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GUIDE TO INVESTIGATING PAROLE IN YOUR STATE

Roderick & Solange
MacArthur
Justice
Center

NATIONAL PAROLE
TRANSFORMATION PROJECT

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Introduction

We cannot stem the tide of mass incarceration without addressing parole. Over a quarter of people currently in prison are there as a result of violations of post release supervision, and an unknown percentage of people currently in prison are there only because parole systems are functioning as a tool to keep people incarcerated, choosing not to parole people as astonishingly low rates.

These systems are rife with rights violations. Advocates have employed various tools in the past to attempt to challenge these systems—policy change, individual advocacy, pressure on elected officials—but there has been relatively limited use of another important tool in the social change toolbox: litigation.

The National Parole Transformation Project is an attempt to change that. NPTP is a coordinated campaign of impact litigation and community-based advocacy that is building a network of like-minded advocates to transform parole systems around the country.

Why litigation?

Litigation is a critical tool for enforcement and accountability. Policy and legislative changes are meaningless without implementation and enforcement. What few rights courts recognize for people facing the parole process are similarly meaningless if there is no monitoring and enforcement. Particularly for parole systems, which are intentionally opaque and subject to little oversight, there is a special need for advocates equipped to conduct rigorous investigation and hold systems accountable.

Who is this guide for?

The first step in bringing transformative litigation is investigation and documentation of the problem, and so our first offering is a guide to investigating parole in your state. This guide is intended to help you assess the current state of parole in your jurisdiction, identify the problems, and begin to think about ways to fix them through targeted litigation. Accordingly, this guide will be most useful for advocates whose ultimate goal is litigation, or who are already in active litigation about parole.

That said, this guide may also be useful to others. One of the primary hurdles to any change in parole systems is that each state's system is different, and in most states these systems are cryptic, difficult to understand, and hard to investigate. We hope this guide will be useful to anyone trying to understand their state's system and challenge its way of doing business.

Limitations and caveats

State parole systems vary widely. Because no two systems are identical, this guide does not offer specifics about individual states. Rather, it is our attempt to share an array of strategies that have worked for us as we have investigated these various systems.

Not every strategy will work in every system. In Illinois, anyone can receive a person's parole file through a Freedom of Information Act request, which can allow investigators to easily reconstruct the circumstances of any Prisoner Review Board decision. In Georgia, parole files are strictly confidential.

Because this guide is focused on systems investigation and change, advice and information about seeking parole or a change in sentence for a particular person is beyond its scope. This guide also does not contain any data or evidence that supports or opposes specific policy changes or legislation.

Finally, if you're already knowledgeable about your state's parole system, this guide is still for you! The "Approaches and Claims" section at the end of this guide outlines how to turn information into concrete litigation and action.

Initial Questions

There are a few big picture questions that can provide a starting point for how you conduct your investigation—what to look for and where to look.

1. Does your state have a discretionary, non-discretionary, or hybrid parole system?
2. Are parole board hearings open or closed?
3. Which portions of the state **code** govern post-release supervision?
4. What types of post-release supervision exist in your state?
5. Which agency is responsible for post-release supervision?
6. What is your state's open records law?

CODE: When we say code, we are talking about your state's statutory code, i.e. your state's laws.

Generally, each state has statutes, passed by the state's legislature, and an administrative code, a set of regulations adopted by state agencies.

Is your state discretionary or non-discretionary, or hybrid?

States with **discretionary parole (**also called **indeterminate sentencing)** release people before their sentence has expired, generally requiring them to be supervised until their sentence ends. A person generally must first serve a minimum percentage of their sentence before their first parole hearing. The decision to grant release is entirely within the parole board's power, with few if any ways to appeal their decision. The parole board's themselves are generally composed of several political appointees by the state's governor.

Indeterminate sentence: A sentence where a person may be released on parole. A court either sentences a person to a range of years, making them eligible for parole at the early part of the range, or to a set number of years, making them parole eligible after serving a certain percentage of that term. If the Board never paroles an incarcerated person, they must be released when they hit their maximum sentence.

States with **non-discretionary states (**also called **determinate sentencing)** automatically release incarcerated people, without a hearing, when their sentences have been completed (with deductions for "good days"). A person then serves a set number of years on supervision and can be sent back to prison only for the balance of time on their supervision period. These states generally have few avenues for early release outside of executive clemency.

Determinate sentence: A sentence where there is no opportunity for discretionary parole and no opportunity for someone to petition the Parole Board for early release. The person serves the entire sentence ordered by the court, less any good time credits received, and, depending on the jurisdiction, may have to serve a set period of post-release supervision after their release from prison. The post- release supervision period is set either by law or by court order.

Example: Illinois abolished parole in 1978. For all offenses committed after 1978, a person is sentenced to a determinate number of years in prison, which can only be shortened through good time credits. At the end of that prison sentence, people are obligated to serve a term of mandatory supervised release for a period ranging from 6-months to 3-years, depending on the felony class.

States with **hybrid systems** have a parole board with release authority for some groups of incarcerated people and determinate sentencing schemes for other groups. For instance, New York has a Parole Board which has the authority to release most people on to discretionary parole. However, for a set number of offenses, incarcerated people must serve their entire sentences and, upon release, serve a set number of years on post-release supervision; in other words, a non-discretionary system.

Why it matters

The types of investigations you can conduct and the legal challenges you can bring are determined by whether your state has discretionary or non-discretionary parole. In the 34 states with discretionary parole, a Parole Board has the authority—and near total discretion—to grant or deny release. Statutes granting a right to parole are very rare, making it difficult to challenge Parole Board decisions in states with discretionary systems.

One exception in discretionary states is where states have specifically limited a Board's discretion by implementing "presumptive parole." In a state with presumptive parole, incarcerated people are automatically granted parole on a specific date if they meet preset conditions, and the state has the burden of showing why that particular person should not be released. The Parole Board has no power to deny release based on its belief that society has not extracted enough retribution, that the judge's minimum sentence was not long enough, that the community would react negatively, that prior criminal activity should be factored in, or that the prosecutor or the Attorney General has noted its opposition. This is discussed further in "Approaches and Claims to Consider Bringing" on page 29 of this guide.

In practice, no state is truly 100% discretionary. In most discretionary states, there are some people eligible for discretionary parole and some people carved out from eligibility, usually people convicted of certain types of offenses, like those defined as violent under state law, and people convicted of crimes eligible for life without parole sentences.

In the 16 **non-discretionary states**, a person has a right to be released on their end-of-sentence date. In most places, a mandatory term of post-release supervision begins immediately thereafter. The supervising authority has no choice or discretion to release someone, but they can decide whether to revoke someone's supervision.

In non-discretionary states, people who were sentenced before discretionary parole was abolished are still eligible for discretionary parole, so your state's parole board may still conduct discretionary hearings even though the vast majority of people are not eligible for parole.

Where to look

The Prison Policy Institute conducted a nationwide survey of parole systems and have determined that the following states have discretionary systems. A star (*) denotes that the system is a hybrid system.

Discretionary	Non-Discretionary (Year Parole Abolished)
Alabama	Arizona (1994)
Alaska	California* (1977)
Arkansas	Delaware (1990)
Colorado	Florida (1983)
Connecticut	Illinois (1978)
Georgia	Indiana (1977)
Hawai'i	Kansas (1993)
Idaho	Maine (1976)
Iowa	Minnesota (1982)
Kentucky	New Mexico (1979)
Louisiana	North Carolina (1994)
Maryland	Ohio* (1996)
Massachusetts	Oregon (1989)

Discretionary	Non-Discretionary (Year Parole Abolished)
Michigan	Virginia (1995)
Mississippi	Washington (1994)
Missouri	Wisconsin (2000)
Montana	United States Federal Gov. (1987)
Nebraska	District of Columbia (2000)
Nevada	
New Hampshire	
New Jersey	
New York*	
North Dakota	
Oklahoma	
Pennsylvania	
Rhode Island	
South Carolina	
Tennessee	
Texas	

Discretionary	Non-Discretionary (Year Parole Abolished)
Utah	
Vermont	
West Virginia	
Wyoming	

See this table in their report for much more information about each state's procedures.

Examples

South Dakota

South Dakota is a state with indeterminate sentences and **discretionary parole.** In most cases, a judge hands down a sentence with a set number of years, and the Department of Corrections calculates an incarcerated person's initial parole eligibility date as a percentage of that sentence. The exact percentage depends on the class of felony, whether the offense is categorized as violent, and the date the offense occurred. A person is first eligible for release on parole on the date calculated by the DOC. If released, the person spends the remaining years of their sentence on parole, unless the Parole Board grants them early discharge. If the person has their parole revoked, they can serve the remaining years of their initial sentence in prison or they may be paroled again at a later hearing date. As is common amongst discretionary states, the Parole Board holds a quasi-judicial **revocation hearing**.

Revocation hearings: A process of returning a person to prison for violations of the conditions of their release. Major Supreme Court decisions have established that people are entitled to a preliminary hearing (sometimes called a probable cause hearing) and a final revocation hearing. Those subjected to these hearings have certain rights, including the right to present witnesses and evidence as to both guilt and mitigation. In practice, many states do not honor these rights and do not conduct true hearings.

Wisconsin

By contrast, Wisconsin has a nondiscretionary system which does not offer a path to early release on parole. For all sentences with an underlying offense after 1/1/2000, a judge sentences a defendant to a set number of years in prison. The Parole Board cannot order the defendant released early. The term can only be shortened through good time or other sentence credits. Upon release, a person must serve a period of extended supervision (ES), which is set by the sentencing court and must be a minimum of 25% of the carceral sentence. The ES period and the carceral period are considered two distinct terms, called bifurcated sentencing. If a person on ES is accused of violating the terms of their supervision, they can only return to prison for the remaining ES term, not the carceral term.

Note: *Not all non-discretionary states have mandatory post-release supervision. In some states, like Maine, there is minimal post-release supervision. In other states and in the federal system, the sentencing judge has discretion to impose supervision*

Are parole board hearings open or closed?

Why it matters

Attending hearings is one of the best ways to understand the system. It will give you an up-close view of how your Parole Board operates. It is also critical if you are trying to document something, like whether they permit people facing parole revocations to present witnesses, which many Boards do not track.

Discretionary parole release hearings are typically open to the public for at least a portion of the hearing. They may be closed during deliberations or the reading of victim impact statements.

Some discretionary states do not have parole release hearings and instead conduct file reviews for most incarcerated people.

Revocation hearings are open to the public in about half of all states.

If you cannot access hearings in your state, it is worth investigating whether their closure complies with your state's open meetings law or violates the First Amendment, which provides a public right of access to court hearings that has been extended to some types of administrative hearings, such as immigration court and other executive branch adjudicatory proceedings. See Detroit Free Press v. Ashcroft, 303 F.3d 681; N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286.

Where to look

[State-by-State Guide: Public Access to Revocation Hearings]

This table, current as of May 2024, provides information about whether different types of hearings in each state are open to the public.

Your state's Parole Board website may have information about how to attend hearings. You can also call and ask. Also consider checking any procedure manuals for the Board, which may provide information about public access.

Which portions of the state code govern post-release supervision?

Why it matters

Post-release supervision schemes can be created through a patchwork of different laws throughout different sections of your state's statutes. In order to understand the system, it is useful to identify all of its parts. Knowing which laws are in play can impact the type of litigation you bring.

Where to look

State laws vary widely in their structure and organization. Generally, you should look at any sections of both the statutory and the administrative code with the following titles or topics.

- Criminal procedure
- Sentencing
  - **TIP**: *For states without sentencing guidelines for classification of crimes or type of felony, you may need to search the statutes for individual crimes to see whether they require supervision.*
- General criminal code
  - **TIP**: *For states where **parole eligibility** is determined by type of crime, you may need to look at the statutory definitions of each crime to determine which ones are parole eligible.*

> **Parole Eligibility (date):** Parole eligibility date refers to the date when a person is first eligible for release on parole. Depending on the state, that date may be after a minimum number of years have been served; after a certain percentage of the overall sentence; or after a date determined by the Parole Board. In most states, there is no guarantee of actual release from prison on that date.

- Department of Corrections
  - **TIP**: *The Department of Corrections will likely publish their policies and procedures on their website. Even if the Parole Board is a distinct entity from the DOC, the DOC's policies will likely include information on release, time-calculation, and supervision practices.*

- Parole, pardons, probation
  - **TIP**: *Parole Boards typically publish a policy and procedures manual on their website. These guides can be extremely helpful in understanding how the parole and post-release supervision system works in practice. Those manuals can also be a great first step in more detailed legal research. They will provide references to the relevant code sections and regulations that guide the Parole Board's work.*
- Sentencing guidelines or Bench Books
  - **TIP**: *Detailed information on post-release supervision is typically available in your state's published sentencing guidelines or Bench Books. However, many states have neither.*

Examples:

Mississippi: Mississippi houses much of their parole law in Title 47 ("Prisons and Prisoners; Probation and Parole), Chapter 7 ("Probation and Parole") of the Mississippi Code. Title 47 includes all laws about parole, probation, earned- release supervision, and post-release supervision. However, to fully understand whether and when someone is parole eligible, one must also look in other parts of the Mississippi Code, such as Title 97 Chapter 3, which defines crime of violence.

Alabama: Alabama houses parole law in its code of criminal procedure (Title 15, Article 2, "Pardons and Paroles"). It is not housed in the same code section as the Alabama Department of Correction. However, to get the full picture of how parole eligibility dates are determined, one would need to look at Alabama's Bureau of Pardons and Paroles administrative regulations, which contain information about how people can apply for early parole consideration.

Hawai'i: Hawai'i's parole law does not even have its own code title, section, or article. The thrust of parole law is housed in Title 37 ("Hawaii Penal Code") Chapter 706 (Imprisonment). Hawai'i law grants the Hawai'i Paroling Authority (HPA) the power to set the minimum term of incarceration following a hearing. The HPA determines parole dates by following the guidelines published on its website. The laws outlining the administrative structure of the HPA are found in Division 1, Title 20 among the statutes regarding government agency structures.

What types of post-release supervision exist in your state?

Broadly, when we talk about post-release supervision, we mean any state control of people after they have finished a carceral sentence. States call post-release supervision many different things. Some examples are parole, mandatory supervised release, probation, community supervision, intensive supervision, and post-release electronic monitoring.

> **TIP:** This can be confusing because words mean different things in different states! For example, in most places, probation is an alternative to a carceral sentence (i.e. a person serves a term of probation instead of going to prison), not a form of supervision after a sentence. But Virginia calls supervision after release from prison "supervised probation." In Illinois, discretionary parole was abolished in 1978, and everyone convicted of a felony serves a term of mandatory supervised release (MSR) after completion of their carceral prison sentence. But they report to parole officers and generally everyone in the system calls it parole, not MSR.

Example:

In South Carolina, there are multiple categories of post-release supervision.

Parole

South Carolina has discretionary parole. When an incarcerated person first becomes eligible for parole depends on whether their sentence is considered violent, when the underlying offense was committed, and the length of the sentence. South Carolina also has so-called "no parole" offenses, where the legislature has omitted certain offenses from any parole eligibility. The South Carolina Board of Paroles and Pardons grants and revokes parole, but parole supervision and parole violations are overseen by the South Carolina Department of Probation, Parole, and Pardon Services.

Community Supervision Program

In South Carolina, this is a mandatory release program for people who have been sentenced to a non-parole eligible offense and have served 85% of their sentence. People on community supervision have a two-year supervision period and are supervised by a probation agent from the Department of Probation, Parole, and Pardon Services. However, revocation hearings of the Community Supervision Program are overseen by the circuit court.

Reentry Supervision

Reentry Supervision is for people with offense dates of January 1, 2011, or later. People must serve a minimum of two years' incarceration before they are placed onto reentry supervision, and they must be released onto supervision before the expiration of their release date. The maximum amount of time a person can serve on reentry supervision is six months. People on reentry supervision are supervised by a probation officer from the Department of Parole, Probation and Pardon Services.

Youthful Offender Supervision

Youthful Offender Supervision is for people ages 17 through 24 who were sentenced under the South Carolina Youthful Offender Act to an indeterminate period of incarceration, not to exceed six years. Those sentenced under this Act are conditionally released onto supervision on or before the expiration of four years from the date of their conviction and are to be discharged unconditionally on or before six years from the date of their conviction. This program is overseen by the South Carolina Department of Corrections.

Which agency is responsible for post-release supervision?

Why it matters

The entity responsible for supervising people varies by state, and can be the Parole Board, the Department of Corrections, local agencies, or a mix of two or more entities. Knowing who has the authority to supervise people will tell you where to look for information. For example, if you want to find data about how many people are currently subject to a particular kind of supervision, the agency supervising them is the entity most likely to have that. Moreover, knowing which agency is in charge of supervision can help you determine which agency or individual agents are the proper defendants.

Where to look

- DOC website
  - If they are responsible for supervision, the DOC's website will likely have a webpage on community corrections, supervision, or parole.
- Parole Board
  - The Parole Board's website or policy manual will likely say who supervises people that are granted parole.
- Local government websites
  - Courts, county governments, and sheriffs all maintain websites with varying degrees of information. Clicking through them can shed light on whether local police or court officers play any role in supervision.
- Discussions with someone who is/was on parole
  - People on parole are constantly checking-in with their PO. Even if your contact is unsure exactly who their PO works for, their PO's name, the physical address where check-ins occur, or even a phone number can lead you to the agency supervising your contact.

Examples

In some states, the Department of Corrections maintains responsibility. An example is Illinois, where the IDOC has a parole department staffed by parole officers who supervise everyone on parole and mandatory supervised release.

In Alabama, the Bureau of Pardons and Paroles has responsibility for supervision.

In Oregon, each county has a community corrections agency that assumes responsibility for supervision of people within the county.

What is your state's open records law?

Why it matters

Your state's open records law is potentially one of the most powerful tools you will have as you investigate. Some states have very strong laws that give you the right to access a lot of information for free. Some have weak laws, vague or indeterminate required response times, and high fees. Knowing the rules will guide what you request, who you request it from, what your remedies are if the agency you ask does not comply, and whether you have to pay for it.

Where to look

Organizations for journalists often have great open records resources. The National Freedom of Information Coalition maintains a list of each state's laws, available here. The Reporters' Committee for Freedom of the Press maintains an in-depth analysis of each state here.

Your state's law should be in the state code. It may be called a sunshine law, an open records law, a freedom of information act, a public records act, a right to know law, or something similar.

Each state's law may have different limitations. For example, some states will waive fees for records requests that will serve the public interest in some way. Some states will only accept requests from residents of the states. Most states will only produce records they keep in the normal course of business; they will not create new formats or compilations in response to a request.

Local journalists often rely on open records laws in investigating government malfeasance and so are often great sources of information on how those laws work.

Government agencies with information

Information relevant to parole exists across state agencies, not just in the custody of Parole Boards. The following is a list of agencies you may consider looking at, either for formal records requests through open records laws, or for information that they make publicly available on their websites.

The Parole Board: This should be your go-to for a lot of information about parole.
Some examples are:

- Release decisions/hearing outcome data
- Policies and procedures governing release decisions
- Transcripts or recordings of hearings
- Lists of people currently being supervised
- Lists of people who were revoked during the previous X months/years
- Procedures governing release hearings, revocation hearings, or intermediate sanctions
- Individual's parole board files (NB: these may be completely confidential in some states or may come heavily redacted)
- Supervision procedures and regulations, if applicable
- CVs, resumes, job applications, letters of reference filed by Parole Board members

FOIA Success Stories: Holding Officials Accountable

In 2018, an Illinois-based government transparency group Edgar County Watchdogs acquired the personnel file of then-Illinois Prisoner Review Board (PRB) member John Clough during his time at the Cole County Sheriff's Office, as well as his financial disclosures and surveillance footage. The file revealed that Clough was overheard saying multiple racial slurs; improperly filled out his financial disclosure forms; and used his PRB-issued car to campaign for local Cole County politicians. The governor fired Clough in response to the Watchdogs' findings.

The Department of Corrections: Your go-to source for determining who is currently incarcerated; how they got there; and, if applicable, how the state government is supervising people post-release. Examples of data and procedures that could prove to be useful:

- Current prison population, entry data, and exit data. Exit data can be particularly useful if it lists the reason for release, such as parole, end of sentence, or judge's orders. Entry data can be useful for understanding the effect of revocations on the prison population if it lists the reason for admission, e.g. parole revocation, new sentence, probation violation, etc.
- Supervision procedures and regulations, if applicable. (If parole officers are employees of the DOC in your state, the DOC should have operating procedures for them.)
- Time calculation procedures (including incarcerated individual's timesheets). These can be helpful, particularly in non-discretionary and presumptive parole states, in determining release dates and in cases in which the DOC has recalculated someone's sentencing credits as a result of a parole violation.
- Release procedures. These are helpful for learning the time between granting of parole and actual release any DOC policies that could delay someone's release or interfere with a mandatory release (victim notification, blood work, home plan confirmation)

Local supervision agencies: Your go-to for supervision policies and rosters of people on supervisions if localities supervise people on parole.

Local jails/sheriffs' offices: These can be particularly helpful for investigating revocation systems, as most people who are arrested on parole violations are first incarcerated at local jails. Jail population data can be useful if it lists a reason for admission, such as a parole hold, that indicates that someone is alleged to have violated post-release supervision.

FOIA Success Stories: The Power of Data

The National Parole Transformation, alongside co-counsel and local partners, utilized Alabama's public record laws to substantiate claims that the Alabama Department of Corrections and Parole Board were systematically over-detaining people who were entitled to release on to a non-discretionary form of post-release supervision. NPTP received years of prison exit data and a list of every person incarcerated in ADOC on a particular day, as well as policies related to mandatory supervision. The findings were stark – thousands of people served hundreds of additional days in ADOC custody. The records also allowed NPTP to find plaintiffs and work with local counsel to advocate for individuals' timely release.

State legislatures: These can be particularly useful if you are investigating recent changes in the law or implementation problems.

- Reports: If any of your state laws require legislative oversight (for example, if the Parole Board is required to submit an annual report to the legislature), the legislature may have useful information related to that oversight role.
- Hearings: officials from the parole board or Department of Corrections may be called to testify in committee hearings, and the legislature may maintain recordings or transcripts of those hearings.

Executive branch offices: The Governor's Office and other offices in the executive branch may have relevant reports if state law requires executive branch oversight of the Parole Board.

State Comptroller's office (or equivalent): Following the money is often a good investigation strategy, and the Comptroller is responsible for tracking a state's income and expenditures. Some states have helpful searchable databases of payments to and from various state agencies, such as the Department of Corrections and the Parole Board and one can receive the contracts that govern those payments through public records laws. If your state contracts with local attorneys to represent people at revocation hearings, the Comptroller's office may have copies of those contracts that would tell you who is getting those contracts and how much they are paid.

Courts: In states with complex/diverse range of sentencing and supervision schemes, we find it can be helpful to read people's sentencing orders to learn more about how those schemes work in practice.

While court records are historically public by default, in some states those records (and sometimes the entire judicial branch of government) are exempt from public records laws, meaning that Court Clerks are not required to provide public documents in response to a Freedom of Information Act request.

The records are available, however, at the Court Clerk's office. You may be charged fees for the production and copying of the documents, and you may have to wait a week or more for them to be retrieved from the Court Clerk's vault. Those court records may also be available on online court docketing sites, which often require user registration and sometimes contacting the local Court Clerk's office.

The Limits of FOIA: Attorney-Client Privilege

One barrier to receiving documents in many states is attorney-client privilege. In New York, advocates tried to unearth training materials provided to Parole Board Members. State officials argued the documents, which were prepared by attorneys, were covered by attorney-client privilege. The state won and successfully blocked advocates from seeing the training manuals. However, the fight isn't over – advocates are now pushing the Fair and Timely Parole Act, which, amongst other reforms would drastically increase the parole board's transparency. This case highlights why it's crucial to have multiple avenues and strategies for investigating parole.

People with information

People impacted directly by the system

Directly impacted people are the best primary source for understanding how the system works and the harms it causes. There are certain factors you should consider when relying on them for your investigation.

Incarceration and systems of state control like post-release supervision are by design traumatic. Consider learning about and using trauma informed practices in any outreach you do to people impacted by the system. One helpful guide is available here.

Special considerations for contacting incarcerated people

In many states it is intentionally incredibly difficult to initiate and maintain contact with people who are incarcerated. Prisons are often located in remote areas and all communications are monitored. All mail will likely be scanned and read, and all phone calls are recorded. There are restrictions on the number of visits, the number of phone calls, and on access to materials to write letters. Prisons usually charge for phone calls. You may need to be on an individual's visitor list in order to contact them.

There is a risk of retaliation against prisoners if they are perceived as doing anything that could shine a light on bad practices. You should assume that all of your communications with someone who is incarcerated are being monitored by the prison, and anything you discuss that is critical of the prison could create a risk of retaliation for the incarcerated person.

There may also be restrictions on what you are allowed to send through the mail. For example, people may not be able to receive anything with staples or paperclips. Many state prison systems will not allow you to send supplies, like stamps and envelopes;
those must be purchased through the prison.

Professional ethics considerations for attorneys

Confidentiality

Mail- Although prisoners have a right to confidential communications with attorneys, you should assume that anything you send into a prison may eventually be read by prison officials, either upon receipt or later, during a shakedown. The best way to avoid this is to make sure you follow each facility's rules for marking legal mail. You will likely need to mark the outside of the envelope as "legal and confidential" and include your name and a law office return address with a phone number. If the facility will allow it, you may also consider providing clients with large envelopes to store your communications. They should be marked with your contact information and an indication that the contents are confidential legal materials. Note that any non-legal entities who mark their mail as "legal mail" risk sanctions, including prohibitions from sending mail and potential action from their state bar for unauthorized practice of law.

Phone calls- Most states have some system for providing confidential attorney phone calls. However, the variations in these systems are nearly limitless, even for different facilities within the same state. The best practice is to call the facility where the person you want to talk to is held and ask them what their procedure is. For example, some states may require you to be on a person's "attorney list" in order to schedule a phone call. Some may require you to provide the case caption for a case where you represent a person, or demand that you provide a justification for why you need a phone call and can't just communicate by mail.

Many of these practices are arguably illegal, but you may have to work around them unless you are willing to first litigate about those practices.

Professional ethics considerations for attorneys

Scope of interaction

You should clearly define the scope of what you can offer up front. If you are only investigating, make clear that you are not offering to represent the person and that they are free not to talk to you.

Attorney advertising rules

If you are in private practice, you should keep in mind any restrictions within your state on attorney advertising. For example, if you want to send letters to people in prison who might be potential clients for parole litigation, you must comply with any labeling requirements in your state.

Law firms and legal organizations may be able to send surveys through the mail. This is particularly helpful if you are trying to gather descriptive information (What do you know about X?) or collect datapoints that you cannot get through a records request, but these also must comply with any applicable attorney advertising and solicitation rules. Mission driven non-profit organizations are generally exempt from such limitations on first amendment grounds (see Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 428, (1963)), but you should confirm your state's rules before making contact.

Ways to connect with people directly impacted by parole

- Attend hearings (informally, or through organized efforts like parole watch)
- File Open records requests with the DOC or Parole Board (see Open Records
- Requests, page 20)
- Request help from community groups that support people re-entering their
- communities
- Ask for referrals from any of the people listed below

People who regularly come into contact with the system

People impacted directly by the system

People who are in regular contact with the system in their professional roles are often an invaluable source of information about how the system actually works in practice, as opposed to how it works according to laws, policies, or procedures. Some categories of people to consider reaching out to:

- Contacts in state government
- Former employees of relevant state agencies
- Adjacent non-profit and legal service providers
- Public defenders
- Private criminal defense attorneys
- Investigative journalists and authors
- Academics
- Local advocates with expertise in navigating your state's open records laws (could be lawyers, paralegals, journalists, government transparency enthusiasts, non-profits, etc.)
- Advocates who have brought similar lawsuits
- The networks of any of the people listed above

Types of documentary evidence to look for

Primary source documents are often available on the internet. Some examples of what you might look for:

- Annual reports from the Parole Board, the Department of Corrections, and other agencies
- Reports made by agencies to state government
- Reports made by state agencies to federal government
  - Reports for recipients of federal money
  - Reports to Bureau of Justice Statistics
- Data from Comptroller's office (how agencies spend money)
- Reports from government oversight agencies, task forces, etc.
- Legislative materials
  - Videos and transcripts of testimony by agency officials to legislature
  - Committee reports or other documents prepared in contemplation of legislation (legislative history)
- Records of open meetings, including agenda, attendees, minutes
- Court documents (some jurisdictions)
  - State criminal court case proceedings
  - PACER (the public access website for federal court electronic records)
- Policy and procedure manuals (some jurisdictions)
- Administrative rules and procedures adopted by state and federal agencies

Secondary source documents are also often available on the internet. For example:

- Reports from outside entities (e.g., The Council of State Governments, The Prison Policy Institute)
- Resources posted by allied advocates
- News articles
- Academic journal articles

Government documents are not necessarily posted on websites. You can file public records requests for:

- Any data kept in the normal course of operations, i.e. prison or parole population data
- Emails and other correspondence by state officials
- Policy and procedure manuals
  - Records of parole decisions
  - Transcripts or recordings of proceedings

You can also:

- Call or email the agency and ask nicely (this works well if you have students or academic partners)
- Seek court records (some jurisdictions) in Court Clerk offices or in online court docketing systems
- Identify allied advocates and ask what they have

Open Records Request

As a general rule, you can ask for any of the records listed in this guide from any government agency covered by your state's open records law. You can find sample letters to use for your state here. In Appendix A you will find three parole-specific examples of requests we have submitted.

There are many helpful guides available for how to draft an effective public records request.

A Citizen's Guide to Public Records Requests

Tips For Filing Public Records Requests in Your State or City

Keep in mind that enforcement of records requests is almost always frustrating. Many agencies will not respond unless you are persistent. And many will respond claiming various exceptions in your state's open records law. Though some states have mechanisms to appeal denials (such as through the state attorney general's office), usually the only way to truly enforce records laws is via litigation.

Unless you are prepared to go to court to obtain your requested records, we recommend planning multiple methods for gathering information. For instance, if the DOC won't give you supervision practices because they deem their disclosure to be a security risk, plan to also leverage interviews with system-impacted people and former employees of the supervising agency.

Approaches and claims to consider bringing

Some approaches to identifying problems

- Look at back-end results and figure out how they are created. Some results to look at include:
  - How many people in your state are incarcerated due to parole violations
  - Parole grant rates broken down by race or gender
  - Whether any parole board members tend to vote to deny parole at significantly higher rates than their colleagues
  - In non-discretionary states, whether the length of post-release supervision a person serves complies with your state's laws
  - Whether DOC is timely releasing people who have a mandatory release or were granted parole
- Start from one person's story and investigate if the facts of their case indicate a systemic issue (e.g.: Your client tells you he was revoked but never saw anyone from the Parole Board--he only received a notice in the mail after he was arrested and transferred to prison. Does your state not hold formal revocation hearings, or was this an administrative error?)
- Look at data to see where reforms would have the greatest impact (e.g. if very few people in your state are revoked, focusing on reforms to the revocation system will have a limited impact).
- Look at any recent legislative changes meant to improve the system and investigate whether they are being implemented and if they are having an impact. (e.g. your state passed legislation shortening the terms of supervision for everyone with class C felonies. One year later, are people with class C felonies still serving the old periods of supervision?)

Types of claims to consider investigating

Parole is a relatively under-litigated part of the criminal legal system. As a result, the caselaw and theories are not as well established as other areas of law. The following is not a comprehensive list of potential claims or theories, but rather general principles to help guide your investigation toward areas where litigation may be a viable option.

In the release process

As a general rule, there is no right to parole. Where there is no right, there is no enforcement. In most states, parole decisions are left entirely to the Parole Board's discretion. As a result, litigation is not likely to be a viable path to challenge something like low parole grant rates unless you can tie those grant rates to an impermissible reason, such as discrimination against a protected class.

The exception to this rule is when a state statute has created some reasonable expectation of release—a state-created liberty interest. Typically, this happens when a statute includes language that requires parole under certain circumstances, usually paired with objective criteria. A common phrasing to look for is "shall be paroled if [objective criteria]." This is often called "presumptive parole." When a statute includes mandatory language, courts are much more likely to find a reasonable expectation of release and therefore a protected liberty interest. When someone has a protected liberty interest, they are entitled to procedural due process (notice and a hearing) before the state can deprive them of that interest.

You may be able to apply a similar argument for procedural due process with statutes that govern release from supervision, sometimes called early termination or early discharge. If a statute includes any mandatory language and objective criteria (e.g., "A Board shall grant early termination when a parolee has completed the following three requirements…") and the Board is not granting early terminations, there may be room for litigation to enforce the statutory requirements.

Even in states where people have no right to parole or to early release from supervision, they still have the right to be free of discriminatory treatment by the government. For example, if parole grant rates suggest discrimination on the basis of a protected trait (race, ability, gender, etc.), there may be grounds for an equal protection or ADA claim.

People also have a substantive due process right to release at the end of a sentence, so if your state has laws that shorten people's sentences by mandating their release to parole for the final portion of their sentence, it may be worth investigating whether the state is complying. If not, claims for over-detention may be viable, depending on the wording of the statute.

Key cases

Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1(1979) (no inherent right to parole outside of state created liberty interests)

Fuller v. Georgia State Bd. of Pardons & Paroles, 851 F.2d 1307 (11th Cir. 1988) (insufficient evidence of racial bias in parole decisions)

Council v. Ivey, No. 2:23-cv-00712 (N.D. Al.), available at https://clearinghouse.net/case/45218/ (equal protection claim alleging race-based discrimination)

Singleton et al v. Hamm et al, No. 1:24-cv-01081-CLM (N.D. Al.), available at https://www.macarthurjustice.org/case/singleton-et-al-v-hamm-et-al/ (Due process case challenging overdetention of people entitled to mandatory parole)

Sample areas of investigation

- *State statutes governing parole release, including regulations found in your state's code or regulations;*
- *Statutes about release from supervision, also called early discharge, early. termination, etc.;*
- *Demographic data about people considered for parole and granted parole;*
- *Parole grant rates;*
- *Data about eligibility for specific statutory provisions (Do all people with a class of felony conviction that qualifies for an early review actually get one?);*
- *DOC and Parole Board policy or procedure manuals that govern release decisions.*

In the revocation process

In contrast to release, there is a firmly established liberty interest in remaining on parole, and so there are enforceable due process rights for those facing revocation.

These include basic requirements for notice, timing, counsel, and hearings (a preliminary and final hearing during which people have a right to present evidence and witnesses in mitigation).

Key cases

Morrissey v. Brewer, 408 U.S. 471 (1972) (due process hearing rights)

Gagnon v. Scarpelli, 411 U.S. 778 (1973) (limited right to counsel)

Bearden v. Georgia, 461 U.S. 660 (1983) (failure to pay fines or fees is improper basis for revocation)

Gasca v. Precythe, 83 F.4th 705 (8th Cir. 2023) (due process hearing rights)

Morales v. Monreal, (due process hearing rights) settlement agreement available at https://www.macarthurjustice.org/wp-content/uploads/2017/01/Morales-Final-Settlement-Agreement.pdf

Sample areas of investigation

- Local jail data
  - How many people in a local jail are there for alleged violations of parole?
- Right to notice
  - By interviewing people who have been revoked, try to establish if they were they advised of the basis for the revocation allegations
  - Investigate if there are standard forms, policies, and procedures for notifying people of violations, and if so, if they have been deployed or followed.
- Right to counsel
  - File open records requests for contracts between your state Parole Boards and appointed attorneys to determine whether and how often attorneys are actually appointed; whether they are paid for preparation work or just per hearing-day; and find contact information for attorneys who may be able to provide information to you about how hearings are run.
  - File open records requests for the procedures used in screening defense counsel applicants and for appointing them in individual cases. Look for the standards for appointing attorneys – do they allow for appointments in cases of indigency and colorable defense, or only in extraordinary circumstances
  - Interview attorneys who have been appointed. What flaws do they see in the process? Do they see certain Parole Board members as problematic, and if so, why? Are all mandated procedures being followed?
- Right to a hearing
  - Using the state open records law, request requirements and protocols for conducting hearings.
  - Attend hearings and document conduct by the hearing officer and Board members or request transcripts/recordings. Are they following the mandated procedures? Do certain Board members always vote to deny or revoke?

In release and/or revocation

You may also consider pressing for more transparency in any parole-related proceedings by invoking either your state's open meetings law or a First Amendment right of access to courts.

Check your state's open meetings law for how it defines a meeting and which meetings it requires to be open to the public. For example, if a quorum of Board members meet to review files and make decisions, and the state law defines a meeting as any gathering of a quorum of members of a public body, you may be able to sue to force the Board to adhere to the open meetings law.

For revocation hearings, you may consider comparing the hearings to criminal court, in which there is a historic right of access for the public, and bringing a First Amendment claim.

Key cases

Herald Co. v. Bd. of Parole of State of N.Y., 131 Misc. 2d 36, 499 N.Y.S.2d 301 (Sup. Ct. 1985).

New York C.L. Union v. New York City Transit Auth., 684 F.3d 286 (2d Cir. 2012).

Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1 (1986)

Sample areas of investigation

- Is the Board violating your state's open meetings law?
- Internal Board policies or procedures may specify how many members are required to make decisions. Are those policies being followed?
- What are the mandated procedures for providing public notice of parole release and revocation hearings? Are those procedures being followed?
- Do Board websites and schedules reflect the protocols required by law?
- Through interviews with people who have been subject to hearings, explore who was in attendance, where the hearings took place, and how they were conducted.

Definitions

Code: When we say code, we are talking about your state's statutory code, i.e. your state's laws. Generally, each state has statutes, passed by the state's legislature, and an administrative code, a set of regulations adopted by state agencies.

Determinate sentence: a sentence where there is no opportunity for discretionary parole and no opportunity for someone to petition the Parole Board for early release. The person serves the entire sentence ordered by the court, less any good time credits received, and, depending on the jurisdiction, may have to serve a set period of post-release supervision after their release from prison. The post- release supervision period is set either by law or by court order.

> Example: Illinois abolished parole in 1978. For all offenses committed after 1978, a person is sentenced to a determinate number of years in prison, which can only be shortened through good time credits. At the end of that prison sentence, people are obligated to serve a term of mandatory supervised release for a period ranging from 6-months to 3-years, depending on the felony class.

Discretionary parole: a process by which a Parole Board uses its discretion to decide whether someone should be released to supervision before the maximum term of their carceral sentence.

Discretionary parole release hearings: a process through which an appointed Parole Board decides whether an incarcerated person should be released. These hearings can look quite different across different states, but typically involve at least one Board member reviewing factors about an incarcerated person and the crime they were convicted of and making a recommendation as to whether they should be released from custody back to the community.

Indeterminate sentence: A sentence where a person may be released on parole. A court either sentences a person to a range of years, making them eligible for parole at the early part of the range, or to a set number of years, making them parole eligible after serving a certain percentage of that term. If the Board never paroles an incarcerated person, they must be released when they hit their maximum sentence.

Example: In Mississippi, people serving sentences for non-violent offenses are parole eligible after serving 25% of their sentence. In New Hampshire, all felony sentences have a minimum term and a maximum term. A person is parole eligible when they reach the minimum term.

Parole Eligibility (date): Parole eligibility date refers to the date when a person is first eligible for release on parole. Depending on the state, that date may be after a minimum number of years have been served; after a certain percentage of the overall sentence; or after a date determined by the Parole Board. In most states, there is no guarantee of actual release from prison on that date.

Post release supervision: Any supervision that occurs after a person completes a carceral sentence. States have many different names for this, including parole, mandatory supervised release, and community supervision.

Revocation hearings: A process of returning a person to prison for violations of the conditions of their release. Major Supreme Court decisions have established that people are entitled to a preliminary hearing (sometimes called a probable cause hearing) and a final revocation hearing. Those subjected to these hearings have certain rights, including the right to present witnesses and evidence as to both guilt and mitigation. In practice, many states do not honor these rights and do not conduct true hearings.