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EARLY RELEASE FROM PRISON IN WYOMING: AN OVERVIEW OF PAROLE IN WYOMING AND ELSEWHERE AND AN EXAMINATION OF CURRENT AND FUTURE TRENDS

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I. INTRODUCTION

The United States has long been described as the "Land of the Free," and for good reason: as United States citizens we enjoy a government that protects and cherishes our civil liberties. However, the "Land of the Free" incarcerates criminals at a higher rate than any industrialized nation in the world.[1] Although

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[1] Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, *available at* http://www.nytimes.com/2008/04/23/us/23prison.html.

the United States comprises five percent of the world's population, it incarcerates twenty-five percent of the world's prison and jail inmates.[2] At the beginning of 2008, the United States held roughly 2.3 million people in prisons or other correctional facilities. The next closest country, China, with a far larger population, incarcerated only 1.5 million, followed by Russia with 890,000 inmates.[3] More than one in every one hundred adults in the United States is now behind bars.[4] As will be discussed in greater detail later, the prison population in the United States has grown at an alarming rate since the early 1970s.[5]

To some degree, the State of Wyoming remains insulated from this prison population explosion. The State of Wyoming's inmates account for an extremely small part of the nation's prison population. As of January 1, 2010, Wyoming incarcerated 2075 adult female and male inmates in prisons.[6] While there are several hundred more individuals locked up in Wyoming's local jails, adding this number to Wyoming's state prison count equals a relatively small total inmate population compared to other states. California, for instance, incarcerates roughly 165,000 inmates in its thirty-three adult prisons.[7] But comparison with California does not tell the whole story. As of January 1, 2010, North Dakota, with a population greater than Wyoming's, incarcerated only 1486 adult inmates in state prison, nearly one third less than Wyoming.[8] At the same time, Maine and New Hampshire, with respective populations nearly three times the size of Wyoming's, incarcerated only a few hundred more inmates than Wyoming; in the case of Maine, the adult state inmate population exceeded that found in Wyoming by a mere 140 prisoners despite Maine's larger population base.[9]

These numbers are relevant for a variety of reasons, not the least of which is the staggering expense of housing these prisoners. Since 1988, spending on

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[2] Liptak, *supra* note 1.

[3] THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 5 (2008), *available at* http://www.pewcenteronthestates.org/uploadedfiles/one%20in%20100.pdf.

[4] *Id.*

[5] THE PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (2010) [hereinafter PRISON COUNT 2010], *available at* http://www.pewcenteronthestates.org/report_detail.aspx?id=57653.

[6] *Id.* at 7.

[7] *California Inmate Release Spurs Public Safety Debate*, MSNBC.COM (Feb. 10, 2009), http://www.msnbc.msn.com/id/29129199/; David G. Savage, *U.S. Supreme Court to Rule on California Inmate Release*, L.A. TIMES, June 15, 2010, *available at* http://articles.latimes.com/2010/jun/15/local/la-me-scotus-inmates-20100615.

[8] PRISON COUNT 2010, *supra* note 5, at 7. The 2009 estimated populations of Wyoming and North Dakota were 544,270 and 646,844, respectively. U.S. CENSUS: STATE & COUNTY QUICKFACTS, http://quickfacts.census.gov/qfd/states/ (last visited Nov. 24, 2010).

[9] The 2009 estimated population of New Hampshire was 1,324,575, with an adult inmate population of 2731; the 2009 estimated population of Maine was 1,318,301, with an adult prison population of 2226. PRISON COUNT 2010, *supra* note 5, at 7; U.S. CENSUS: STATE & COUNTY QUICKFACTS, *supra* note 8.

corrections has grown at a faster rate than every other state budget category except Medicaid.[10] The total amount spent by states on corrections has increased from $12 billion in 1988 to more than $50 billion in 2008.[11] In Wyoming, the Department of Corrections has a biennial budget of more than a quarter of a billion dollars—$263 million for 2009–2010—amounting to three percent of the $8.6 billion budget for the entire state over that time period.[12] Although Wyoming's prison population is small, the state recently expended $128 million to construct a new prison in Torrington, the Wyoming Medium Correctional Institution (WMCI), which will house 700 medium security inmates.[13] This was, in fact, a cost-saving maneuver. Prior to opening the WMCI and at a cost of millions of dollars a year, Wyoming was forced to house as many as 485 or more inmates in other states due to a lack of bed space.[14] The opening of the WMCI allows Wyoming to bring all of its inmates home, at least for the time being. Not only does Wyoming save money by housing inmates in-state, it also provides inmates from Wyoming the opportunity for continued contact with families and other community ties, which can assist with the eventual transition back into the community. By housing its inmates in-state, Wyoming prison officials can also better monitor and control prison conditions, minimizing the risk of exposing inmates to sub-standard conditions of confinement.

While bringing Wyoming's prisoners home will reduce incarceration-related expenditures, another obvious way to cut costs is to imprison fewer people. In order to accomplish this, Wyoming must send fewer people to prison or release a higher number of those currently incarcerated. This article focuses on the second option: releasing portions of the population housed in Wyoming's prisons. This is not a new idea among the states. Dire economic circumstances in states such as California, Colorado, and Wisconsin have caused those states to either undertake or consider the extreme measure of unconditionally releasing thousands of prisoners, including some violent offenders, earlier than their scheduled release date, with or without some form of supervision.[15] Due to severe overcrowding,

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[10] Press Release, The Pew Center on the States, Leaders Take on Recidivism and Corrections Spending 1 (Jan. 27, 2010), *available at* http://www.pewcenteronthestates.org/news_room_detail.aspx?id=56979.

[11] *Id.*

[12] STATE OF WYOMING, 2009–2010 BIENNIUM APPROPRIATIONS THROUGH 2009 GENERAL SESSION, *available at* http://ai.state.wy.us/budget/pdf/0910Appropriations09GS/B1EXCEL.pdf.

[13] Press Release, Wyoming Department of Corrections, Wyoming Medium Correctional Institution Grand Opening (Jan. 8, 2010), *available at* http://www.corrections.com/news/article/23188-wyoming-medium-correctional-institution-grand-opening. The WMCI opened in January of 2010. *Id.*

[14] Joan Barron, *State Ships Out More Inmates*, CASPER STAR TRIB., Mar. 10, 2005, *available at* http://trib.com/news/state-and-regional/article_f386e9c3-0a51-5541-a609-6ae3f283d920.html.

[15] Kirk Mitchell, *First 10 Felons Set Free Under Colorado Early-Release Initiative*, DENVER POST, Oct. 15, 2009, *available at* http://www.denverpost.com/ci_13564285; Savage, *supra* note 7; Steven Senne, *States: Freed Inmates Would Save Millions*, USA TODAY, Apr. 3, 2008, *available at*

46,000 inmates are expected to be released from California prisons over the next two to three years as part of a federal court order.[16] The Governor of California and a group of Republican state lawmakers have appealed the order, and the United States Supreme Court is expected to issue a ruling in early 2011.[17] In Colorado, plans exist to release as many as 6400 inmates early to help save $19 million toward a $318 million shortfall in the yearly state budget.[18] In Wisconsin, with a $6.6 billion state budget shortfall, the Department of Corrections has reviewed hundreds of non-violent offenders, some with "extraordinary health conditions," to consider early release in exchange for good behavior.[19] Wisconsin state officials estimate the reviews could affect an early release for as many as 3000 inmates and may save the state up to $30 million over the course of their two-year state budget.[20]

In Wyoming, prisoners may be released early from prison on parole. Probation and parole are often thought of interchangeably, but they are distinct concepts. Both parole and probation refer to the supervision of an offender who lives and works in the community. Probation occurs when a sentencing judge places an offender on supervision in lieu of a prison sentence. In contrast, parole happens when the Board of Parole (Board) releases an inmate from prison, into the community and under supervision, after a period of incarceration. Parole in Wyoming "means permission to leave the confines of the institution in which a person is confined under specified conditions, but does not operate as a discharge of the person."[21]

This article provides an overview of the history and process by which inmates are released from prison on parole in Wyoming. It also compares Wyoming's release system with systems in other states. This article further examines recent legislative enactments in Wyoming and other programs which increase the effectiveness of releasing prisoners and managing them on parole, thereby reducing incarceration costs to the citizens. Additionally, this article recommends increased inmate access to early release through the creation of a merit-based voluntary early release option

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http://www.usatoday.com/news/nation/2008-04-03-prison-release_N.htm; *State Prisons to Release Inmates Early*, JANESVILLE GAZETTE, Jan. 5, 2010, *available at* http://www.gazettextra.com/weblogs/latest-news/2010/jan/05/state-prisons-release-inmates-early/.

[16] Savage, *supra* note 7.

[17] Coleman v. Schwarzenegger, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010), *appeal docketed*, No. 09-1233 (U.S. June 14, 2010). Oral arguments were held November 30, 2010. Savage, *supra* note 7.

[18] Mitchell, *supra* note 15.

[19] *State Prisons to Release Inmates Early*, *supra* note 15. An extraordinary health condition is defined as advanced age, infirmity, disability, or a need for medical treatment not available in the prison facility.

[20] *Id.*

[21] WYO. STAT. ANN. § 7-13-401(a)(vii) (2010).

for those inmates denied parole. Such an option would not obviate the need to maintain a purely discretionary parole board. Lastly, this article is designed to give the members of the Wyoming Bar, and the public in general, a better understanding of parole in Wyoming and elsewhere. As this article discusses, almost every inmate will be released from prison at some point. With that fact in mind, our society would benefit from exploring programs, incentives, ideas, or other suggestions that will assist former inmates in transforming into productive members of society.

II. BACKGROUND

A. *The History and Function of Parole in Wyoming*

Wyoming is an indeterminate sentencing state requiring sentencing courts to prescribe a minimum and maximum term of confinement when imposing a sentence upon a person convicted of a felony.[22] For instance, a common sentence in Wyoming for a felony may be for a minimum period of three years to a maximum of six years. Once an inmate serves the minimum sentence of three years, less any reduction for good time earned, he or she is not discharged from the state penal institution but becomes eligible for parole. The Wyoming Governor's rules on good time provide that inmates may earn good time based upon "a proper and helpful attitude, conduct and behavior" as evidenced by "adherence to an individualized case plan, participation in work, education, vocational programs, job training, treatment or rehabilitative programs as recommended by the [Department of Corrections], the Board or the sentencing court and adherence to the rules of the institution."[23] If such an inmate is granted parole by the Board, he or she will serve the remainder of the maximum sentence on parole unless the parole is revoked for a violation of the conditions set by the Board.[24] If such an inmate is not granted or never seeks parole, the individual will serve the entire six years of the maximum in prison, less any reduction for good time earned.

The Wyoming Board of Parole has evolved over the years. The genesis for the Board occurred in 1947 when the Wyoming Legislature gave the Board of Pardons the power to grant paroles to persons committed to any penal institution of the state.[25] For the first twenty-four years of its existence, Wyoming's five elected state officials comprised the Board of Pardons.[26] In 1971, the State of Wyoming

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[22] *Id.* § 7-13-201.

[23] *Id.* § 7-13-420; GOVERNOR'S OFFICE, GOOD TIME ALLOWANCES FOR INMATES AND PAROLEES OF THE WYOMING DEPARTMENT OF CORRECTIONS 2 (Doc. 7887, adopted July 1, 2010) [hereinafter GOOD TIME], *available at* http://soswy.state.wy.us/Rules/RULES/7887.pdf.

[24] WYO. STAT. ANN. §§ 7-13-402(c), -408.

[25] 1947 Wyo. Sess. Laws 17–18.

[26] *About Us*, WYO. BOARD OF PAROLE, http://boardofparole.wy.gov/aboutus/History.htm (last visited Nov. 24, 2010). Wyoming's five elected officials are the Governor, Secretary of State, State Auditor, State Treasurer, and State Superintendent of Public Instruction.

Legislature created the Board of Parole as the successor to the Board of Pardons.[27] The Wyoming Legislature directed the Governor to appoint, with the consent of the Senate, a three-member board with not more than two members belonging to the same political party.[28] The term of membership was set at six years.[29]

Today's version of the Board has grown considerably.[30] The number of board members is now seven, and they continue to be appointed by the Governor with consent of the Senate.[31] No more than four members shall be of the same political party, and members serve six-year terms.[32] Board members are paid a daily wage at the same rate as state legislators.[33] Like Wyoming's state legislators, the Board members work part-time. In 2003, the Board became a separate operating agency with its own budget, office, and staff, splitting from the Department of Corrections, which had previously provided those resources to the Board. Currently, the Board typically holds hearings twice a month for two to four days at a time. These hearings are conducted by three-member panels and take place at the various penal institutions around the state.[34] While the majority of parole hearings occur in person, inmate movement issues require that the occasional hearing take place telephonically or via teleconference. Additionally, victim hearings are sometimes conducted via Skype. To help carry out this work, the Board has a staff of seven based in Cheyenne, including an executive and a deputy director.[35] In fiscal year 2010, the Board reviewed and made decisions in 1187 cases, including parole hearings, revocations, and other administrative hearings.[36]

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[27] 1971 Wyo. Sess. Laws 117.

[28] *Id.* at 118.

[29] *Id.*

[30] The first three members of the Wyoming Board of Parole, appointed on July 1, 1971, by Governor Stan Hathaway, were Ed Hershler (who later served as Wyoming's governor from 1975 to 1987), George Sawyer, and Dr. Brian Miracle. Since that time, the membership of the Board has encompassed Wyoming citizens from a broad spectrum of backgrounds. They have been former and active law enforcement officers, probation and parole agents, university professors, doctors, attorneys, ranchers, teachers, school principals, state administrators, city council members, mayors, clerks of court, and state legislators, among other vocations.

[31] WYO. STAT. ANN. § 7-13-401(b) (2010).

[32] *Id.*

[33] *Id.*

[34] *Id.* §§ 7-18-101 to -115. The state penal institutions are located in Torrington, Rawlins, Riverton, Newcastle, and Lusk, and parole hearings may also take place at the state's version of half-way houses, referred to as Adult Community Correctional facilities, currently located in Cheyenne, Casper, and Gillette.

[35] *Id.* § 7-13-401(g).

[36] WYOMING BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2010, *available at* http://bop.state.wy.us/pdf/10%20Annual%20Report%20for%20Agency%20081.pdf. Other administrative hearings conducted by the Board include matters such as victim hearings, restoring voting rights to convicted felons, modifying or rescinding a parole grant, and considering recommendations for parole good time.

That same year the Board granted parole fifty-seven percent of the time, hearing 819 parole-eligible inmates and granting parole to 465 of them.[37] There were also seventy-eight parole revocation hearings resulting in reincarceration rather than reparole.[38]

While they work closely together, the Board and the Department of Corrections are separate state agencies. The Department of Corrections is tasked with the responsibility of preparing inmates for parole hearings and a possible release back to the community. Before each inmate is heard for parole, the Board members are supplied with background information in the form of a parole summary prepared by institutional caseworkers. The parole summary contains criminal history information, personal and family information, educational background, an assessment of the offender's criminogenic risks and needs, a parole plan, institutional disciplinary and movement history, and a recommendation from the institution regarding the decision to parole the inmate.[39]

After meeting with an inmate for his or her parole hearing, the Board has the discretion to grant or deny parole. If granted, the Board possesses the authority to impose conditions of parole. Depending on the identified criminogenic needs of the inmate, the Board may impose many or very few conditions. For instance, a sex offender with an identified substance abuse problem may have a litany of sex offender conditions imposed as well as be required to undergo or continue with drug and alcohol treatment. On the other hand, a low level "bad check" writer may have very few conditions specified other than standard requirements to obey the law and pay restitution to his or her victims.

If parole is granted, the Department of Corrections investigates the inmate's parole plan to verify suitable living, financial, employment, and treatment arrangements before releasing the inmate. Once on parole, a parole agent employed by the Department of Corrections supervises the individual. As will be discussed in greater detail later, parole good time may be earned by those who comply with the terms and conditions of their release, thereby reducing their time spent on parole.[40]

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[37] *Id.*

[38] *Id.* The term "reparole" refers to a parolee who has his or her parole revoked by the Board but is placed back on parole rather than being returned to prison. Common violations leading to revocation are the commission of new crimes, absconding from supervision, consumption of alcohol or drugs, failing to maintain contact with the supervising agent, failure to pay restitution, and failure to attend treatment.

[39] The term "criminogenic" is a popular buzzword in corrections parlance, and it refers to something which produces or tends to produce criminality, e.g., alcohol, illicit drugs, poverty. *See* THE FREE DICTIONARY, http://www.thefreedictionary.com/criminogenic (last visited Nov. 24, 2010).

[40] *See infra* notes 95–96 and accompanying text.

If the individual violates his or her parole, the parole agent has the discretion to initiate revocation of the parole and return the parolee before the Board for a revocation hearing. Before parole is revoked, however, the agent will have usually exhausted all available options short of revocation in the form of graduated sanctions including increased monitoring and drug testing, community service, restrictions on personal time such as a curfew, or short term confinement at a jail or half-way house. If the violations are numerous enough or if the parolee's violation is sufficiently serious, revocation may be the only option. After a preliminary hearing to determine probable cause of the violation(s), parolees are usually returned to prison to await a final revocation hearing.[41] If the individual's parole is revoked, the Board has the option of reparoling or reincarcerating the individual after finding a parole violation occurred. Regardless of whether the Board reparoles or reincarcerates, it may credit some or all of the time the individual spent on parole toward his or her sentence.[42] The Board also has the discretionary authority to add the time spent on release back to the individual's sentence.[43]

B. Parole Law in Wyoming

The Wyoming Supreme Court has held:

> There is no constitutional or inherent right of a convicted person to be paroled before the expiration of a valid sentence. The right to parole, if it exists at all, is a right provided for by the legislature. The legislative enactment creating such a right may specify the requirements or conditions an inmate must satisfy to be eligible for parole.[44]

The Wyoming Legislature provides the Board with almost absolute discretion in paroling decisions, subject only to restrictions which deny eligibility to inmates who have escaped from a state penal institution, have committed an assault with a deadly weapon while an inmate, are serving a life sentence, a sentence of life without parole, or are sentenced to death.[45] The distinction between a sentence of life and a sentence of life without parole is that the Governor may commute a sentence of life to a term of years, while a sentence of life without parole may not

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[41] Revocation hearings are held during the Board's regularly scheduled hearings at the institutions, typically in Torrington or Lusk.

[42] WYO. STAT. ANN. § 7-13-404 (2010).

[43] *Id.*

[44] Dorman v. State, 665 P.2d 511, 512 (Wyo. 1993).

[45] WYO. STAT. ANN. §§ 6-10-301(c), 7-13-402(a)–(b), -807; Montez v. State, 573 P.2d 34, 38 (Wyo. 1977).

be commuted.[46] Thus, it is possible for an inmate with a life sentence to become parole eligible if and only if the Governor commutes his or her life sentence to a term of years. The Board has the power to recommend commutations of sentences to the Governor, which is the predominant means by which commutations are initiated.[47] Wyoming prisoners who receive a sentence of life without parole are condemned to spend the remainder of their lives in confinement. Furthermore, inmates awaiting the death penalty may not be paroled.[48] Additionally, an inmate who escapes, attempts to escape, or commits an assault with a deadly weapon while housed in a state penal institution, including an Adult Community Correctional facility, is also ineligible for parole on the sentence being served at the time of the offense.[49] The Governor has the authority to commute a sentence, with the exceptions noted above, and pardon any offense except treason or cases of impeachment.[50]

After consultation with the Board and Department of Corrections, the Governor is required to adopt rules and regulations establishing a system of good time and special good time allowances for inmates and parolees. The current rules provide that for an inmate, fifteen days per month may be deducted from both the minimum and maximum sentence for good behavior.[51] For parolees, twenty days a month may be deducted from a parolee's sentence for compliance with parole conditions.[52] The Wyoming Legislature has made it clear that a prisoner cannot expect to receive good time: "The granting, refusal to grant, withholding or restoration of good time or special good time allowances to inmates shall be a matter of grace and not that of right of inmates."[53]

The Board of Parole also has the authority to "flatten" inmates, which is jargon for the withholding and/or removal of some or all inmate good time.[54] In corrections parlance, when an inmate is "flattened," he or she must serve the full minimum sentence before becoming eligible for parole and the full

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[46] WYO. CONST. art. 3, § 53; WYO. STAT. ANN. § 6-10-301(c). While not defined in Wyoming statutes, a commutation is an act by an executive official such as a governor to reduce a punishment to one which is less severe.

[47] WYO. STAT. ANN. § 7-13-401(f). A commutation of sentence is a reduction of the terms imposed, such as a reduction from a life sentence to a term of years, or a reduction of a term of years to time served. A commutation does not reverse or annul the conviction, nor does it restore any civil rights which are lost as a result of a felony conviction; a pardon, on the other hand, restores many of those rights. *See id.* § 6-10-106(a)(ii).

[48] *Id.* § 7-13-807. As of this writing, Wyoming has only one inmate awaiting execution.

[49] *Id.* § 7-13-402(b).

[50] WYO. CONST. art 4, § 5.

[51] GOOD TIME, *supra* note 23, at 2.

[52] *Id.*

[53] WYO. STAT. ANN. § 7-13-420(b).

[54] *Id.* § 7-13-420; GOVERNOR'S RULES ON GOOD TIME ALLOWANCES FOR INMATES AND PAROLEES OF THE WYOMING DEPARTMENT OF CORRECTIONS (2010) (on file with the Wyoming Secretary of State).

maximum sentence as pronounced by the court before the sentence is discharged. A "flattened" inmate with the hypothetical sentence of three to six years, as discussed above, would not be eligible for parole until serving three years and would serve every day of those maximum six years either in prison or on parole. "Flattening" is an extreme measure, reserved for those inmates who commit serious disciplinary violations or obstinately refuse to engage in rehabilitative programming. However, "flattening" does not bar parole eligibility, and the Board may "unflatten" an inmate by restoring previously removed good time to those who subsequently follow institutional rules and engage in programming as recommended by institutional caseworkers.

Once granted parole, an inmate is subject to rules which must be obeyed as conditions of release. If these rules are violated, the Board may revoke the parole. For much of the twentieth century, parolees had only a modicum of due process rights when facing parole revocation.[55] Such was largely due to the belief that parole is a matter of grace and not a right of inmates; therefore, they had no protected "liberty interest" in remaining on parole.[56] In 1972, the United States Supreme Court significantly increased the level of due process protection afforded to parolees facing revocation in the landmark case of *Morrissey v. Brewer*.[57] The *Morrissey* Court held parole revocation requires "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."[58] The Court mandated a preliminary hearing to determine whether sufficient evidence of a violation existed to support the parolee's detention pending a final hearing.[59] The preliminary hearing must be held promptly, reasonably near the place of violation, and be conducted by an "independent officer" who need not be a judicial officer.[60] The parolee must receive notice of the time, location, and purpose of the hearing, as well as notice of the alleged violations. The parolee is also given the right to appear and present evidence at the hearing and a limited right to cross-examine adverse witnesses.[61] Although the Court granted parolees a limited amount of due process, it rejected the notion that the rules of evidence need to be strictly followed, permitting "[e]vidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[62] If a hearing officer determines probable cause exists to show a violation of parole

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[55] 2 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE 18-6 to 18-9 (2d ed. 1999).

[56] *Id.*

[57] 408 U.S. 471 (1972).

[58] *Id.* at 484.

[59] *Id.* at 485.

[60] *Id.* at 486–87.

[61] *Id.* at 484–87.

[62] *Id.* at 487, 489.

has occurred, *Morrissey* requires a final revocation hearing before the paroling authority with the same basic rights afforded to the parolee as are available in the preliminary hearing.[63]

The preliminary parole hearing requirements of *Morrissey* have been incorporated into Wyoming law.[64] The geographic size of Wyoming and the small Board staff dictate that most preliminary hearings be held telephonically. The Board's hearing officer calls the parole agent and parolee at the particular jurisdiction where the parolee is located, usually at the local jail.[65]

The *Morrissey* Court did not reach or decide the question of whether a parolee is entitled to the assistance of appointed counsel if indigent. A year later, in 1973, the United States Supreme Court established a flexible rule for determining when counsel must be provided in parole revocation cases in *Gagnon v. Scarpelli*.[66] In *Gagnon*, the Court stated counsel should be provided in cases where the parolee makes a request based on a timely and colorable claim that he has not committed the alleged violation.[67] Furthermore, counsel should be provided if the violation, even if uncontested or a matter of public record, is supported by substantial reasons which justify or mitigate the violation and are complex or otherwise difficult to present.[68]

In Wyoming, the Board rarely, if ever, appoints an attorney for a parolee facing revocation. In the vast majority of revocation cases, the allegations are not especially difficult or complex, and usually the parolees admit to the violations, permitting the Board to proceed directly to the dispositional phase of the hearing. However, a Wyoming parolee has the option to retain counsel with his or her own funds, if he or she is able. In addition, statutes in other jurisdictions give parolees the right to appointed counsel at parole revocation hearings.[69] The Wyoming Supreme Court has also held a parolee has no right to be admitted to bail pending final revocation of parole.[70]

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[63] *Id.* at 487–88.

[64] *See* WYO. STAT. ANN. § 7-13-408 (2010) (requiring parolees be given reasonable notice of the hearing, a chance to admit, deny, or explain allegations, and the right to cross examine and present evidence).

[65] WYO. BD. OF PAROLE, POLICY AND PROCEDURE MANUAL 53 (July 1, 2010), *available at* http://soswy.state.wy.us/Rules/RULES/7887.pdf. If probable cause is found, the parolee is transferred to a Wyoming Department of Corrections institution for a final hearing. WYO. STAT. ANN. § 7-13-403(a)(b). If probable cause is not found, the parolee is released back to parole. Preliminary parole revocation hearings in Cheyenne are typically conducted in person, at the Laramie County jail.

[66] 411 U.S. 778 (1973).

[67] *Id.* at 790.

[68] *Id.*

[69] 18 U.S.C. §§ 3006(A)(b), 4214(a)(2)(B) (2006); *see, e.g.*, HAW. REV. STAT. § 706-670 (3)(c) (2010); Passaro v. Bd. of Prob. & Parole, 424 A.2d 561 (Pa. Commw. Ct. 1981).

[70] Pisano v. Shillinger, 814 P.2d 274, 276 (Wyo. 1991).

C. Parole in Other Jurisdictions

When examining parole in other jurisdictions, it is helpful to have an understanding of the different types of paroling systems. Inmates are either released conditionally or unconditionally. Persons released unconditionally are released without any post-release supervision after their sentences expire. Individuals released prior to the expiration of their sentence are released conditionally, usually on parole. There are two types of conditional release methods: discretionary and mandatory. Wyoming is a discretionary parole state, meaning the Board has the discretion to release or not release inmates on parole. In mandatory parole states, on the other hand, inmates are released after they have served a percentage of their sentence, without any determination of their fitness to return to society.[71]

For the better part of the twentieth century, discretionary parole, in its current form in Wyoming, was widespread across the United States. Many states sentenced their inmates to prison for indeterminate periods of time, with rehabilitation as a focus of both prisons and parole boards.[72] Beginning in the 1960s, "law and order" proponents began to wage war on crime, under the theory that if all criminals are locked up and removed from society, crime would be reduced, if not eliminated. Politicians began to target parole boards as lenient and soft on crime, often accusing such boards of letting criminals out of prison too early. After 1975, lawmakers enacted legislation designed to increase the likelihood of a prison sentence rather than probation or jail, creating determinate sentencing systems with fixed prison terms.[73] The focus in many states turned to punishment rather than rehabilitation. This movement has often been referred to as "truth in sentencing." The federal government and many states enacted "three strike" laws which require lengthy minimum sentences for categories of repeat offenders.[74]

The nation also began to shift toward a system of mandatory parole or an automatic release mechanism, typically occurring after an inmate had served a set percentage of their sentence incarcerated. Until the 1980s, discretionary parole

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[71] Mandatory parole states include, among others, Arizona, California, Illinois, Indiana, Minnesota, Ohio, Oregon, Virginia, and Wisconsin. The federal government also has mandatory parole. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 66–67 (2003).

[72] As discussed herein, many states abolished parole altogether during the war on crime, but states such as Colorado, Connecticut, and Florida reinstated parole. PEGGY B. BURKE, ABOLISHING PAROLE: WHY THE EMPEROR HAS NO CLOTHES 16 (1995).

[73] PETERSILIA, *supra* note 71, at 65.

[74] *Id.*, *supra* note 71, at 12, 22, 68; BURKE, *supra* note 72, at 9–10. Three strikes laws apply to individuals convicted of a third felony, usually a violent offense, which results in a lengthy sentence of incarceration, producing a "three strikes and you're out" result. Wyoming has a version of a three strikes law, referred to as a habitual criminal penalty, which authorizes a sentence of ten to fifty years for a third and violent felony conviction, with the first two felony convictions arising from separate charges, and a life sentence if the individual has three or more previous and separate felony convictions subsequent to a violent felony conviction. *See* WYO. STAT. ANN. § 6-10-201 (2010).

accounted for fifty-five percent of all prison releases.[75] Over the last thirty years, discretionary parole has fallen by the wayside; by 2000, just twenty-four percent of released prisoners were discretionary releases, and sixteen states had abolished discretionary release altogether.[76] Other states have retained discretionary release but limit it to certain offenses, typically non-violent crimes.[77]

As a result, United States prison populations began to swell. In 1999, inmates released served an average of six months longer than inmates released in 1990.[78] Inmates released for the first time in 1999 served an average of forty-nine percent of their sentences, up from thirty-eight percent in 1990.[79] Despite this movement toward mandatory parole, inmates released by discretionary parole boards actually served longer sentences than those released through mandatory parole systems.[80] In 1999, inmates released through discretionary parole served an average of thirty-five months in prison and jail compared to an average of thirty-three months for those inmates released to mandatory parole.[81] Thus, by retaining the discretion to deny parole to inmates who pose a risk to society or who have failed to ready themselves for reintegration, discretionary parole boards actually keep offenders incarcerated for longer periods of time. Moreover, those released to mandatory parole have significantly higher return-to-custody rates.[82]

The movement toward abolishing discretionary parole and replacing it with mandatory parole has done little to alleviate the spike in incarceration rates in the United States, and it does not appear to have reduced recidivism either. Recidivism has many definitions, taking different levels of criminal behavior and time periods as variables; most generally, it is defined as the tendency to relapse into a condition or mode of behavior, typically criminal behavior. Recidivism is often measured by tracking those offenders who return to custody for a new crime or parole violation within three years of conditional or unconditional release to the community.

In Wyoming, those who accept parole rather than finishing their sentence in prison are less likely to return to prison three years from the completion of their

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[75] AMY L. SOLOMON, VERA KACHNOWSKI & ANINASH BHATI, URBAN INST., DOES PAROLE WORK: ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES 2 (Mar. 2005), *available at* http://www.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf.

[76] *Id.*

[77] *Id.*

[78] TIMOTHY HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE 1990–2000, at 1, 5 (2001).

[79] *Id.*

[80] *Id.* at 7.

[81] *Id.*

[82] PETERSILIA, *supra* note 71, at 69–71.

parole period than those that finish their sentence without parole.[83] The ratio as a percentage of inmates who finish their sentence without parole and do not return to prison within three years compared to those inmates who accept parole, successfully complete supervision, and do not return to prison in the same time period was 89.8 to 90.6 in 2004, 85.1 to 93.7 in 2005, 89.7 to 94.9 in 2006, and 92.7 to 94.0 in 2007.[84] While the difference in success rates may have been small in some of the years studied, the difference was noticeable in others. Given the expense of housing an inmate, even a small difference can mean saving tens of thousands of dollars.[85]

Furthermore, a study conducted by the Urban Institute comparing the probability of rearrest two years after release indicates that inmates released on mandatory parole are more likely to be rearrested than inmates released by a discretionary paroling authority and that mandatory parolees are nearly as likely to be rearrested as those inmates released unconditionally.[86] Mandatory parolees, like inmates who finish their sentence without parole and are released unconditionally, have the knowledge they will be released on a date certain, without any review to determine their readiness for parole. Notwithstanding evidence demonstrating that lengthy and numerous prison sentences are not the solution to high crime rates, some conservative politicians and prosecutors in Wyoming and elsewhere continue to rally around "tough on crime" and "truth in sentencing" principles when seeking to garner votes.

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[83] WYO. DEP'T OF CORR., ANNUAL REPORT (2009), *available at* http://corrections.wy.gov/about/annual_report.html; e-mail from Joanne Struebing to Patrick Anderson (Oct. 15, 2009, 16:14 MST) (on file with author); Comparison of Percentage of Inmates Who Do Not Return to Prison for a New Felony Conviction within Three Years of Release from the Institution with Percentage of Parolees Who Do Not Receive a New Felony Conviction within Three Years of Release from Parole (unpublished statistics) (on file with author); The Percentage of Probationers and Parolees Who Successfully Complete Supervision and Do Not Return to the WDOC within Three Years of Release from Supervision [hereinafter Comparison of Percentages] (unpublished statistics) (on file with author). It should be noted that the offenders who were tracked included only those convicted of a felony and returned to the custody of the Wyoming Department of Corrections; the study does not account for those offenders who left the state.

[84] Comparison of Percentages, *supra* note 83.

[85] Wyo. Dep't of Corr., Cost Per Day 1 (Sept. 30, 2009) [hereinafter Cost Per Day 2009] (unpublished statistics) (on file with author); *see* Wyo. Dep't of Corr., Daily Counts Nov. 1–3, 2010 (Nov. 4, 2010) [hereinafter Daily Counts] (unpublished statistics) (on file with author) (documenting that women housed in the Lusk prison comprise only eight percent of the total state inmate population).

[86] SOLOMON, KACHNOWSKI & BHATI, *supra* note 75, at 13–15. The authors caution that discretionary parole boards select candidates that are low-risk and that "parole boards base their decisions on such factors as attitude, motivation, and preparedness for release that our model cannot take into account." *Id.* at 15.

III. BENEFITS OF DISCRETIONARY PAROLE FOR WYOMING CITIZENS

The Board's retention of the decision whether to parole inmates from the penal institutions of Wyoming results in many benefits for Wyoming citizens. As mentioned earlier, inmates released on parole in states with mandatory parole are released without any consideration of their willingness to abide by the conditions set upon them or accept a parole in general. Conversely, retaining the discretion to deny parole to violent inmates or inmates who refuse to follow prison rules promotes public safety. If the Board members believe an inmate presents an unacceptable risk of reoffending or endangering society, they may extend that inmate's term of incarceration to the maximum term imposed by the court.

By releasing inmates to parole on a discretionary basis, the Board recognizes those inmates who have demonstrated not only a desire to become productive citizens but have actively engaged in rehabilitative programming and followed the rules of the institution. While the Board considers public safety and the need to remove certain offenders from society, its main objective is to successfully transition the offender back into the community. In making the decision to grant parole, by policy the Board considers that sentences are imposed for the purposes of punishment, rehabilitation, general deterrence, and removal from society. The Board also considers evidence-based risk assessment information derived from an assessment instrument which has been normalized to the Wyoming inmate population and does not consider awards of parole as a form of clemency.[87]

The opportunity to live on the "streets" while serving their sentences as opposed to living in a prison cell provides offenders with an incentive to rehabilitate themselves and avoid engaging in criminal behavior. The inmate and parole systems of good time provide additional positive reinforcement for behavioral change. The conditions placed upon a parolee provide structure and support to aid with the process of reintegration through supervision and assistance received from the parole agent as well as from other community partners, such as the Department of Family Services, Department of Workforce Services, and other public service agencies. For inmates who have family ties in Wyoming, release on parole provides the opportunity to re-establish those ties and contribute to family finances.

Many inmates have large court-ordered restitution obligations. Through release on parole, those individuals can pay substantially more restitution to their victims than they can while incarcerated. An inmate in a Wyoming state prison earns less than $100 per month at most prison jobs and only a fraction of that is applied toward restitution. However, many parolees routinely pay hundreds of dollars per month toward restitution and are required to do so as a condition of

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[87] WYO. BD. OF PAROLE, *supra* note 65, at 34–35.

parole if restitution has been ordered by the sentencing court.[88] While neither the Board nor the Department of Corrections track the exact amount of restitution paid by parolees in Wyoming, it is easily in the tens of thousands of dollars per year.[89]

Another obvious benefit to releasing inmates on parole in Wyoming is a reduction in the expense associated with housing inmates. For fiscal year 2011, the Department of Corrections estimated that it cost $147.23 a day to feed, clothe, provide medical care to, and house a male inmate at the maximum security prison in Rawlins, $132.15 to similarly incarcerate male inmates at the medium security prison in Torrington, and $123.05 to house female inmates in Lusk.[90] The expense to house an inmate in Rawlins exceeds what California spends, as it was reported that California spent an average of $46,104 per year to house an inmate in 2008.[91] These numbers appear extraordinarily expensive when compared to the $5.44 per day the Department estimated that it expended to supervise probationers or parolees on traditional supervision in September of 2009.[92]

IV. INCENTIVES, ALTERNATIVE SANCTIONS, AND THE REENTRY MOVEMENT

In light of the nation's escalating prison population, many experts in the criminal justice field have offered suggestions to decrease the number of those incarcerated. Some of the suggestions include reducing the time spent in prison for offenders by eliminating the use of prison for technical violations of probation or parole, decriminalizing certain offenses such as drug use and abuse, making prison more humane and geared toward prisoner reentry into society, returning to discretionary parole on a nation-wide basis, permitting convicted felons to regain the full panoply of civil rights lost after conviction, and increasing the use of reentry and drug courts.[93] While some of these suggestions may be viewed

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[88] WYO. STAT. ANN. § 7-13-421(b) (2010).

[89] Restitution is paid directly to the Clerk of Court, and the Department is required to notify the Board of any unpaid restitution ninety days prior to the expiration of a parolee's sentence. *See* WYO. STAT. ANN. § 7-9-108(b); WYO. BD. OF PAROLE, *supra* note 65, at 41.

[90] Wyo. Dep't of Corr., Cost Per Day, Fiscal Years 2005–2011 (unpublished statistics) (on file with author); *see* Daily Counts, *supra* note 85 (documenting that women housed in the Lusk prison comprise only eight percent of the total state inmate population).

[91] Senne, *supra* note 15. At $147.23 a day, the yearly expense to house an inmate at the Wyoming State Penitentiary in Rawlins totals $53,738.95.

[92] Cost Per Day 2009, *supra* note 85.

[93] A technical violation is defined as a violation of parole conditions that does not necessarily constitute grounds for revoking parole or being arrested for a new offense. *See* RHIANA KOHL ET AL., URBAN INST., MASSACHUSETTS RECIDIVISM STUDY: A CLOSER LOOK AT RELEASES AND RETURNS TO PRISON 5 (Apr. 2008), *available at* www.urban.org/UploadedPDF/411657_massachusetts_recidivism.pdf. Examples of technical violations include failing to comply with a curfew, entering a bar, associating with unapproved persons, not attending treatment, not having a job, leaving the state without

as radical or unnecessary by many, several of the concepts have recently been implemented in Wyoming and elsewhere to assist offenders in avoiding a return to prison.[94]

In 2008, the Wyoming legislature enabled the Governor to promulgate rules making parolees eligible to earn good time, which is currently available to parolees at a rate of twenty days per month.[95] For the fiscal year 2009, this resulted in a reduction of 38,234 days of parole time for Wyoming parolees, or just less than 105 years, for an average of 163.4 days for each of the 234 parolees granted parole good time.[96] Parole good time not only provides a powerful incentive for offenders to become law-abiding citizens, it can also significantly shorten the length of an offender's sentence. Critics of good time, whether it applies to inmates or parolees, appear to be in the minority. As of March 18, 2008, all but six states had some form of a sentence reduction plan, the majority of which are similar to Wyoming's system of good time. Several states have good time available in greater amounts than Wyoming, and many states have comparable rates of good time.[97] For instance, while Wyoming may grant up to twenty days of parole good time for every month served, Alabama may grant as many as seventy-five days for every thirty days served for certain offenders, and other states offer as many as thirty days of good time for every month served, or a day reduction for every day served.[98]

Also in 2008, the Wyoming Legislature granted the Department of Corrections the authority to impose administrative sanctions set forth in the Intensive Supervision Program in lieu of revocation of parole in response to violations. Those sanctions include up to thirty days in jail or sixty days at an Adult Community Correctional facility.[99] The option of sanctioning a parolee

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permission, or a positive drug or alcohol test. *See* PETERSILIA, *supra* note 71, at 171–220; JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 22–25 (Nov. 2007), *available at* http://www.jfaassociates.com/publications/srs/ UnlockingAmerica.pdf; PEGGY BURKE & MICHAEL TONRY, CTR. FOR EFFECTIVE PUB. POL'Y, SUCCESSFUL TRANSITION AND REENTRY FOR SAFER COMMUNITIES: A CALL TO ACTION FOR PAROLE 29–30 (2006), *available at* http://www.cepp.com/documents/A%20Call%20to%20Action%20for%20Parole.pdf.

[94] *See supra* note 93 and accompanying text; *infra* notes 95–101, 112 and accompanying text.

[95] WYO. STAT. ANN. § 7-13-420(a) (2010).

[96] WYO. BD. OF PAROLE, ANNUAL REPORT 4 (2010) [hereinafter ANNUAL REPORT], *available at* http://bop.state.wy.us/pdf/10%20Annual%20Report%20for%20Agency%20081.pdf.

[97] CONN. DEP'T OF CORR., SENTENCE REDUCTION PROGRAMS (Mar. 18, 2008), *available at* http://www.ct.gov/doc/lib/doc/pdf/pdfreport/nationalgoodtimestudy.pdf. Some states which offer inmate and/or parole good time in excess of that available in Wyoming are Alabama, Arkansas, California, Indiana, Kansas, and New Mexico.

[98] *Id.*

[99] WYO. STAT. ANN. §§ 7-13-408(e), -1107(b). Parolees sanctioned to Adult Community Correctional facilities are permitted to leave the facility to work, search for jobs, attend treatment, or pursue approved activities, but must otherwise reside at and be subject to the facility rules. Jail sanctions are uninterrupted periods of incarceration at the county detention center.

rather than seeking revocation is a valuable tool for reducing the prison population as approximately ten percent of Wyoming prison intakes are returning parolees.[100] If appropriate to the violation, sanctions can also provide a more measured response to transgressions which are not as disruptive of the parolee's progress in the community. For instance, sanctioning a parolee to a weekend in jail will most likely enable the parolee to keep his or her job and maintain other community ties while a lengthy return to incarceration substantially severs those ties.

The Department of Corrections has also implemented a system of not only sanctioning bad behavior but providing incentives for good behavior to both probationers and parolees as part of the Positive Reinforcements, Incentives, and Sanctions Matrix program (PRISM).[101] The PRISM program, available to the supervising agent, provides a list of common desirable and undesirable behavior, suggesting either a positive reinforcement or sanction as appropriate.[102] Under PRISM, the supervising agent can utilize a system of graduated sanctions to address undesirable behavior, which may be in the form of verbal reprimands on the low end, ranging up to revocation at the high end.[103] To encourage and recognize positive behavior, the agent may reward the parolee with increased liberties, reduction in the level of supervision, and consideration of and possible request for early discharge.[104]

Dan M. Kahan examined alternative sanctions in 1996, as he viewed the public's appetite for imprisonment as a matter of grave public concern.[105] Kahan noted imprisonment became the dominant form of punishment in the United States in the mid-nineteenth century for many reasons, one of which was the idea that imprisonment was viewed as rehabilitative when compared with corporal punishment.[106] Another reason for the disappearance of corporal punishment was the demise of colonial life in the United States, which had previously incorporated an element of shame into corporal punishment, as "[i]t was always inflicted in public, and the public often participated in its administration."[107]

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[100] In 2010, the Board decided to revoke parole and reincarcerate seventy-eight times. ANNUAL REPORT, *supra* note 96, at 3. The total prison intake for fiscal year 2010 was 812. WYO. DEP'T OF CORR., ANNUAL REPORT 2 (2010), *available at* http://corrections.wy.gov/about/ annual_report.html. Seventy-eight divided by 812 is .096 or nearly ten percent which represents the percentage of Wyoming intakes who are returning parolees.

[101] Les Pozsgi, *The Leading Edge of Corrections: Positive Direction for Change*, WYO. DEP'T OF CORRECTIONS, http://doc.state.wy.us/doc/leadingedge.html (last visited Nov. 24, 2010).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996).

[106] *Id.* at 612–13.

[107] *Id.* at 611.

As our country grew and communities became more impersonal, the disgrace of corporal punishment faded.[108]

The early reformers who championed imprisonment as more humane and rehabilitative than corporal punishment surely did not envision what has become of today's prisons. Kahan realized this paradox, asking, "How can it be that corporal punishment brutalizes us more than imprisonment, which we know is just as painful, just as undignified, just as violent, and almost certainly more destructive of the offender's personality?"[109] Kahan did not recommend a return to corporal punishment as an alternative sanction, but he did advocate the use of a shame component, in combination with other sanctions such as fines or community service, to express social condemnation for criminal acts.[110] The idea of holding offenders accountable for their actions in front of their family and peers, as was done in colonial times, is a notion that has been incorporated into our nation's drug courts.

A drug court is comprised of a team led by the judge and other practitioners replicating "[a] community where institutionalized and systematic structures assure the program's effectiveness and survival, while a larger community of practitioners and offender/participants exert control over offender behavior."[111] Research demonstrates that drug courts, in use for over twenty years around the country, are excellent tools in assisting drug-addicted offenders as they return to the community.[112] However, many drug court programs around the nation fill their rosters with low to medium risk offenders, who do not need nor do particularly well in drug courts.[113]

There is a current movement toward expanding drug courts to prison-based reentry courts, targeting high-risk drug-involved offenders.[114] United States Attorney General Eric H. Holder has recognized that drug courts play a vital role in rehabilitating addicts and reducing crime and should be available to more people, especially juveniles.[115] Holder stated, "I believe that we can put drug

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[108] *Id.*

[109] *Id.* at 610.

[110] *Id.* at 630–53.

[111] Nat'l Ass'n of Drug Ct. Prof'ls, *Proposal For a National Reentry Court Initiative*, *in A Proposal For a National Reentry Initiative: Four Policy Papers*, Apr. 1, 2009, at 1.

[112] *Id.*; Nat'l Ass'n of Drug Ct. Prof'ls, *County Jail-Based Reentry Courts*, *in A Proposal For a National Reentry Initiative: Four Policy Papers*, Apr. 1, 2009, at 2 [hereinafter *County Jail-Based Reentry Courts*].

[113] *County Jail-Based Reentry Courts*, *supra* note 112, at 1.

[114] Nat'l Ass'n of Drug Ct. Prof'ls, *Prison Based Reentry Courts*, *in A Proposal For a National Reentry Initiative: Four Policy Papers*, Apr. 1, 2009, at 1.

[115] Shelley Murphy, *Holder Sees Drug Courts as a Lifeline*, BOSTON GLOBE, June 4, 2010, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/06/04/holder_sees_drug_courts_as_a_lifeline/.

courts within reach of every person who needs them, and I am confident that we can."[116] Jeremy Travis, President of the John Jay School of Justice and former Director of the Department of Justice's Bureau of Justice Statistics, remarked about prison-based reentry courts:

> Reentry Courts offer numerous advantages over our current system of reentry supervision. Judges command the public's confidence and, by contrast, our parole system is held in low public esteem. Judges carry out their business in open courtrooms, not closed offices, so the public, former prisoners, family members, and others can benefit from the open articulation of reasons for the government's decisions. Judges have been trained in the law, with experience in applying legal standards to facts about making tough decisions after weighing advocates' competing proposals. . . . However, the most compelling reason for moving toward a universal system of reentry courts is these court's ability to promote reintegration.[117]

Most recently, in 2009, the Wyoming Legislature permitted parolees to participate in the state's drug court programs, statutorily referred to as "court supervised treatment programs," provided the parolee is accepted by the program.[118] As of this writing, the drug court programs of Campbell, Fremont, Laramie, Natrona, and Sublette Counties have all executed agreements to permit parolees to apply and, if accepted, enroll in their drug courts, and the Board is seeking to enlist more drug court programs around the state to serve as reentry courts.[119]

On the federal level, there is also a movement away from the "truth in sentencing" model toward a structured, community-supported early release system. The Second Chance Act was signed into law on April 9, 2008, and was created to improve the chance of success for prisoners returning to the community from prison and jails.[120] In fiscal year 2010, the United States Department of Justice appropriated $114 million for prisoner reentry programs, including $14 million for reentry initiatives in the Federal Bureau of Prisons and $100 million for Second

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[116] *Id.*

[117] *Id.*

[118] WYO. STAT. ANN. § 7-13-1615 (2010).

[119] Drug courts receive a mixture of county, state, and federal funding and resources. *See id.* § 7-13-1609(a); *Drug Court Funding Increases 50 Percent*, JOIN TOGETHER (Jan. 10, 2008), http://www.jointogether.org/news/funding/trends/2008/drug-court-funding-increases.html.

[120] *About the Second Chance Act*, NAT'L REENTRY RESOURCE CENTER, http://nationalreentryresourcecenter.org/about/second-chance-act (last visited Nov. 24, 2010). The Second Chance Act was introduced in the Senate by Senators John Coryn of Texas, Patrick Leahy of Vermont, and Sheldon Whitehouse of Rhode Island.

Chance Act programs.[121] The appropriations also provide $10 million for reentry courts, $13 million for reentry substance abuse and criminal justice collaboration, and $10 million for reentry research.[122] The Criminal Justice Reinvestment Act of 2010 (CJRA) is designed to help states and localities determine how to best manage the growth in prison and jail populations and increase public safety.[123] The CJRA authorizes grants to provide data-driven guidance regarding the factors driving prison and jail populations for particular localities and to create policies to better manage prison spending.[124] United States Senator Sheldon Whitehouse, a former Rhode Island attorney general, stated, "The combination of growing prison populations, rising costs and budget shortfalls is unsustainable in the long term, and in the short term tends to prejudice programs like reentry support that are important to public safety."[125]

Wyoming has received outside assistance in refining its reentry efforts, having been awarded the Transition from Prison to Community Initiative (TPC).[126] The TPC is sponsored by the National Institute of Corrections in conjunction with the Urban Institute and the Center for Effective Public Policy and is aimed at improving the process of transitioning offenders from prison to the community.[127] The TPC is a three-year program, and the sponsors provide ongoing technical assistance to the community stakeholders, such as corrections, law enforcement, and human service agencies.[128] As the United States trends toward a system of dealing with offenders focused on alternatives to prison and reentry, Wyoming has managed to embrace and adopt many of the diversionary and reentry programs that are rapidly gaining acceptance around the country.

V. A SUGGESTION TO IMPROVE WYOMING'S SYSTEM OF EARLY RELEASE

The fact that Wyoming has retained a system of discretionary parole is admirable, especially given the widespread but fading movement toward mandatory parole and the subsequent research that largely shows the movement backfired. While discretionary parole, as part of an indeterminate sentencing system, is preferred to a system of mandatory parole and determinate or

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[121] *Second Chance Act, Appropriations Update*, REENTRY POL'Y COUNCIL, http://www.reentrypolicy.org/government_affairs/second_chance_act (last visited Nov. 24, 2010).

[122] *Id.*

[123] Criminal Justice Reinvestment Act of 2010, Pub. L. No. 111-174, 124 Stat. 1216 (to be codified at 18 U.S.C. § 3006A).

[124] *10 Questions: U.S. Sen. Sheldon Whitehouse*, CAPITOL IDEAS, July/Aug. 2010, at 25, *available at* http://www.csg.org/pubs/capitolideas/jul_aug_2010/10questions.aspx.

[125] *Id.*

[126] *Wyoming Department of Corrections Receives Technical Assistance for Effective Re-entry*, WYO. DEP'T OF CORRECTIONS (Oct. 9, 2009), http://corrections.wy.gov/news.aspx?NewsID=108.

[127] *Id.*

[128] *Id.*

"automatic" sentencing when seeking to reduce prison populations, the system of discretionary parole does have some room for improvement. The discretionary authority possessed by the Board inevitably leads to many inmates being denied parole. As discussed above, of the parole eligible inmates who appear before the Board having served their minimum sentence, only fifty-seven percent are granted parole, with the remainder finishing their sentences in prison.[129]

Apart from those inmates who seek and are denied parole, other inmates choose to waive their parole hearings for various reasons. First, inmates may not wish to live under the thumb of the Department of Corrections within the community. Terms such as "institutionalized" and "prisonization" are often used to describe individuals who have become so adjusted to life in prison that they would rather remain locked up than be released on supervision. Second, some inmates are firm in their desire to continue a criminal lifestyle upon release and refuse to engage in rehabilitative programming. For other inmates, it may simply be a matter of timing. As inmates get closer to release, it logically follows that the idea of simply completing their sentence without seeking parole becomes more attractive. A 2009 study concluded that Wyoming inmates with short sentences were more likely to waive their parole hearings than inmates with longer sentences.[130] Inmates with a year and half or less remaining on their sentence at the time of their parole hearing were more likely to waive their hearing than inmates with two or more years left on their sentences.[131] The study also revealed that inmates may consider a lack of connection to the community or "nothing to come home to" as a reason to remain in prison rather than seek parole.[132] Other inmates may simply choose not to seek parole for fear of living under supervision with the risk of parole revocation leading to a return to prison.[133] Also, some inmates likely fear that they will be denied parole, based upon their crime or disciplinary and programming history, and decline to appear for their hearing as a result.[134]

While some inmates may not pursue a grant of parole for the variety of reasons discussed above, unfortunately, there are inmates who strive to gain parole and are unable to do so. Many inmates are denied parole every time they appear before the Board. The reasons for continued denial can be as varied as the reasons

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[129] *See supra* note 37 and accompanying text.

[130] Brianna Best & Eric Wodahl, Identifying Inmates Who Choose Incarceration Over Parole (2009) (unpublished Senior Honors Research Project, University of Wyoming) (on file with the Wyoming Board of Parole).

[131] *Id.* at 25.

[132] *Id.* at 24.

[133] *Id.* at 25.

[134] *Id.* at 27.

for which the Board may grant a parole. The particular crime may be of such a heinous or severe nature that the Board finds a grant of parole at any time during the sentence would depreciate the seriousness of the crime. Some inmates may want a parole but cannot or will not follow institutional rules or programmatic recommendations. Many inmates are granted parole upon completion of a treatment program or an Adult Community Correctional program but are later denied acceptance into those programs and ultimately finish their sentence as an inmate.

Without changing anything about the current structure and duties of the Board, an optional, merit-based early release to supervision could be created and offered to those inmates who are willing and meet certain criteria. This early release could be created legislatively as an administrative conditional release. In order to qualify, an inmate would need to demonstrate his or her commitment to engage in rehabilitative programming and that he or she has remained free of major disciplinary infractions. Ideally, the inmates would need to have appeared before the Board at least once and been denied or received a parole grant that is impossible to complete, such as a parole upon completion of a program that will not accept the inmate or one for which the inmate does not qualify. Non-acceptance into rehabilitative programming may happen for various reasons, such as timing, escape history, conviction(s) for violent crimes or sex offenses, and the vagaries in scores of certain assessments.

This new type of early release could be made available to inmates with less than a year but more than six months left on their sentence, ensuring a meaningful amount of time under supervision. By limiting this type of early release to the last year of the sentence, inmates who desire parole any earlier will have no alternative but to see the Board. Conversely, those inmates who have been repeatedly denied parole by the Board but have otherwise availed themselves of institutional treatment programs and remained free of disciplinary violations would automatically qualify for early release.

Conditions of supervision could be imposed according to criminogenic risks and needs identified using proven assessment tools. If early release is revoked, the Department of Corrections or the Board would be best suited to preside over and administer the early release revocation hearing. Moreover, individuals released under this proposed system would presumably have little time left on their sentence, and accordingly, a limit could be placed upon the amount of incarceration time that could be served if the early release was revoked, such as sixty to ninety days. Further, the Department of Corrections could create a housing unit solely for those offenders who are being returned to prison custody for either parole revocation or upon revocation of their early release. Such housing units could provide offenders with a place to obtain short-term programming to help them regain their health and sobriety, address identified risks and needs, find

employment, learn or relearn basic life skills, and ready themselves for reentry. At the time of this writing, the Department of Corrections is working to create such a unit at the WMCI in Torrington.

The suggestions in this article are not merely designed to lower Wyoming's prison population. Parole and early release in general provide many benefits to the offenders, victims, and citizens of Wyoming. Increasing access to early release for inmates who meet pre-determined criteria would decrease the number of offenders who are released directly from prison back to the community without any form of support, thereby enhancing public safety. Other states have legislatively adopted many of these strategies: Louisiana law limits incarceration to ninety days for a first technical violation of parole; a Washington statute caps the maximum confinement for minor violations of parole at sixty days; the Nevada State Board of Pardons Commissioners can order a parolee to six months incarceration or residential confinement for a parole violation in lieu of revoking parole; and Colorado statutes authorize the construction and operation of a 300-bed, privately owned and operated pre-parole and revocation facility.[135] An administrative early release program could also be implemented using existing legislative authority (with perhaps some modification) for the Department of Corrections to grant "reentry furloughs."[136]

The proposition that inmates may gain an early release if not granted parole by the Board should not be taken to imply that the purely discretionary nature of the Board should be altered in any way. As discussed, it is the discretionary authority of the Board that fosters public safety by enabling the Board to deny parole to those who pose a threat to public safety or have not availed themselves of the opportunity to prepare for release. The early release mechanism envisioned in this article would also not be considered a mandatory system of release; rather, the inmates would have the option to pursue an early release if not first granted parole by the Board, providing they meet certain criteria.

VI. CONCLUSION

The Board of Parole has a rich history in Wyoming. Its members have come from all walks of life and from all parts of the State, making them truly representatives of the community. While it has evolved over the years, the Board has not fundamentally changed. It has remained a discretionary body with the authority to parole inmates who make a sincere effort at rehabilitation and present a reasonable probability and willingness to fulfill the obligations of a law-abiding citizen; the Board further retains the power to require those who pose a risk to

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[135] ALISON LAWRENCE, NAT'L CONF. OF STATE LEGISLATURES, PROBATION AND PAROLE VIOLATIONS: STATE RESPONSES 4–5 (Nov. 2008), *available at* www.ncsl.org/print/cj/violationsreport.pdf.

[136] WYO. STAT. ANN. § 7-13-701(b) (2010).

the community or are otherwise not ready for parole to serve their full sentence. Moreover, as prison populations soar across the nation, the Board and the Department of Corrections have implemented many of the innovations currently being touted as possible solutions to the incarceration explosion.

Many who have given the subject serious consideration would agree that the United States needs to shift its focus from building prisons that are all too quickly filled toward a more humane and cost-effective manner of dealing with offenders. This article does not advocate that all inmates should be released at the earliest possible time. While research and reliable assessment data supports release at the earliest possible time for many offenders, certain prisoners pose a risk to the community due to their criminal history, their conduct as an inmate, or both; those particular inmates should not be released early.

The notion that all inmates must be locked up as long as possible, however, has proven to deplete budgets and does little to change the overall safety of the community. It is estimated that ninety-three percent of all inmates will return to the community at some point.[137] Requiring such inmates to serve an additional year or two will not alter the fact that they may still commit new crimes when allowed back into society. Similarly, some offenders released early on supervision will also re-offend. Parole, early release, and reentry will never entirely end recidivism, nor will enforcing the maximum sentence for all inmates wipe out crime; it will, however, cost far more than the alternative.

The reality is that many who are released from prison early do change: they address their criminogenic needs, avoid ending up back in prison, and ultimately become productive and contributing members of society. What this article recommends is that Wyoming's system of parole remain discretionary but that those inmates who have done what has been asked of them while incarcerated be given the chance to reenter society on early release providing they one day become parole eligible. As we continue to grow as a society and State, both in terms of population and viewpoints, our habit of locking up criminals at the rate we do needs careful and critical re-examination. While the Board and Department of Corrections will play a part in this examination, other members of the criminal justice system such as law enforcement, the prosecution and defense bar, the judiciary, and the legislature must also participate. The greater availability of reentry courts in Wyoming, which have proven effective in reducing recidivism of offenders around the nation, is powerful evidence that these stakeholders can work effectively together to reduce prison populations.

After the opening of the WMCI in Torrington, Wyoming has the resources necessary to house its entire prison population in-state. It remains to be seen how long this condition will last. Through the continued adoption and application

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[137] PETERSILIA, *supra* note 71, at 3.

of correctional principles aimed less at retribution and more at rehabilitation, Wyoming can position itself to avoid building more prisons for generations to come. This will be in keeping with Wyoming's Constitutional mandate that "[t]he penal code shall be framed on the humane principles of reformation and prevention."[138]

[138] WYO. CONST. art. 1, § 15.