are available. Applying these three factors, the Commission will be able to select rules with the greatest potential to increase net benefits, while still conserving resources.

The Commission Should Design Rules Ex-Ante So They Can Be Effectively Monitored and Evaluated.

Careful planning during a rule’s formation is integral to determining what reporting requirements and data collection systems will reduce the costs and improve the quality of subsequent retrospective reviews. The Government Accountability Office recommends that when formulating new rules the agency should consider how it “will measure the performance of the regulation, including how and when [it] will collect, analyze, and report the data needed to conduct a retrospective review.”⁵⁹ Effective review of existing regulatory programs will depend on the availability of performance data, which will only exist if the appropriate accounting mechanisms are “built into the regulations themselves.”⁶⁰

For example, before it finalizes its pending changes to procedures governing the imposition of release conditions, the Commission should carefully consider whether the rule incorporates sufficient data collection to properly assess the rule’s impact and efficiency after several years.

⁵⁸ Preliminary Plan, *supra* note 2, at 78184.

⁵⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 53 (2007).

⁶⁰ Cary Coglianese & Lori D. Snyder Benneer, *Program Evaluation of Environmental Policies: Toward Evidence-Based Decision Making*, in DECISION MAKING FOR THE ENVIRONMENT: SOCIAL AND BEHAVIORAL SCIENCE RESEARCH PRIORITIES 246, 258 (Garry D. Brewer & Paul C. Stern eds., National Academics Press 2005) (“All of the program evaluation methods we have reviewed here depend on valid and reliable data.”).

Rules that are structured to facilitate on-going information collection will allow for lower costs higher value reviews in the future. be more valuable. When an agency is forced develop ad hoc data collection procedures after a rule has been in place for many years, there will be a significant possibility that important data will be left out or will be impossible to recreate. Designing rules ex-ante so that they can be easily and effectively monitored will help improve the quality and lower the cost of future look-back efforts..

The Commission Should Adopt More Specific Guidelines to Institutionalize Retrospective Review.

Though obviously constrained by resources and personnel, the Commission should strive to conduct retrospective reviews on the most important substantive rules and manual provisions for which there might be updated data or changed circumstances; given how few rules and provisions the Commission issues each year, this is a reasonable goal.⁶¹

The current plan explains that “even after the retrospective review [of release conditions] ends, the Commission intends to maintain the working group for the periodic review of its rules . . . and to analyze new proposed rules and procedures.”⁶² While this language speaks to the Commission’s intent, a more comprehensive plan is needed to ensure that the working group will continue operating by prescribed standards. As long as the Commission has sufficient resources and has identified potential targets based on changed circumstances, updated data, or inaction, retrospective review should occur. While the number of rules that require analysis in a given year may vary, according to a number of factors, including resource availability, procedures should be in place for the Commission to evaluate, on a regular basis, whether rules are ripe of retrospective review.

CONCLUSION

In developing new regulations for drug use and technical parole violations, the Parole Commission should ensure that it employs evidence-based decisionmaking. The Commission should look closely at the numerous studies that have been conducted by state and local parole authorities for guidance in determining programs and punishment levels that are likely to be effective. Still, the Commission should, to the extent feasible, conduct its own studies to test the cost-effectiveness of its programs, and to reevaluate the efficacy of those programs through periodic retrospective review.

Respectfully submitted,

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⁶¹ See Preliminary Plan, *supra* note 2, at 78183 (observing that over the past ten years, the Commission has issued only 13 final rules).

⁶² *Id.* at 78184.