

VOICES OF THE DENIED

by
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This Note explores the impact of lengthy prison sentences on rehabilitation and the need for second chances. While incarceration serves purposes such as retribution and incapacitation, it fails to promote rehabilitation and deterrence. Oregon should do more in providing opportunities for early release and rehabilitation for individuals serving lengthy sentences. The Note features interviews with incarcerated individuals who share their thoughts and experiences. Overall, this Note sheds light on the importance of second chances and on the need for reform in the criminal justice system to ensure that prisoners are not denied the chance to lead productive and fulfilling lives.

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INTRODUCTION

My journey of hope is that I will, one day, be released. I do not feel entitled to it, I feel entitled to informed process, and a fair process. I deserve that much . . . I have watched two and sometimes three generations of a family come into prison and then depart; both as prisoners and corrections employees. My time will come.¹

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¹ Interview with Charlie Tladatsi, Adult in Custody (AIC) at Oregon State Correctional Institution (OSCI) (June 9, 2023) (on file with author).

Incarceration serves four primary purposes—retribution, rehabilitation, deterrence, and incapacitation—and those purposes are sometimes in conflict.² The decades-long sentences commonly issued in response to serious crimes serve the purpose of incapacitation and retribution by removing the offender from society.³ They do not serve the purpose of rehabilitation—which is meaningless when a person has no chance of release—and “[r]esearch demonstrates that increases in already long prison sentences, say from 20 years to life, do not have material deterrent effects on crime.”⁴ Life sentences in particular serve *only* the purposes of retribution and incapacitation.

In fact, lengthy sentences explicitly avoid the purpose of rehabilitation.⁵ Oregon claims to be a state that cares about rehabilitation.⁶ The longtime director of the Oregon Department of Corrections (ODOC), Collette Peters, was tapped to take over the Federal Bureau of Prisons at least partly due to her image as a correctional innovator.⁷ However, in Oregon (and elsewhere), those who are sentenced to lengthy sentences are not eligible for the most powerful types of programming that would aid the goal of rehabilitation.⁸ Instead, they are left to serve out their time in despair-inducing conditions. The Ninth Circuit Court of Appeals has found that life without parole (LWOP) sentences condemn the prisoner “to die in a living tomb, there to linger out what may be a long life . . . without any of its alleviation or

² Marta Nelson, Samuel Feinsh & Maris Mapolski, *A New Paradigm for Sentencing in the United States*, VERA INST. OF JUST. 14 (Feb. 2023), <https://www.vera.org/publications/a-new-paradigm-for-sentencing-in-the-united-states>.

³ *Id.* at 18–20.

⁴ Daniel S. Nagin, *Guest Post: Reduce Prison Populations by Reducing Life Sentences*, WASH. POST (Mar. 21, 2019, 6:30 AM), <https://www.washingtonpost.com/crime-law/2019/03/21/guest-post-reduce-prison-populations-by-reducing-life-sentences>. See also Mirko Bagaric, Peter Isham & Jennifer Svilar, *The Increased Exposure to Coronavirus (COVID-19) for Prisoners Justifies Early Release: And the Wider Implications of This for Sentencing—Reducing Most Prison Terms Due to the Harsh Incidental Consequences of Prison*, 48 PEPP. L. REV. 121, 157 (2021) (“The increasing consensus among researchers is that mass incarceration has not meaningfully improved community safety. A 2016 Brennan Center report notes that “[r]igorous social science research based on decades of data shows that increased incarceration played an extremely limited role in the crime decline.”).

⁵ See Nelson, et al., *supra* note 2, at 14, 18–19.

⁶ Or. Dep’t of Corr., *Department Mission, Vision, and Values*, DOC Policy 20.1.1 (Mar 27, 2019) (“The mission of the Oregon Department of Corrections is to promote public safety by holding offenders accountable for their actions and reducing the risk of future criminal behavior We provide meaningful work experiences, education, programs, and opportunities for offenders to develop pro-social life skills to become productive citizens. We continue to focus on lowering the recidivism rate. We recognize offenders can change.”).

⁷ Keri Blakinger, *She Tried to ‘Humanize’ Prisons in Oregon. Can She Fix the Federal System?*, MARSHALL PROJECT (Aug. 4, 2022), <https://www.themarshallproject.org/2022/08/04/she-tried-to-humanize-prisons-in-oregon-can-she-fix-the-federal-system>. During her time running ODOC, Peters visited Norway “in the hope of bringing a gentler model of incarceration back to the United States.” *Id.* The Norway Model was translated back home as “The Oregon Way.” *The Oregon Way*, OREGON.GOV, <https://www.oregon.gov/doc/about/Pages/oregon-way.aspx> (last visited Aug. 13, 2024).

⁸ Oregon Administrative Rule 291-062-0130(2) governs eligibility for Alternative Incarceration Programs and specifically bars those convicted of offenses including murder, robbery, arson, serious sex offenses from participation. OR. ADMIN. R. 291-062-0130(2) (2021).

rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope.”⁹

Hope is the idea that my existence won’t be wasted away in the place that has no value. My future is bleak; it is meandering down these corridors of hate and misery. The lights are always on and they are the darkest lights I have known. This place is cold and unfeeling, it is hell, and hope doesn’t seem to have a place in my head or heart. Hope is but a fantasy that doesn’t feel like it is meant for people like me. I wish I could trudge through life with that spark of hope, yet I am left with too much doubt and that dammed [sic] gray cloud won’t leave me alone. I could go on and tell you all what hope looks like, but I can’t tell you all what it feels like, personal experience leaves me empty of a brighter future. My future seems like one big past.¹⁰

This bleak punishment is felt sometimes decades after the commission of a crime.¹¹ Courts determine the levels of “harm and culpability” assigned to the defendant, and sentence accordingly.¹² However, “[h]arm and culpability are . . . fixed at the time the crime is committed This static concept of censure creates an impermeable ‘fire wall’ between the offender’s post-offence conduct and his deserved sentence.”¹³ These lengthy sentences “do not account for adolescent brain development and culpability, nor do they consider the human and fiscal costs imposed on individuals, families, and communities.”¹⁴ This approach means that despite any lip-service paid to rehabilitation, “the state is indifferent to the response of the offender to the sentence.”¹⁵ Without opportunities for release, including early release, one of the biggest carrots in a “carrot-and-stick” approach is off the table and all that is left are the sticks.

With 1.52 million Americans incarcerated in prisons nationwide,¹⁶ the failures of the criminal legal system have a wide-reaching impact. Nationally, states spend an average of \$33,274 per incarcerated person but this figure only includes the “cost of operating prisons, jails, parole and probation—leaving out other costs including policing, court costs and economic losses incurred by families of incarcerated people.”¹⁷ One study estimated that the aggregate burden of incarceration in state and

⁹ Norris v. Morgan, 622 F.3d 1276, 1291 (9th Cir. 2010).

¹⁰ Letter from Andrew Gordon, Adult in Custody (AIC) at OSCI on Hope, to author (June 2023) (on file with author).

¹¹ Tom Jackman, *Study: 1 in 7 U.S. Prisoners is Serving Life, and Two-Thirds of Those are People of Color*, WASH. POST (Mar. 2, 2021, 8:00 AM), <https://www.washingtonpost.com/nation/2021/03/02/life-sentences-growing>.

¹² Netanel Dagan & Julian V. Roberts, *Retributivism, Penal Censure, and Life Imprisonment Without Parole*, 38 CRIM. JUST. ETHICS 1, 3 (2019).

¹³ *Id.*

¹⁴ Lindsey Linder & Justin Martinez, *No Path to Redemption: Evaluating Texas’s Practice of Sentencing Kids to De Facto Life Without Parole in Adult Prison*, 22 SCHOLAR 307, 316 (2020).

¹⁵ Dagan & Roberts, *supra* note 12, at 4.

¹⁶ Bagaric, Isham & Svilar, *supra* note 4, at 153.

¹⁷ Miriam Aroni Krinsky & Marc Levin, *U.S. Taxpayers Already Pay a High Price to Support America’s Giant Prison Population. Now COVID-19 is Costing Them Even More*, MARKETWATCH, (Aug. 20, 2020, 4:30 PM), <https://www.marketwatch.com/story/us-taxpayers-already-pay-a-high-price-to-support-americas-giant-prison-population-now-covid-19-is-costing-them-even-more-2020-08-19>.

federal prisons “exceeds \$500 billion, nearly half of which is borne by families, children, and communities.”¹⁸ Outside of the fiscal costs, “the hardships associated with lengthy terms of incarceration include permanent separation from loved ones, decades without privacy, meager health care, unpalatable food, monotony, aging in an institution ill-equipped to care for the elderly, and hopelessness.”¹⁹

The trends nationally are reflected locally in Oregon as well. Oregon spends \$140.87 per day or over \$51,400 per year per incarcerated individual—well above the national average.²⁰ Of the roughly 13,000 adults in custody in Oregon’s prisons, over 63% entered prison with a substance abuse problem and 50.4% met the criteria for dependence or addiction.²¹ Forty-four percent of the prison population in Oregon is categorized as having at least moderate need for mental health treatment.²²

Despite efforts to minimize judicial discretion in sentencing through sentencing guidelines schemes and mandatory sentencing legislation, sentence length disparities persist. For instance, “the sentence after trial in federal cases is at least double the sentence imposed in cases where the defendant pled guilty, and as practitioners know, in cases involving mandatory minimum sentences, recidivist enhancements, or once mandatory guidelines, the post-trial sentence can be much longer.”²³ And while mostly outside the scope of this article, racial disparities in the criminal justice system persist into both sentencing and duration of actual time served.²⁴ For instance, Black inmates serve more time on average than other demographic groups across most types of offenses.²⁵

Much of the general discourse around criminal justice reform is front-end focused: reforms targeting bias in policing, prosecutorial discretion, alternatives to incarceration and even sentencing reform.²⁶ But changes to these areas of the criminal legal system do nothing to address those already sentenced and serving lengthy or life sentences in prison, and they don’t fully address the problem of mass

¹⁸ Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the U.S.* 20 (Inst. for Advancing Just. Rsch. and Innovation, Working Paper No. AJI072016, 2016).

¹⁹ Linder & Martinez, *supra* note 14, at 318.

²⁰ OR. DEP’T OF CORR., ISSUE BRIEF: QUICK FACTS 1 (Mar. 2023).

²¹ *Id.*

²² *Id.*

²³ JaneAnne Murray, *Ameliorating the Federal Trial Penalty Through a Systematic Judicial “Second Look” Procedure*, 31 FED. SENT’G REP. 279, 279–280 (2019) (defining the trial penalty as “the threat of a substantially more severe conviction or longer sentence after trial than the one available upon a guilty plea”).

²⁴ Mindy S. Bradley & Rodney L. Engen, *Leaving Prison: A Multilevel Investigation of Racial, Ethnic, and Gender Disproportionality in Correctional Release*, 62 CRIME & DELINQUENCY 253, 269–70 (2016).

²⁵ *Id.* at 255 (citing data from the National Corrections Reporting Program). Specifically, “Black men serve longer terms, on average, than White and Hispanic men; Black women serve less time than Black men, but more than White and Hispanic women; White and Hispanic women serve the shortest terms.” *Id.* at 269.

²⁶ Ram Subramanian, Lauren-Brooke Eisen, Taryn Merkl, Leily Arzy, Hernandez Stroud, Taylor King, Jackie Fielding & Alia Nagra, *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. 7–8, 18 (December 9, 2020), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform>.

incarceration.²⁷ In fact, discretionary release (by parole boards) has been one of the drivers of mass incarceration.²⁸ Parole boards nationwide have become “increasingly hesitant to release prisoners . . . more risk-averse in their decision-making and ever more fearful of external scrutiny and condemnation. Instead of using their release discretion . . . parole boards transformed themselves into agencies of ‘release-denial discretion.’”²⁹ This hesitation to release prisoners is understandable,

No one pays attention to most of what parole boards do, so they are never given credit for parolees who do well or the reductions in crime that come along with the successful reintegration of hundreds or thousands of ex-prisoners. Instead, board members are held personally accountable only for a tiny number of worst-case scenarios in high-profile cases.³⁰

Parole boards aren’t alone in this risk aversion; lawmakers are also susceptible and “often worry that someone released will commit a new crime and that it will be used against them in their next campaign.”³¹ But failure to recognize and reward change, is indeed a failure.

Anyone who has worked with those who have been incarcerated for lengthy sentences can tell you that the person incarcerated for 20 years is frequently unrecognizable as the younger person who committed the offense, often even to themselves.³² As one Adult in Custody³³ said, “I . . . found myself reflecting on how much I had changed from that lost, aggressive, addicted young man to the responsible, . . . sober adult that I had become. A confident, loving version of who I now am.”³⁴ People are capable of, and do, change. And these anecdotal observations are backed up by empirical data. “While traditional wisdom held that adolescent personality shifts into fixed personality in adulthood, studies demonstrate that personality traits continue to change throughout the lifespan.”³⁵ Studies about

²⁷ *Id.* at 18, 20.

²⁸ Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2746–2748, 2752 (2020) (“During the 1990s—the decade of most rapid expansion—the National Research Council estimated that increases in time served were responsible for more than 60% of incarceration growth across the states.”).

²⁹ *Id.* at 2745.

³⁰ *Id.* at 2749–50.

³¹ Jessica Jackson, *Clemency, Pardons, and Reform: When People Released Return to Prison*, 16 U. ST. THOMAS. L.J. 373, 374 (2020).

³² Interview with Cesar Munoz, AIC at Or. State Corr. Inst. (June 9, 2023) (on file with author); Michael L. Zuckerman, *When a Prison Sentence Becomes Unconstitutional*, 111 GEO. L. J. 281, 303 (2022).

³³ “Adult in Custody” or “AIC” is a term that, in Oregon, has come to replace similar terms that could be found offensive such as “inmate,” “offender,” and other similar terms. They are synonymous. OR. REV. STAT. § 30.642(2) (2024); OR. ADMIN. R. 291-109-0110(2) (2019). Like many similar discussions of terminology, not all of those in the group being described agree on the preferred descriptor. From personal conversations, the author has been informed that some incarcerated folks prefer the term “inmate,” so this Note will use the terms interchangeably.

³⁴ Interview with Cesar Munoz, *supra* note 32.

³⁵ M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 174–175 (2019) (“Compassion training, for example, results in visible changes ‘in brain regions that are involved [in] social cognition and empathetic responses.’ These neurological changes in response to compassion training correlate with reduced aggressive behavior. Likewise,

neuroplasticity “are relevant to sentencing because they demonstrate the potential for significant personal change in response to environment, presumably even among adults who have committed violent crimes.”³⁶ Additionally, “the age-crime relationship has been characterized as ‘one of the most robust and stable empirical findings of criminological research.’ Rates of violent offending . . . tend to peak in the teen years and then drop with age. Thus, ‘eventual desistance from crime is the norm’”³⁷

Spurred by the Black Lives Matter protests of 2020 and the COVID-19 pandemic, a new willingness to take measures to reduce the prison population made the executive power to grant clemency salient.³⁸ Governor Kate Brown was faced with these external realities and the call of her own conscience.³⁹ While executive clemency had become increasingly rare prior to 2020, the political convenience of the end of her term gave Gov. Brown a freedom to grant clemency at a pace unprecedented in recent times.⁴⁰ But obviously not all of those who applied received clemency.⁴¹

In the summer of 2023, the Criminal Justice Reform Clinic at Lewis & Clark Law School visited the Oregon State Correctional Institution and spoke to people incarcerated there who had applied for, and been denied, clemency. This Note will discuss types of “second chance” opportunities, the impact of opportunities for early release, concerns about recidivism, and a call for Oregon to expand the use of early release in its various forms. Throughout this discussion, the voices of those AICs who generously shared their experience with us can—and should—be heard.

I. TYPES OF “SECOND CHANCE” OPPORTUNITIES

Second chances are everything. If you’re saying “no second chances,” you’re asking everyone to be perfect.⁴²

A relatively wide variety of release mechanisms fall under the umbrella of “second chance” sentencing. The simplest is presumptive parole: “a system in which incarcerated individuals are released upon first becoming eligible for parole unless

‘mindfulness [training] increases grey matter concentration in brain regions’ associated with emotional regulation, empathy, and self-awareness.” (alterations in original)).

³⁶ *Id.* at 174.

³⁷ Michael O’Hear, *Early Release for Prisoners Convicted of Violent Crimes: Can Anyone Escape the Incapacitation-Retribution Catch-22?*, 52 CONN. L. REV. 653, 664–65 (2020).

³⁸ See Amanda Waldroupe, *The Story of One US Governor’s Historic Use of Clemency: ‘We Are a Nation of Second Chances’*, GUARDIAN (Sept. 28, 2022), <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency>.

³⁹ *Id.*

⁴⁰ See Mark Cebert & Aliza B. Kaplan, *Governor Kate Brown of Oregon’s Historic Use of Clemency: Using Clemency Exactly as it was Intended*, 28 LEWIS & CLARK L. REV. 521 (2024).

⁴¹ Noelle Crombie, *Gov. Kate Brown Ends Term with Flurry of Commutations, Pardons; Calls Clemency a Chance ‘To Save Lives’*, OREGONIAN (Jan. 14, 2023, 4:16 PM), <https://www.oregonlive.com/politics/2023/01/gov-kate-brown-ends-term-with-flurry-of-commutations-pardons-calls-clemency-a-chance-to-save-lives.html> (indicating that some 1,400 applications were rejected during the final year of Governor Kate Brown’s term).

⁴² Interview with Casey Alexander, AIC at OSCI (June 9, 2023) (on file with author).

the parole board finds explicit reasons to not release them.”⁴³ This differs from the current experience of parole eligibility in which sentences for offenses, other than murder, have been replaced by determinate and mandatory minimum sentences and even for those eligible for parole, an individual must convince the parole board that they are worthy of release and the presumption is that they will remain incarcerated.⁴⁴

After almost 27 years of being in prison, spending the entirety of my adulthood locked up, I have done far more than was ever requested or expected of me. I didn’t do it to look good for the parole board or anyone else, either, because such considerations have never been an option for me. Everything I did up to now was either because I wanted to do it, or it felt like the right thing to do. I am probably far more “habilitated” now than I ever would have been before. Thus, in the back of my mind, I keep having this thought: “If I’m not good enough for release now, or even to see the parole board, then I never will be.”⁴⁵

Second Look sentencing is another “second chance” mechanism and “allows a case to be brought back into court for a judge to consider reducing the sentence.”⁴⁶ In Oregon, only certain juvenile offenders are eligible for a Second Look hearing,⁴⁷ however California passed a Second Look law in 2018 allowing resentencing hearings “upon the recommendation of the DA.”⁴⁸ The Model Penal Code (MPC) proposes legislative principles for developing Second Look legislation.⁴⁹ The principles suggest a hearing after 15 years of incarceration and that the hearing should be “analogous to a resentencing in light of present circumstances.”⁵⁰ This reflects a change from the current hearing process in which many AICs spend much of their time with the parole board discussing the details of the crime, how they came to commit it, and any disciplinary actions taken against them during their incarceration.⁵¹ The backwards-looking nature of the hearings feels to some AICs like

⁴³ Colleen M. Berryessa, *A Tale of “Second Chances”: An Experimental Examination of Popular Support for Early Release Mechanisms That Reconsider Long-Term Prison Sentences*, 18 J. EXPERIMENTAL CRIMINOLOGY 783, 787 (2022).

⁴⁴ For a history of sentencing in Oregon, see Aliza B. Kaplan & Venetia Mayhew, *The Governor’s Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. REV. 1285, 1313–16, 1323–24 (2020).

⁴⁵ Interview with Kevin Gregory, AIC at OSCI (June 29, 2023) (on file with author).

⁴⁶ Berryessa, *supra* note 43, at 787.

⁴⁷ OR. REV. STAT. § 420A.203 (2020).

⁴⁸ Rory Fleming, *Prosecutor-Driven “Second-Look” Policies Are Encouraging, but Not a Panacea*, 32 FED. SENT’G REP. 205, 205 (2020) (detailing concerns with prosecutor-driven Second Look policies).

⁴⁹ MODEL PENAL CODE § 11.02 app. A, cmt. a (AM. LAW INST. 2017).

⁵⁰ *Id.* § 11.02, app. A.

⁵¹ *Discretionary Parole*, AM. PROB. & PAROLE ASS’N (Jan. 2022), https://www.appanet.org/eweb/Dynamicpage.aspx?&webcode=IB_PositionStatement&wps_key=8251643f-fb4f-4c73-ac85-67b87546e895; *Board Hearings*, OR. BD. OF PAROLE, <https://www.oregon.gov/boppps/pages/board-hearings.aspx> (last visited Aug. 13, 2024).

it doesn't give them sufficient credit for the growth and change they've experienced during their incarceration.⁵²

Second Look processes can be legislatively achieved through enactment of sentencing schemes that include them—like that suggested by the MPC and Oregon's juvenile offender eligibility—but prosecutors frequently play a heavy role in reevaluating lengthy sentences.⁵³ In some federal jurisdictions, prosecutors can “dismiss long-final convictions outright under the procedure used in *United States v. Holloway*, otherwise known as the ‘*Holloway Doctrine*.’”⁵⁴ Oregon Senate Bill 819 allows individuals to file requests for reconsideration of their sentences—and even their convictions—with their prosecuting District Attorney's office. Upon agreement of the district attorney, their case can be brought back before the court for re-sentencing or the setting aside of convictions.⁵⁵

A third “second chance” opportunity, compassionate release, “shortens sentences when circumstances, such as age or health, reduce the need for imprisonment.”⁵⁶ Compassionate release may receive increased attention in coming years as “[e]lderly people represent the fastest-growing United States prison population.”⁵⁷ The growing number of older prisoners is particularly striking in the following statistic: “Between 1993 and 2013, people who are 55 years of age and older increased 400 percent, while the overall prison population increased 55 percent.”⁵⁸ The increasing elderly incarcerated population “is symptomatic and a direct consequence of punitive drug sentencing, ‘three strikes’ and mandatory minimum laws that have

⁵² See Zuckerman, *supra* note 32, at 303–04.

⁵³ MODEL PENAL CODE § 11.02, app. A (AM. LAW INST. 2017); OR. REV. STAT. 420A.203; Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429 (2017).

⁵⁴ Zuckerman, *supra* note 32, at 298 (citing *United States v. Holloway*, 68 F. Supp. 3d 310, 314–15 (E.D.N.Y. 2014)).

⁵⁵ S.B. 819, 81st Legis. Assemb., Reg. Sess. §§ 1(a), 2(a) (Or. 2021).

⁵⁶ Berryessa, *supra* note 43, at 788. In the federal system, the First Step Act provides a provision for “Increasing the Use and Transparency of Compassionate Release” and, while it did not create the mechanism of compassionate release, it did remove the Bureau of Prisons from the role of serving as a gatekeeper to inmate requests for compassionate release. First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194; David Roper, *Pandemic Compassionate Release and the Case for Improving Judicial Discretion over Early Release Decisions*, 33 FED. SENT’G REP. 27, 27–28 (2020) (noting that prior to passage of the First Step Act, the “system functioned poorly and was very restrictive, to say the least, with the BOP supporting only a handful of petitions each year: an average of only twenty-four federal prisoners per year were granted compassionate release from 1984 to 2013.”). The Act “amended 18 U.S.C. § 3582(c)(1)(A) to allow individuals in federal prison to petition their sentencing court for compassionate release after a lapse of thirty days following a request that the warden of their institution file a motion on their behalf.” *Id.* at 29. Now, instead of compassionate release requests being forwarded to the courts from BOP, after a thirty-day waiting period, individuals can take their requests directly to the district courts. “Although this procedural change might appear to be minor, it allows federal district courts to review compassionate release petitions without the BOP indefinitely standing in the way as gatekeeper for these motions.” *Id.*

⁵⁷ Johnny Thach, *Not Far Enough: The Rising Elderly Prison Population and Criminal Justice and Prison Reform Following the First Step Act of 2018*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 631, 637 (2020).

⁵⁸ *Id.* at 640.

created a population of elderly people who have simply aged inside of prisons after having been incarcerated for life or long sentences.”⁵⁹ In Oregon, 34% of the incarcerated population is 46 years old or older.⁶⁰ Given the research that supports the fact that most people “age out of crime,” a growing elderly population in our nation’s prisons seems particularly worth taking action on.⁶¹

The final “second chance” type is executive clemency. Prior to the early 1900s, executive clemency—the commutation of sentences by the President or Governor—was widely used.⁶² As parole systems were implemented, executive clemency became used less and less frequently, and, as parole systems were replaced by mandatory sentences, executive clemency continued to fall into disfavor.⁶³ By 2020, executive clemency was “all but dried up, the result of perceived political pressures.”⁶⁴

The trend of reduced use of executive clemency power is somewhat refuted by the clemency actions of President Barack Obama who granted 1,927 applications for pardon or commutation during his administration.⁶⁵ However, President Obama waited until the end of his term-limited administration to pick up the pace of his clemency actions.⁶⁶ Prior to 2016, President Obama had granted only 153 of the 1,927 applications he eventually granted.⁶⁷ On review of this data, it appears that the trend of waiting until the end of a presidential administration to grant more pardons and commutations is a more recent phenomenon.⁶⁸ As discussed above, Governor Brown’s clemency actions also only picked up pace towards the end of her term-limited tenure.⁶⁹

II. THE IMPACT OF OPPORTUNITIES FOR EARLY RELEASE

For so many of us, when you hear our stories, we were abused, neglected, and victimized by a system that did not allow us to have a first chance. It is 100 percent my fault that as an adult and man into his late 30’s that I chose to use drugs and commit crimes. The part that is *not* my fault is that, as a child who was supposed to be safe and loved and cared for, I was instead abused by . . . family and trusted adults . . . I was given alcohol and drugs, physically and

⁵⁹ *Id.* at 639 (citing STEVEN RAPHAEL, *THE NEW SCARLET LETTER? NEGOTIATING THE U.S. LABOR MARKET WITH A CRIMINAL RECORD* 22–23 (2014)).

⁶⁰ OR. DEP’T OF CORR., *supra* note 20.

⁶¹ O’Hear, *supra* note 37, at 664–66 (noting that age has been consistently found to be a useful consideration in predicting recidivism).

⁶² Zuckerman, *supra* note 32, at 294.

⁶³ *See generally id.* at 294–96.

⁶⁴ *See* Fleming, *supra* note 48, at 208; Jackson, *supra* note 31, at 396 (“[E]very politician in charge of clemency decisions know[s] the other side will use mercy as fodder for attack advertisements if even a single person released early reoffends, especially if it is a crime of violence.”).

⁶⁵ Off. of the Pardon Att’y, *Clemency Statistics*, U.S. DEP’T OF JUST, <https://www.justice.gov/pardon/clemency-statistics> (Aug. 7, 2024).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ *See* Cebert & Kaplan, *supra* note 40 and related text.

sexually abused. Where is the chance in that? So what I am really saying is that an opportunity to have a real *first* chance at a life that is based in love, compassion, community, and recovery from the comorbidity of addiction and criminality is what we are talking about for many just like me.⁷⁰

Opportunities for early release have many significant benefits, both to the incarcerated population directly impacted and to the communities they release into. At the community level, early release reduces prison overcrowding, results in financial savings for the state, and encourages “a continuum of treatment in the community that assists in reducing recidivism.”⁷¹ On the individual level, opportunities for early release serve as motivation for incarcerated individuals to engage in the rehabilitative efforts that would enable their early release.⁷² Releasing early from prison also “minimize[es] the negative effects of incarceration.”⁷³

A. *Rehabilitation*

My hope is that I and others can be seen as the people we are at the time we apply for clemency or anything that gives us an opportunity for a second chance. When you come to prison, time freezes. Who you are freezes at that point in time. The way the DA portrays you, the media, and the judge is all people see you as. No matter how much change or programming you do that’s who they see. My hope is that can change. That we can be seen as new and looked at as examples of change.⁷⁴

The constitutionality of an ongoing punishment of an individual “is the same [question] as . . . ‘how much punishment is appropriate for this person?’, just at a different moment in time [from sentencing].”⁷⁵ As Michael Zuckerman explains, if, when the question of resentencing is raised, a relatively short amount of time has passed since the initial sentencing, there may not be much difference in the answer to how much punishment is appropriate.⁷⁶ This is “because the ab initio sentencing decision is a guess about the future: it attempts, based on what is currently known about the defendant, the crime, and others who have committed the crime, to divine what would be appropriate” and, without significant time passing, not much has changed to change the decision maker’s calculation.⁷⁷ When the question is raised much later in the incarceration, the calculation changes:

The question at some significantly later moment—“is that full amount still appropriate?”—includes all that original data, but it also includes the data from all the years already served, so it is a better-informed guess. In addition, it lowers the stakes from the government’s perspective, not only because

⁷⁰ Interview with Richard Lowry, AIC at OSCI (June 9, 2023) (on file with author).

⁷¹ Uri Timor & Ety Elisha, *Long Road to Freedom: Factors Delaying Prisoners’ Early Release from Prison*, 101 Prison J. 466, 468–69 (2021).

⁷² *Id.*

⁷³ *Id.* (noting that “[m]any studies have found that staying in prison is a criminogenic factor, that is, reinforcing prisoners’ criminal mindsets and behaviors”).

⁷⁴ Interview with Tyler Lopez, AIC at OSCI (June 15, 2023) (on file with author).

⁷⁵ Zuckerman, *supra* note 32, at 304.

⁷⁶ *Id.*

⁷⁷ *Id.*

people tend to “age out of crime” but also because the defendant has already undergone a significant amount of the punishment. In other words, the later-in-time question is not just a rerun of the ab initio question, but rather, from the defendant’s perspective, a lighter ask with heavier support.⁷⁸

One factor that changes in a later-in-time evaluation of the appropriateness of a lengthy sentence is the incarcerated person’s age. In fact, age is “one of the most robust and stable empirical findings of criminological research.”⁷⁹ Sentences of incarceration longer than twenty months have little practical effect on reducing recidivism and incarceration itself—especially for lengthy sentences—actually has criminogenic effects that increase the likelihood of recidivism.⁸⁰ In an apparent paradox, those who commit violent offenses are sentenced to lengthy sentences but are the least likely to reoffend.⁸¹

In the current U.S. system, when second chance opportunities exist, they require offenders to convince decision-makers of their rehabilitation. Johnny Thach has explained it thus:

The need for complete rehabilitation has been used to justify prolonged and extended imprisonment, which reinforces indeterminate sentences until they are determined rehabilitated enough to reintegrate into society. Rehabilitation has treated people as deformed and broken and required them to be cured of their criminogenic tendencies to justify their release. Under the belief that all people can be rehabilitated with enough time, rehabilitation has been used to argue that a sentence should last as long as possible to allow for the person behind bars to be rehabilitated.⁸²

For people accustomed to the U.S. system, the emphasis on rehabilitation may seem normal—maybe the only sensible way to approach early release. But there are other models. The European system of parole balances “risk [to reoffend] and a right to release.”⁸³ In the European model, prisoners are considered to have a right to release and eligibility for early release is the baseline.⁸⁴ When considering early release,

⁷⁸ *Id.*

⁷⁹ Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The “Aging” Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 JUST. Q. 827, 828 (2009) (citing Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIOLOGY 552 (1983); Terence P. Thornberry, *Introduction: Advantages of Developmental and Life-Course Perspectives for the Study of Crime and Delinquency*, in DEVELOPMENTAL THEORIES OF CRIME AND DELINQUENCY 1 (Thornberry ed., 1997).

⁸⁰ Berryessa, *supra* note 43, at 785 (noting that “[u]nsurprisingly, in part due to criminogenic effects, the majority of US prisoners are reincarcerated within 3 years.”).

⁸¹ Jenna M. Codignotto, Note, *Categorically Caged: The Case for Extending Early Release Eligibility to Inmates with Violent Offense Convictions*, 95 ST. JOHN’S L. REV. 495, 507 (2021) (citing Megan Denver, Justin T. Pickett & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 671(2017)).

⁸² Thach, *supra* note 57, at 649–50.

⁸³ M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 196 (2019).

⁸⁴ *Id.*

Release occurs in spite of the risk of reoffense, and . . . the risk must be balanced against the prisoner's recognized liberty interest. There is a strong commitment to due process as well as the 'underlying values such as human dignity, social reintegration, and the ability to change.' Perhaps even more important, the European system of parole favors a 'strong presumption in favor of release at the initial parole eligibility' process.⁸⁵

B. *Victims*

I know my victim doesn't get a second chance. Not one day goes by I don't think about that . . . I get to have feelings of pain, happiness, rage, excitement when he doesn't.⁸⁶

I battle to forgive myself on a daily basis. I also hold hope that [the victim's family has] begun to heal. I would do anything 1000 times over to take back what I have done. It causes me pain to have caused . . . so much pain and suffering . . .⁸⁷

Victims of crimes have rights to participate in the criminal proceedings at the federal and state level.⁸⁸ Speaking about the involvement of victims in criminal cases is a tricky business for a few reasons: (1) the victims are "not a monolith"⁸⁹ and (2) they are "the most profoundly affected by an incarcerated person's actions."⁹⁰ The push to longer and longer sentences has, in part, been justified by reference to victims' rights. "The mainstream victims' rights push has predominantly been defined by its carcerality and punitiveness, rather than the granting of additional rights to victims. . . ."⁹¹ That being said, "70 percent of crime survivors prefer alternatives to prison or jail, such as community supervision or treatment."⁹² Victims' advocates are typically funded by and housed with the prosecutors in those same cases—raising concerns about the nature of victims' advocates' support.⁹³

All of the above rights and concerns regarding victim participation applies just as strongly to parole hearings, requests from executives for victim input, and resentencing, as they do to initial proceedings. An additional concern about victim participation in second chances, is the potential—even the *likelihood*—that the initial

⁸⁵ *Id.* (quoting Dirk van Zyl Smit & Alessandro Corda, *American Exceptionalism in Parole Release and Supervision*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* (Kevin R. Reitz ed., 2018)).

⁸⁶ Interview with Andrew Gordon, AIC at OSCI (June 15, 2023) (on file with author).

⁸⁷ Interview with Rodolfo Leos-Maldonado, AIC at OSCI (June 15, 2023) (on file with author).

⁸⁸ See *Victim Law Library*, NAT'L CRIME VICTIM L. INST., <https://ncvli.org/professional-resources/victim-law-library/> (last visited Aug. 13, 2024).

⁸⁹ Jackson, *supra* note 31, at 383.

⁹⁰ JaneAnne Murray, Sean Hecker, Michael Skocpol & Marissa Elkins, *Second Look = Second Change: Turning the Tide through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341, 346 (2021).

⁹¹ Jackson, *supra* note 31, at 383 (noting that "the Modern Crime Victims' Rights Movement can fairly be termed the Carceral Victims' Rights Movement").

⁹² *Id.*

⁹³ *Id.* at 384, 396.

traumas will be resurfaced.⁹⁴ That said, when “[t]houghtfully implemented, where victims and their families are receptive, second look resentencing also presents a rare opportunity to facilitate application of emerging restorative justice theories and initiatives in some of the hardest cases.”⁹⁵ As one AIC put it, “I represent the human condition at its best and worst. In any process that involves looking at a person’s past crimes and who they are today I can understand how it is hard to weigh the good things a person has done against the harms caused to victims society.”⁹⁶ With the proper support and preparation, second chances could provide victims with an opportunity for healing.⁹⁷

CALL FOR OREGON TO DO MORE

There should be decision makers and tools that can give people a second chance because the justice system needs it. The idea of giving people a second chance should be an integral process of doing justice and should start at sentencing. If convicted people could clearly envision a path forward that aims toward a second chance, they would be able to follow a more structured rehabilitation plan. I believe recidivism rates would dramatically drop because people would have a huge motivation to change right from the beginning of their sentence. People would do their time differently because they would be motivated to get involved in programs and stay out of trouble. I believe this structure would create true long-term change as opposed to temporal or conditioned change from people who become motivated right before their parole date.⁹⁸

The risk of recidivism has decreased for many individuals serving lengthy sentences,⁹⁹ and the humanity of the incarcerated population has been overlooked for far too long. The ongoing incarceration of those who no longer require it—particularly those who no longer pose a risk due to age, health, or reduced recidivism risk—“constitutes a complete violation of their right to a just and proportionate punishment.”¹⁰⁰ Many individuals could be released “without jeopardizing public safety.”¹⁰¹ In fact, public safety is harmed both because of the criminogenic effects

⁹⁴ Murray, et al., *supra* note 90, at 346.

⁹⁵ *Id.*

⁹⁶ Interview with Jacob Barrett, AIC at OSCI (June 9, 2023) (on file with author).

⁹⁷ Murray, et al., *supra* note 90, at 346 (noting that “[w]ith the passage of time, many victims’ impulse for retribution diminishes. Restorative justice programs in which offenders are held accountable to their victims have documented success in reducing posttraumatic stress disorder.”).

⁹⁸ Interview with Gustavo Martinez-Aquepucho, AIC at OSCI (June 9, 2023) (on file with author).

⁹⁹ U.S. SENT’G COMM’N, LENGTH OF INCARCERATION AND RECIDIVISM (2022).

¹⁰⁰ Thach, *supra* note 57, at 640; Bagaric, Isham & Svilar, *supra* note 4, at 160–66 (noting that in addition to the intentional denial of liberty—an “intentional and intrinsic aspect of incarceration”—incarceration infringes on the right to procreation, lowers their life expectancies, and exposes prisoners to “injuries resulting from accidents and intentional acts of violence. Almost one in twenty prisoners reports being either raped or sexually abused behind bars.”).

¹⁰¹ Codignotto, *supra* note 81, at 505 (citing to Megan Denver, Justin T. Pickett & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 672 (2017)).

of incarceration discussed previously and because, as we learned during the COVID-19 pandemic, contagious diseases can spread rapidly inside of institutions and those diseases could leave institutions in the systems of prison employees.¹⁰²

To quote Bryan Stevenson, “[e]ach of us is more than the worst thing we’ve ever done.”¹⁰³ Second chance opportunities provide motivation to rehabilitate and reward those who do.¹⁰⁴ The public at large, despite popular narrative, supports second chance opportunities.¹⁰⁵ Our criminal justice system should acknowledge that “[p]eople’s freedom, property, reputations, and lives are at stake. Everything the criminal justice system does should acknowledge that.”¹⁰⁶ The values of “victims’ interests or state interests in security and crime prevention should [not] be ignored. They are important, but there is no zero-sum game. Treating offenders unjustly does not honor victims, affirm moral values, or make a safer society.”¹⁰⁷ Our current system, rather than being based on “research findings, cost-benefit studies, impact projections, or meta-analyses,” was created and evolved like it has “because policy makers believed them to be intuitively plausible, morally appropriate, or politically expedient. Their proponents believed that ‘we’ deserve protection from ‘them’ and that ‘they’ have forfeited any claim to have their interests or human rights taken into account.”¹⁰⁸

With Governor Brown now out of office, her replacement, Governor Tina Kotek, and future Oregon governors have a recent example of the use of executive clemency power and should follow in her footsteps. Additionally, the state legislature should enact comprehensive Second Look legislation that would extend opportunity for early release to all serving lengthy sentences. By doing so, the legislature and governor “can position themselves as leaders in correcting the worst and most counterproductive excesses of the mass incarceration era, delivering savings to state budgets, and a second chance to individuals and communities who have been left behind for too long.”¹⁰⁹ In returning more of the incarcerated population to their communities, the humanity, hope, and transformation can come home where it can do the most good.

When you get us the help we need, educate us, and show us how to make a difference and give back in an effort to make amends . . . we are a driving force for change and healing like you have never seen.¹¹⁰

¹⁰² Codignotto, *supra* note 81, at 505.

¹⁰³ BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 22 (2014).

¹⁰⁴ Murray, et al., *supra* note 90, at 347.

¹⁰⁵ Colleen M. Berryessa, *Public Support for Using “Second Chance” Mechanisms to Reconsider Long-Term Prison Sentences for Drug Crimes*, 34 FED. SENT’G REP. 71, 76–77 (2021).

¹⁰⁶ Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 445 (2017).

¹⁰⁷ *Id.* But see Mirko Bagaric & Jennifer Sivilar, *A (Partial and Principled) Defense of Sentences of Life Imprisonment*, 70 CLEV. ST. L. REV. 667, 669 (2022) (arguing that “[o]nly a permanent loss of liberty is commensurate with the harm caused by first-degree murder, can uphold the importance of human life, and preserve the integrity of the criminal justice system.”).

¹⁰⁸ Tonry, *supra* note 106, at 451.

¹⁰⁹ Murray, et al., *supra* note 90, at 341.

¹¹⁰ Interview with Richard Lowry, *supra* note 70.