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The Retroactive Application of Justice: Using Prosecutorial Discretion to Correct Sentences that No Longer Serve a Valid Purpose

Jennifer Smith and Jeremiah Bourgeois

The criminal justice system is centered around three major participants: a prosecutor, a defense attorney, and a defendant.¹ Each plays a role in the ensuing adversarial process, and each has their own perceptual lenses and interests. The prosecutor, for instance, seeks a conviction and focuses more on evidence of guilt than on innocence. The defense attorney endeavors to bring about a verdict of not guilty or a favorable plea rather than seeking to promote public safety. As for the defendant, he often cannot perceive the factors that led to his criminality, and he has neither the insight nor the will necessary to change his life's trajectory.

After sentencing, the criminal justice system in Washington State provides very few mechanisms for any of these participants to undo the result, even after decades have passed.² A prosecutor, who "has the

¹ The identification of the prosecutor, defense attorney, and defendant as the major participants in the criminal legal system is not meant to suggest that victims play no part in the process, but rather that the role of victims is subsumed by the advocacy of prosecutors and becomes more central at the sentencing phase. *See, e.g.,* Meghan E. Miller, *Victim Impact Testimony in Texas: The Need for Reformation and Clarification*, 5 TEX. WESLEYAN L. REV. 121, 124 (1998).

Today, the criminal justice system is dependent on the use of victim impact testimony throughout the entire process of a criminal case but especially in the sentencing phase. Witnesses and experts play a major role in the prosecution and conviction of the accused during the trial phase, but it is the family's statements during the sentencing phase that provide justice to the victims. These statements inform the court, the jury, and the defendant about the impact of the crime on the victim and the victim's family.

Id. (citation and internal quotations omitted).

² *See, e.g.,* 13 ROYCE A. FERGUSON, JR., WASH. PRAC. & PROC. §5002 (3d ed. 2020).

responsibility of a minister of justice and not simply that of an advocate,”³ may later come to question the fairness of the sentence. However, until 2020, prosecutors lacked the power to reduce the term of confinement.⁴ A defense attorney may belatedly find mitigating evidence, but procedural rules foreclose the opportunity to have the defendant resentenced.⁵ As for a defendant who underwent an incredible transformation after a substantial period of confinement, the only hope for an early release is the unlikely possibility of a sentence commutation.⁶ The absence of an effective means to undo injustice has long been the status quo of punishment in the State of Washington.⁷

Legislation enacted in 1989 establishes a one-year time limit for any collateral attack upon a judgment and sentence in a criminal case, whether by writ of habeas corpus or PRP, applicable whenever “the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Id.; see also *In re Bush*, 193 P.3d 103, 106 (2008).

RCW 9.94A.728(5) provides that “[t]he governor, upon recommendation from the clemency and pardons board, may grant an extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances.” RCW 10.01.120 further gives the governor power to “commute a sentence or grant a pardon, upon such conditions, and with such restrictions, and under such limitations as [she] may think proper.”

Id.

³ WASH. R. OF PRO. CONDUCT 3.8 cmt. 1.

⁴ See, e.g., *State v. Lewis*, 797 P.2d 1141, 1146 (1990) (“[T]he Legislature provided a number of limitations within the SRA on the discretion of the prosecutor, and the prosecutor only acts within the authority delegated by the Legislature.”).

⁵ See, e.g., WASH. REV. CODE § 10.73.090(1) (1989) (“No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.”).

⁶ In “extraordinary cases” the Governor has the power to commute the sentence of any offender. WASH. REV. CODE § 9.94A.885. See also *In re Bush*, 193 P.3d 103, 106 (Wash. 2008) (“Neither the constitution nor the statutes limit the governor’s discretion to grant, deny, or place conditions on commutations.”).

⁷ The original SRA provided for elimination of the Board of Prison Terms and Paroles. It abolished much of the court’s sentencing discretion. The statute established presumptive sentencing ranges, which were based on the seriousness of the crime and the offender’s criminal history. Absent exceptional circumstances, the court was required to

On June 11, 2020, a new law became effective which gives prosecutors more power to look back at past criminal case outcomes and move the court to reduce the punishment if it no longer advances the interests of justice.⁸ The court then checks the prosecutor's power and is directed to consider the inmate's disciplinary record in the Department of Corrections; any evidence of rehabilitation while incarcerated; any evidence that shows whether the inmate's age, time served, or diminished physical condition reduces the risk for future violence; and any evidence of changed circumstances since the inmate's original sentencing in determining whether to grant the motion.⁹ Describing the bill's purpose during a hearing in the Senate Committee on Law and Justice, Senator and King County prosecutor Manka Dhingra explained:

[Prosecutors] have a responsibility to do justice. Not simply get convictions, not simply send individuals to prison, but to do justice, for the victims, for the community, and yes, also, for the defendant. We have learned a lot in the last 10, 20, 30, 40 years about our criminal justice system. About trauma informed care, about risk needs responsibility tools, behavior modification, about implicit bias, about institutional and structural racism. This bill is about ensuring that our dedicated, thoughtful prosecutors who are tasked with doing justice have the tools they need to do simply that—justice. This bill gives prosecutors the ability, the discretion, to ask for an offender to be resentenced when the original sentence no longer serves the interest of justice . . . This discretion is an essential tool for prosecutors to provide justice in our community and to make sure that we are learning from what history has taught us.¹⁰

impose a sentence within the standard range. 13B SETH A. FINE, WASH. PRAC., CRIMINAL LAW § 42.5 (3d ed. 2020).

⁸ WASH. REV. CODE § 36.27.130 (2020).

⁹ *Id.*

¹⁰ Senate Law & Justice Committee, *Public Hearing: SGA 9355, SGA 9357, SB 6316, SB 6164, SB 6202, SB 6530 (Proposed Sub)*, TVW (Jan. 28, 2020, 10:00 AM),

This article addresses, in the context of mass incarceration in Washington State, the significance of providing justice in our community, the reasons that prosecutors embracing their role as the ministers of justice is an important tool, and the ways the use of this newfound tool will not only serve to validate the redemption of many incarcerated individuals who have changed their lives for the better, but will also provide redemption for our criminal justice system by acknowledging and correcting sentencing outcomes that no longer serve a valid purpose.

Part I begins with a case study of how a defendant, who was given a cruel sentence of life in prison after committing a terrible crime when he was fourteen years old, transformed himself in the decades after, thus rendering his continued incarceration counterproductive; how the legal system corrected its error of sentencing a child to a sentence with no possibility of release; and how the defendant's successful reintegration into the community after twenty-seven years of confinement has benefited the community. In Part II, we highlight the cause and effect of the absence of a similar post-sentence review process for the vast majority of prisoners in the Washington Department of Corrections, and how that has deteriorated the health of our criminal justice system. In Part III, we illustrate how powerful the human capacity for positive change is, despite one's benighted history in the community and record of criminal offending, and why our system's limited capacity to recognize and validate redemption is counterproductive. Finally, in Part IV, we explore the powerful opportunity that prosecutors have to move for these cases to be reexamined in light of recent changes that depart from the Sentencing Reform Act.¹¹

<https://www.tvw.org/watch/?clientID=9375922947&eventID=2020011325&autoStartStream=true> [<https://perma.cc/94KV-4SUH>].

¹¹ "The prosecutor of a county in which an offender was sentenced for a felony offense may petition the sentencing court or the sentencing court's successor to resentence the offender if the original sentence no longer advances the interests of justice." WASH. REV. CODE. § 36.27.130(1) (2020).

I. THE RELEVANCE OF REFORM IN A HEALTHY JUSTICE SYSTEM

On May 19, 1992, a terrible crime was committed.¹² That afternoon, a local Seattle businessman left the witness stand after testifying against a teenager who had assaulted him in the late evening as he left his store several months before.¹³ He still had a colostomy bag connected to his abdomen due to the gunshot wound inflicted by his fifteen-year-old assailant. The businessman, an immigrant from a war-torn country, was a respected member of his community and had dreams of building a prosperous life for his wife and children.¹⁴ Hours after leaving the King County Juvenile Court, where his young assailant was convicted, he was killed in his place of business by his teenage assailant's younger brother, Jeremiah Bourgeois.¹⁵ His business partner was shot too, but fortunately survived his gunshot wounds.¹⁶

Jeremiah was fourteen years old when he committed this offense. Court records revealed how in less than three years he became “a delinquent, then a runaway, then a drug dealer, then a killer.”¹⁷ Originally charged in juvenile court with murder in the first degree, he, as with his brother, faced confinement until no later than his twenty-first birthday.¹⁸ Believing this maximum sentence to be insufficient punishment, prosecutors moved to

¹² Richard Seven, *6-Year-Old May Face Death Penalty in Trial*, SEATTLE TIMES (Oct. 3, 1992), <https://archive.seattletimes.com/archive/?date=19921003&slug=1516409> [<https://perma.cc/3ACL-TU2M>].

¹³ *Id.*

¹⁴ Jeremiah Bourgeois, *Breaking Good: How to Heal a Life Spent Behind Bars*, CRIME REP. (Aug. 29, 2017), <https://thecrimereport.org/2017/08/29/breaking-good-how-to-heal-a-life-spent-behind-bars/> [<https://perma.cc/X99Z-XW3W>].

¹⁵ Seven, *supra* note 12.

¹⁶ *Id.*

¹⁷ Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 151 (2013).

¹⁸ *State v. Bourgeois*, 866 P.2d 43, 47 (Wash. Ct. App. 1994); *see also* WASH. REV. CODE. § 13.40.300 (2019) (providing that in no case may a juvenile offender be committed by the juvenile court to the department of social and health services for placement in a juvenile correctional institution beyond the juvenile offender's twenty-first birthday).

have the case transferred to adult court where, upon conviction for murder in the first degree, Jeremiah would instead face a mandatory minimum sentence of twenty years.¹⁹ At the ensuing decline hearing, Jeremiah’s probation officer voiced his belief that declining juvenile jurisdiction was entirely appropriate, declaring, “[d]espite his small size, he is violent and extremely aggressive, particularly when caught engaging in criminal conduct. A hallmark of his many police reports is his use of flight, intimidation[,] and violence to avoid apprehension.”²⁰ Jeremiah’s mother “made an impassioned but ultimately fruitless plea for J.J. to be treated as a juvenile, telling how she had repeatedly asked for the courts’ help. Each time, she was told J.J.’s crimes weren’t serious enough.”²¹ In the end, the juvenile court judge agreed that Jeremiah should be tried as an adult, citing the “aggressive, premeditated, and willful nature” of the offense.²²

¹⁹ *State v. Miller*, 756 P.2d 122, 123 (Wash. 1988) *overruled by* *State v. Barber*, 248 P.3d 494 (Wash. 2011) (stating that “under RCW 9.94A.120(4) the mandatory minimum term for first degree murder is 20 years.”); *See, e.g., State v. Holland*, 635 P.2d 142, 148 (Wash. Ct. App. 1981), *aff’d*, 656 P.2d 1056 (Wash. 1983).

The seriousness and violent nature of the charged offenses, the substantial indications of guilt, the defendant’s prior contacts with juvenile authorities, the extensive evidence on the comparative rehabilitative services offered in the adult and juvenile corrections programs, and the psychologists’ inability to assure the public safety if the defendant was released at age 21 from the juvenile court’s jurisdiction all point to the conclusion that the decline of jurisdiction was warranted. Substantial evidence supports the decision of the juvenile court.

Id.

²⁰ *Bourgeois*, *supra* note 17.

²¹ Carey Quan Gelernter, *Life Without Possibility—A Young Teen’s Life Sentence for Murder Raises the Questions: Could Intervention Have Helped? Would Rehabilitation Help Now?*, SEATTLE TIMES (Feb. 13, 1994), <https://archive.seattletimes.com/archive/?date=19940213&slug=1894882> [<https://perma.cc/26FJ-6TV6>].

²² Richard Seven, *15-Year-Old May Face Death Penalty in Trial*, SEATTLE TIMES, Oct. 3, 1992, at A16, <https://infoweb.newsbank.com/apps/news/document-view?p=WORLDNEWS&docref=news/0EB535DADC5FFED8&f=basic> [<https://perma.cc/QWK7-CHXA>].

When arraigned in adult court, the murder charge was raised to the state's most serious offense and, consequently, Jeremiah became the youngest person in King County to face trial for first-degree aggravated murder.²³ His attorney believed the charge was "absolutely inappropriate" in light of "the extreme youthfulness of the boy" and because if convicted, Jeremiah would die in prison.²⁴ Conversely, prosecutors felt a mandatory sentence of life without the possibility of parole was entirely appropriate given the "aggravating factor was the killing of a court witness."²⁵ The prescient nature of this statement later manifested when the survivor of the shooting had to be arrested on a material-witness warrant so prosecutors could secure his testimony.²⁶ Following his arrest and confinement, the victim emotionally explained to the judge, "Nothing is worse than losing my life, so I didn't want to be killed for testifying in court."²⁷ Later, "[s]everal prosecution witnesses, including a man who lived across the street and

²³ *Id.*; see also Erin Heffernan, *New Law Puts Killer Who Got Life Sentence as a Teen on Path to Parole*, SEATTLE TIMES (June 20, 2014), <https://www.seattletimes.com/seattle-news/new-law-puts-killer-who-got-life-sentence-as-a-teen-on-path-to-parole/> [<https://perma.cc/AT9A-LJW7>] (stating Jeremiah was the second youngest person to face being sentenced to life without the possibility of parole); Medha Raman, *Barry Massey, Youngest Person Sentenced to Life, Talks with LSJ Students*, UNIV. OF WASH. (Apr. 25, 2016), <https://lsj.washington.edu/news/2016/04/25/barry-massey-youngest-person-sentenced-life-talks-lsj-students> [<https://perma.cc/AF4R-X8V3>] (stating the youngest person to face a life sentence was Barry Massey, who was sentenced to this term of confinement in Pierce County for crimes he committed at age thirteen).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *State v. Bourgeois*, 917 P.2d 1101, 1103 (1996), rev'd, 133 Wash. 2d 389, 945 P.2d 1120 (1997) ("At trial, the State began direct examination of its first witness, Dagnew Andemichael, by asking, "Mr. Andemichael, do you want to be here today?" Over objection, the State elicited that Andemichael had to be arrested and brought to trial on a material witness warrant because he was afraid to testify.").

²⁷ Richard Seven, *Survivor of Shooting Will Testify in Trial*, SEATTLE TIMES (Mar. 26, 1993), <https://archive.seattletimes.com/archive/?date=19930326&slug=1692649> [<https://perma.cc/BFR4-DHT5>].

identified Bourgeois as the killer shortly after the shooting, said they were afraid to testify against him.”²⁸

Jeremiah was convicted a year after his arrest and was sentenced to life without the possibility of parole.²⁹ His case produced almost a decade of appeals and petitions for relief at both the state and federal level, none of which were successful in undoing his sentence.³⁰ In 2001, his appeals came to an end. Thereafter, the only part of the criminal justice system that had any interest in him was the Department of Corrections.

Although Jeremiah was set to die while imprisoned unless he received a sentence commutation, he underwent an extraordinary transformation. His early years in prison were defined by disciplinary misconduct and violent behavior, including two separate convictions for custodial assault before the

²⁸ Richard Seven, *I Wasn't Strong Enough, Father Says of Son's Conviction—Jury Took 2 Hours to Decide Youth Guilty of Murder*, SEATTLE TIMES, Apr. 10, 1993, at A8 <https://infoweb.newsbank.com/apps/news/document-view?p=WORLDNEWS&docref=news/0EB5365C73DC364B&f=basic> [<https://perma.cc/BKQ2-2XVD>].

²⁹ Matter of Bourgeois, No. 74850–5–I, 2017 WL 1315503 (Wash. Ct. App. Apr. 3, 2017) (“In 1992, 14-year-old Jeremiah Bourgeois participated in a murder. In 1993, he was convicted of aggravated first degree murder and sentenced under RCW 10.95.030 to life in prison without the possibility of parole or “any sort of good time calculation.”).

³⁰ See State v. Bourgeois, *supra* note 26; *In re* Pers. Restraint of Bourgeois, No: 92–1–06444–4, 2017 WL 1315503 at 1 (Wash. Ct. App. Apr. 3, 2017) (denying Bourgeois’ personal restraint petition on the grounds that the Miller fix did not increase the quantum of punishment and therefore did not violate the prohibition against ex post factor laws); Personal Restraint Petition, Coa, Div. I Docket, Case No. 434209, WASH. CTS. (filed Sept. 25, 1998), https://dw.courts.wa.gov/index.cfm?fa=home.casesummary&crt_itl_nu=A01&casenumber=434209&searchtype=aName&token=1E5CCACA76B0EAA53CC30EE712D4EFA7&dt=1AD1C5AA88B4D29D5F2CD90BD0A4DE72&courtClassCode=A&casekey=12598242&courtname=COA,%20Division%20I [<https://perma.cc/2PHG-AD6R>]; Supreme Court Docket, Case No. 684839, WASH. CTS. (filed Sept. 7, 1999), https://dw.courts.wa.gov/index.cfm?fa=home.casesummary&crt_itl_nu=A08&casenumber=684839&searchtype=aName&token=6C5ABFC802B6E9D547C104E61ED7EFA7&dt=68D7B0A8FCB2D1ED242ED30ADCA7DE72&courtClassCode=A&casekey=12656273&courtname=Supreme%20Court [<https://perma.cc/9BNY-6MWS>].

age of twenty-three,³¹ but after a decade of confinement he later explained, “The value of philosophy, law, and history impressed itself on my life when I was drowning in the prison subculture, surrounded by nothing but bars and facing nothing but time.”³² His ability to participate in rehabilitative programs was limited due to correctional policies,³³ but he still cobbled together a higher education by obtaining donated textbooks from colleges and universities, became a clerk in the law library to have unfettered access to caselaw to study, and used the limited funds available to him to pay for distance-learning courses to earn a bachelor’s degree.³⁴

After twenty-two years of confinement, Jeremiah was given an opportunity to be released due to legislative changes made in response to the U.S. Supreme Court’s decision in *Miller v. Alabama*, a case which held that it is unconstitutional to sentence juvenile offenders to mandatory terms of life in prison without the possibility of parole for the commission of homicide.³⁵ His sentence was amended to an indeterminate life term with a mandatory minimum of twenty-five years—making him eligible for parole three years later.³⁶ By age forty-two, Jeremiah had “become a model of transformation. The violent boy grew into a thoughtful man, who, having spent 25 years behind bars, wait[ed] on a state board to clear him for

³¹ *In re Bourgeois*, Jeremiah Joseph, No. 96-1-00129-4, 1996 BL (Wash. Super. Ct. May 15, 1996); *In re Bourgeois*, Jeremiah Joseph, No. 00-1-00122-2, 2000 BL (Wash. Super. Ct. Apr. 10, 2000).

³² Bourgeois, *supra* note 17, at 154.

³³ Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 153 (2013); Jeremiah Bourgeois, *A Janus-Faced Approach: Correctional Resistance to Washington State’s Miller Fix*, 15 OHIO ST. J. CRIM. L. 451, 456 (2018).

³⁴ Jeremiah Bourgeois, *A Janus-Faced Approach: Correctional Resistance to Washington State’s Miller Fix*, 15 OHIO ST. J. CRIM. L. 451, 456 (2018); *see also* Jeremiah Bourgeois, *Starving for an Education*, LINKEDIN (May 6, 2020), <https://www.linkedin.com/pulse/starving-education-jeremiah-bourgeois> [<https://perma.cc/BPB6-QUTA>].

³⁵ *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

³⁶ WASH. REV. CODE §§ 10.95.035, .030(3)(a)(i) (2020).

release.”³⁷ He earned his bachelor’s degree, became a columnist for a criminal justice news site, published several legal commentaries, advised a non-profit that provided higher education to prisoners, and mentored those around him.³⁸ Jeremiah’s sentencing judge urged the parole board to set him free.³⁹ His prosecutor agreed and wished Jeremiah the best as he transitioned to society.⁴⁰ After twenty-seven years of confinement, at age forty-two, Jeremiah was released.⁴¹ Immediately, he began working as a paralegal, studied to take the Law School Admission Test, and advocated to promote progressive policy changes in the criminal justice system.⁴² Seven months later, Jeremiah became a JD candidate at Gonzaga University School of Law.⁴³

³⁷ Levi Pulkinen, *Limbo: Seattle Man Who Killed at 14 Wonders if He’ll Be Freed*, SEATTLE PI (Mar. 25, 2018), <https://www.seattlepi.com/seattlenews/article/Juvenile-Justice-Life-Bourgeois-12779252.php> [<https://perma.cc/XLP8-3YG4>].

³⁸ See, e.g., Bourgeois, *supra* note 34, at 457; Jeremiah Bourgeois, *Fourteen to Forty: Creating Something out of Nothing*, 29 J. PRISONERS ON PRISONS 13, 16–17 (2020); Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 154 (2013).

Now I write term papers and legal briefs that benefit both me and others confined with me. My transformation has affected not only those who knew me when I was a menace, but also those who are just starting to serve their sentences. They see me as a role model and see what can be accomplished in spite of one’s circumstances.

Id.

³⁹ Wash. State Dep’t of Corr., Indeterminate Sentence Rev. Bd., Decision and Reasons, Doc. # 708897 (Aug. 14, 2019), at 3 (on file with author); Letter from Judge Anthony P. Wartnik (Retired), to Indeterminate Sentence Rev. Bd. (Aug. 11, 2017) (on file with author).

⁴⁰ King Cnty. Prosecutor’s Off., FACEBOOK (Nov. 16, 2016), <https://www.facebook.com/kcprosecutor/posts/1251822544838469> [<https://perma.cc/MA8R-W6UL>].

⁴¹ Jeremiah Bourgeois, *A (Not so Fond) Farewell to Prison Life*, CRIME REP. (Oct. 28, 2019), <https://thecrimereport.org/2019/10/28/a-not-so-fond-farewell-to-prison-life/> [<https://perma.cc/69RJ-83AP>].

⁴² Aimeé Muul, *Jeremiah JJ Bourgeois Speaking on Why Parole is Needed in WA State*, YOUTUBE (Jan. 21, 2020), <https://www.youtube.com/watch?v=dWPBKRM18qg> [<https://perma.cc/BZ2E-AEUV>].

⁴³ Jeremiah Bourgeois, *From Prison to Law School: A Journey Tempered by Sadness—And Anger*, CRIME REP. (May 6, 2020), <https://thecrimereport.org/2020/05/06/from->

Jeremiah's case demonstrates how much change can occur within those who are sentenced for even violent offenses, and how prosecutors' and judges' conceptions of justice is ever-evolving. Prosecutors determined Jeremiah's actions deserved a long punishment, especially the prosecutors who were involved in the case directly. King County Deputy Prosecuting Attorney Tami Perdue maintained with respect to Jeremiah's original sentence of life without the possibility of parole, "I think he deserves it. . . . I looked into his eyes and saw nothing . . . I feel something is missing."⁴⁴ Yet the reality of transformation and redemption became manifested when Jeremiah transformed from a teenage killer into a college educated columnist. The King County Prosecutor then touted how decades after being sentenced to die imprisoned, Jeremiah was critiquing the code of silence that leads prisoners to turn a blind eye to cruelty. The Prosecutor declared, "Jeremiah shares his insights into the prison experience and the code of silence he witnessed. It is . . . remarkable. . . . We wish him the best in his transition from prison to freedom next year."⁴⁵ Jeremiah's release was only made possible by legislative changes that made him eligible for release based on evidence of reform. His case demonstrates that when it comes to punishing people by using the most severe measure available—the loss of liberty—we must have review systems in place, both to ensure that continued confinement is no greater than necessary and to validate redemption. The next section shows that, for most individuals who are incarcerated in Washington's prison system, there is no review system in place to undo sentences that no longer serve the interests of justice.

prison-to-law-school-a-journey-tempered-by-sadness-and-anger [https://perma.cc/367M-4UYM].

⁴⁴ Gelernter, *supra* note 21.

⁴⁵ King Cnty. Prosecutor's Off., *supra* note 40.

II. WHEN REFORM BECOMES IRRELEVANT, THE SYSTEM SUFFERS

The United States is considered the incarceration nation for its exceptionally large prison population.⁴⁶ This reality is no different in Washington State, where the incarceration rate has more than doubled since the 1980s.⁴⁷ As for the quantum of punishment, “[T]he public demand for severe sentencing of certain classes of offenders has resulted in harsher sentences...through ballot initiatives as well as some politically popular actions of the Sentencing [Guidelines] Commission and the legislature.”⁴⁸ By 2019, 41.5% of all prisoners in Washington State were serving a sentence of ten or more years and 17% of prisoners were serving a life sentence.⁴⁹

⁴⁶ Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCH. 56 (Oct. 2014), <https://www.apa.org/monitor/2014/10/incarceration> <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/5EP3-7YUC>].

⁴⁷ Katherine Beckett & Heather Evans, ACLU OF WASH., ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE I (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state> [<https://perma.cc/47SV-4N7X>].

⁴⁸ Kate Smith, PRINCIPLES, PRAGMATISM, AND POLITICS: THE EVOLUTION OF WASHINGTON STATE’S SENTENCING GUIDELINES, 76 Law & Contemp. Prob., no. 76, 2013, at 105, 125; *see also* David L. Fallon, THE EVOLUTION OF GOOD INTENTIONS: A SUMMARY OF WASHINGTON STATE’S SENTENCING REFORM, 6 Fed. Sent. R. 147 (Nov. 1993) (“All guideline changes must be enacted by the legislature, which has amended the sentencing laws every year since 1985.”).

⁴⁹ Beckett & Evans, *supra* note 47, at 7.



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The increase in the prison population, largely due to legislative changes in the 1980s, is problematic for a wide array of reasons, including logistical issues,⁵¹ racial inequalities, and an ineffectiveness at promoting public safety.⁵² After the Sentencing Reform Act was passed in 1984, incarceration practices in Washington State changed dramatically when the state moved away from a system that recognizes and rewards rehabilitation. This section explores how specific laws have worked in conjunction with the Sentencing Reform Act to increase the length of sentences as well as the number of life

⁵⁰ Joshua Aiken, PRISON POL'Y INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH graph: *Jail and Prison Incarceration Rates in Washington 1978-2015* (May 31, 2017), https://www.prisonpolicy.org/graphs/WA_Prison_Jail_Rate_1978-2015.html [<https://perma.cc/3MSF-WDPL>] (reproduced with permission from the Prison Policy Initiative).

⁵¹ STEVE HERBERT, TOO EASY TO KEEP: LIFE-SENTENCED PRISONERS AND THE FUTURE OF MASS INCARCERATION (2019).

⁵² Beckett & Evans, *supra* note 47, at 1–11.

sentences administered in Washington, and how these sentences negatively impact the community.

A. The History of Incarceration Since the Sentencing Reform Act.

The proliferation of life and long sentences was a direct result of the Sentencing Reform Act. Passed in 1984, the Sentencing Reform Act (SRA) was the outcome of increasing concerns that the state's use of indeterminate sentencing for felony cases was yielding inconsistent outcomes.⁵³ This legislative act created strict sentencing guidelines for adult felonies and abolished the use of Washington State's parole board.⁵⁴ Thus, to create more predictable outcomes, "[T]he state's longstanding system of expansive judicial and parole discretion was replaced with a set of statutory sentencing guidelines enacted by the state legislature."⁵⁵ This legislation emphasized incapacitation and retribution as the paramount goals of punishment and "discounted rehabilitation."⁵⁶ While increasing sentence lengths was not an explicit goal of the SRA, it did directly increase sentence lengths by making life without the possibility of parole (LWOP) or the death penalty the only options for aggravated murder cases.⁵⁷ The SRA also paved the way for multiple legislative changes in the 1990s that caused life and long sentences to proliferate.⁵⁸

While the SRA was consistent with legislation passed in Washington State in 1975, it was a huge departure from past legal practices.⁵⁹ Before

⁵³ See *id.* at 12 ("The primary goal of the new sentencing system was to ensure that defendants who commit similar crimes and have similar criminal histories receive similar sentences.").

⁵⁴ *Id.*

⁵⁵ Smith, *supra* note 49, at 107.

⁵⁶ *In re Mota*, 788 P.2d 538, 543 (1990) (citing commentators).

⁵⁷ Beckett & Evans, *supra* note 47, at 12.

⁵⁸ *Id.* at 15.

⁵⁹ See Smith, *supra* note 49, at 107 ("With the passage of the Sentencing Reform Act of 1981 (SRA), sentencing in Washington state underwent a radical transformation."); David Boerner & Roxanne Lieb, SENTENCING REFORM IN THE OTHER WASHINGTON, 28 Crime & Just. 71, 71-72 (2001) ("The Sentencing Reform Act of 1981 rejected many

1975, there was significantly more judicial discretion, and the existence of a robust parole board demonstrated a belief in an individual's ability to be rehabilitated.⁶⁰ Considering this history, it is important to note that changes in sentencing laws after the passing of the SRA are a reflection of the particular political and social climate existing at that time, and not a reflection of justice as we have always seen it.

B. Laws that Increase Incarceration

While the Sentencing Reform Act contributed greatly to the proliferation of both life and long sentences, other legislative changes have also contributed to the significant increase in sentence lengths that we see today.⁶¹ There have been four laws that have most significantly impacted the increase in life and long sentences: The Persistent Offender Accountability Act, Hard Time for Armed Crime Act, changes to offender scores, and the auto-decline of youth offenders to adult courts.⁶² These laws are the quartet of inequity.⁶³

The Persistent Offender Accountability Act (POAA), also known as Three-Strikes and You're Out, was adopted by Washington State in 1993 and required courts to sentence "persistent offenders" to life without the possibility of parole.⁶⁴ POAA states that upon the third conviction for a

core tenets of indeterminate sentencing, putting into place a sentencing system based on principles of just desert and accountability.”).

⁶⁰ Smith, *supra* note 49, at 108–09.

⁶¹ *Id.* at 26.

⁶² WASH. REV. CODE § 9.94A.570 (2000); WASH. REV. CODE § 9.94A.533 (2020); Smith, *supra* note 49, at 128 (“For instance, in the two decades between 1989 and 2008, the average offender score rose from 1.4 to 2.9, a shift that appears to be due to legislated changes in the way scores are calculated.”); *see* State v. Cornejo (*In re Boot*), 925 P.2d 964, 968 (1996) (“In 1994, the Legislature enacted comprehensive changes to state law for the express purpose of deterring violent conduct. One of the areas addressed was the Basic Juvenile Court Act, RCW 13.04. The Legislature amended RCW 13.04.030 to bring certain offenses committed by 16- and 17-year-olds under the ‘exclusive original jurisdiction’ of the adult criminal court.”).

⁶³ Beckett & Evans, *supra* note 47, at 24–27.

⁶⁴ WASH. REV. CODE § 9.94A.570 (2000); Beckett & Evans, *supra* note 47, at 16.

crime considered by the legislature to be a “most serious offense,” the offender must be sentenced to a mandatory term of life imprisonment without the possibility of parole.⁶⁵ Crimes that are considered “most serious offenses” include all Class A felonies, such as manslaughter and robbery while brandishing a firearm, along with some Class B felonies.⁶⁶ Additionally, it is considered a “most serious offense” if a Class B felony includes a deadly weapon or they find there is a sexual motivation.⁶⁷ Importantly, the idea that animated legislators was that crime would be reduced by incapacitating repeat offenders and deterring potential criminals.⁶⁸ However, as discussed by Beckett in her expansive research report *About Time*, there is no evidence to support either of these notions.⁶⁹ Beyond lacking positive outcomes, studies have found multiple downfalls.⁷⁰ One outcome of laws like the POAA is that defendants are dissuaded from pleading guilty; instead, defendants are more likely to accept plea bargains in order to avoid going to trial and receiving a strike.⁷¹ Thus, the Three-Strikes law punishes individuals for utilizing their constitutionally protected right to a trial by jury.

The Hard Time for Armed Crime Act also impacted sentence lengths by further removing judicial discretion.⁷² Established by Initiative 159 and passed in 1995, the Hard Time for Armed Crime Act (HTACA) established mandatory sentence enhancements for all felony offenses committed while using a weapon by adding time to the term of confinement imposed for the base offense.⁷³ The additional time for Class A felonies with a firearm enhancement can amount to up to sixty months of additional confinement

⁶⁵ Beckett & Evans, *supra* note 47, at 16.

⁶⁶ WASH. REV. CODE § 9.94A.030 (2020).

⁶⁷ *Id.*

⁶⁸ Beckett & Evans, *supra* note 47, at 16.

⁶⁹ *Id.*

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

⁷² WASH. REV. CODE § 9.94A.533 (2020).

⁷³ Beckett & Evans, *supra* note 47, at 19.

that must be served consecutively and cannot be reduced for good behavior.⁷⁴ As with the POAA, there is little evidence to support the impulses that motivated voters to support the adoption of the HTACA.⁷⁵ Consequently, this law seems to arbitrarily add to the length of sentences absent evidence of deterrence.

Another way in which Washington laws have directly impacted the increase in sentence lengths was through a change in the calculation of offender scores.⁷⁶ The SRA dictates that sentences are determined by the seriousness of the most serious offense and the defendant's offender score, which is determined by the number and seriousness of the defendant's past convictions and any other current offenses.⁷⁷ There have been many changes to how one's offender score is calculated since the inception of the SRA, and in all but one, the modifications have increased the defendants' offender scores and thereby increased the aggregate terms of confinement that must be served.⁷⁸ Given that crime rates have been steadily falling since the 1990s, this increase in offender scores seems to serve no purpose other than to operationalize a heightened retributive ethos to further punish offenders.⁷⁹

Finally, the decision to auto-decline certain youth cases to adult courts played a role in the increase in the prison population serving life or long sentences.⁸⁰ The Youth Violence Reduction Act, passed in 1994, had the effect of transferring sixteen and seventeen-year-olds charged with certain felonies to adult courts and, if they were convicted, sending them to state prisons.⁸¹ This practice was studied at length by private organizations such

⁷⁴ *Id.*

⁷⁵ *Id.* at 20.

⁷⁶ Smith, *supra* note 49, at 128.

⁷⁷ WASH. REV. CODE § 9.94A589(1)(a) (2020).

⁷⁸ Beckett & Evans, *supra* note 47, at 38.

⁷⁹ *Id.* at 38–39.

⁸⁰ *Id.* at 18.

⁸¹ *Id.*

as the Washington State Institute for Public Policy (WSIPP), and those findings revealed that transferring youths to the adult criminal justice system not only decreased the well-being of juveniles in state prisons vis-à-vis juvenile detention centers, but also made no significant change to recidivism rates when compared to youth who were retained in the juvenile system.⁸²

C. The Impact of Life and Long Sentences

The proliferation of life and long sentences has had significant costs on the system of incarceration and the communities that are meant to be protected by the criminal justice system. For example, there are significant logistical issues with housing an increasingly aging population. Professor Steve Herbert from the University of Washington discusses these problems with an aging population in his work *Too Easy to Keep*.⁸³ According to Herbert, the physical layout of prisons is not meant for elderly or immobile prisoners, which creates greater burdens for all parties when housing these prisoners, transferring them to other prisons, and moving them within the facilities.⁸⁴ Additionally, the orderly operation of prisons is undermined by the security risks, greater uncertainty, and extra supervision costs that are required since the elderly tend to have more medical emergencies.⁸⁵ Herbert's research also promotes the idea that older inmates age out of crime and go through a maturation process that reduces their likelihood of reoffending; therefore, it does not logistically or economically make sense to maintain such a large elderly incarcerated population to protect public safety.⁸⁶

⁸² ELIZABETH DRAKE, *THE EFFECTIVENESS OF DECLINING JUVENILE COURT JURISDICTION OF YOUTHFUL OFFENDERS* (2013).

⁸³ STEVE HERBERT, *TOO EASY TO KEEP: LIFE-SENTENCED PRISONERS AND THE FUTURE OF MASS INCARCERATION* (2019).

⁸⁴ *Id.* at 69.

⁸⁵ *Id.* at 81.

⁸⁶ *Id.* at 124–27.

Racial disparities have also been associated with the increase in sentence lengths throughout the state. Data from Beckett’s report demonstrates that between January 1986 and June 2017, Black people represented only 3.5% of the Washington State population, yet they represented 28% of those sentenced to life without parole.⁸⁷ This statistic demonstrates a clear racial bias present in our sentencing practices notwithstanding one of the putative bases for the SRA. Thus, while fair and consistent outcomes may have initially been the goal animating the SRA and subsequent legislative changes in the 1980s and 1990s, it is clear that the actual outcome has been longer sentences that continue to produce bias and further racial inequity.

Crime victims have also fared poorly due to the overreliance on incarceration as the means to make them whole. The common perception tends to be that victims want the harshest sentence possible. However, research tells us that victims tend to be more satisfied with a restorative approach that includes open communication to help provide the perpetrator with the opportunity to grow and achieve their release.⁸⁸ This theory was reinforced in a study published by the Alliance for Justice and Safety, which found that 61% of crime victims support shorter prison sentences and emphasize restorative approaches.⁸⁹ It was found that even victims of violent crimes overwhelmingly support rehabilitation over long prison sentences.⁹⁰

The increased financial burden on taxpayers and diversion of resources from other public needs, like education, to sustain the imposition of life and long sentences are alarming and unsustainable. Blagg highlights that each “LWOP sentence will cost Washington State \$51,193 each year for thirty years (until age 55)...[and] [e]lderly prisoners over fifty-five are at least

⁸⁷ Beckett & Evans, *supra* note 47, at 51.

⁸⁸ *Id.* at 54–58.

⁸⁹ *Id.* at 55.

⁹⁰ *Id.*

twice as costly to incarcerate as their younger peers.”⁹¹ For example, it will cost Washington State \$102,386 each year for a fifty-five-year-old prisoner until their death at approximately age sixty-four.⁹² Based on these calculations, “[T]he sum of the average cost of a life without parole sentence in Washington State is \$2,457,264 per prisoner.”⁹³ Taxpayers are now paying over \$1.4 million more for each LWOP sentence when compared to the cost of life sentences prior to the enactment of the SRA, when the average life sentence cost taxpayers only \$767,895 per prisoner (in 2014 dollars) because, in part, the sentences provided some mechanism for early release.⁹⁴

Studies have shown, for example, that in 2013, “1,383 individuals were serving either life without parole or a de facto life sentence in Washington State.”⁹⁵ Of those individuals, 704 were serving an official LWOP sentence and 679 were serving a de facto LWOP.⁹⁶ Since the average cost of incarcerating a prisoner for a life sentence is \$2,457,264, the total average cost of incarcerating those 1,383 individuals is 3.9 billion dollars.⁹⁷ The cost was almost two-thirds less under the Pre-SRA system that afforded prisoners a mechanism for early release.⁹⁸ These costs cannot be justified when we consider the data showing that the SRA and subsequent legislative changes to increase sentences did not provide more public safety and equity as hoped. Moreover, a system of punishment that provides no mechanism for review of maturation both extinguishes hope and sends a deeply cynical message to those who are incarcerated that they are incapable of reform. The existence of hope is vital to the practice of incarceration and can be

⁹¹ *Id.* at 33.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 35.

⁹⁵ *Id.* at 6.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ BLAGG ET AL., *supra* note 91, at 35.

seen in letters to the Seattle Clemency Project, an organization that works to provide pro-bono attorneys with incarcerated individuals hoping to achieve clemency by Washington State’s governor. Grady Mitchell, an incarcerated individual, stated in one letter that his lawyers and the possibility of clemency has “restored my character, my faith, my goodness. It has validated the forgiveness that I’ve sought for so long and questioned if God really had. Hope is a powerful emotion that will conquer hate, evil, and demolishes doubt.”⁹⁹ In this quote, Mitchell beautifully captures the importance of hope and provides the reminder that those who are incarcerated are deserving of forgiveness and capable of rehabilitation. However, hope has been slowly removed from Washington State’s prisons with the removal of the parole board in 1984 and with severe limitations on the ability to achieve sentence reductions for good behavior.

In summary, our system of punishment promoted rehabilitation and viewed individuals as capable of growth and maturation prior to the Sentencing Reform Act of 1984. However, after the SRA and other legislative acts removed the goal of rehabilitation from our sentencing scheme and dramatically increased sentence lengths, our prison population became overcrowded and hopeless. Despite the abandonment of rehabilitation as a goal of Washington’s sentencing system over the last thirty years, many individuals in our prison system have still gone through extraordinary periods of maturation.

III. POWERFUL EVIDENCE OF THE VALUE OF A SECOND LOOK FROM THE FEW WHO HAVE ACCESS TO EARLY RELEASE

Jeremiah’s case falls within one of the three small classes of prisoners who are eligible to apply for review to obtain early release. First, there is a subset of prisoners who remain subject to Washington’s indeterminate

⁹⁹ Letter from Grady Mitchell to Jon Zulauf, Seattle Clemency Project (June 27, 2020) (on file with the Seattle Clemency Project).

sentence scheme that was in place before parole was abolished in 1984.¹⁰⁰ Second, there are two classes of juvenile offenders: those who committed aggravated murder and those who can petition for release after serving twenty years of confinement.¹⁰¹ Finally, there are sex offenders who can be released upon completion of their minimum terms.¹⁰² However, the purpose of these hearings is to determine whether the offender will serve *more* than their determinate-plus sentence, not less, so it cannot be fairly characterized as an early release process. There is no mechanism for review for most prisoners in Washington other than to apply to the Governor for clemency, a process that lacks capacity to hear the large number of cases that need review.¹⁰³

While Jeremiah's transformation is extraordinary, it is in many respects quite ordinary. There are many people serving long sentences in Washington prisons who, like Jeremiah, have grown, healed, made amends, and become more than the system expected them to be. The case of Eugene Youngblood captures this reality. Indoctrinated into Los Angeles' gang culture when he was ten years old, Eugene was an easy target for

¹⁰⁰ WASH. REV. CODE § 9.95.100 (2001).

¹⁰¹ WASH. REV. CODE § 10.95.030(3) (2015) (juveniles convicted of aggravated murder); WASH. REV. CODE § 9.94A.730 (2015) (juveniles serving more than twenty years of confinement for crimes other than aggravated murder or for sex offenses under WASH. REV. CODE § 9.94A.507 (2008)).

¹⁰² WASH. REV. CODE § 9.94A.507 (2020).

¹⁰³ The Clemency and Pardons Board is unpaid and only meets four times per year. *Bylaws of the Washington State Clemency and Pardons Board*, ACCESS WASH. 1, 3 (Mar. 22, 2011), https://www.governor.wa.gov/sites/default/files/documents/clemency_bylaws.pdf [<https://perma.cc/9BWS-YTJT>]. Given those limitations, the Board only has capacity to hold about fifty hearings per year. See *Governor Inslee Clemency and Pardons Board*, ACCESS WASH., <https://www.governor.wa.gov/sites/default/files/Status%20Table%20for%20CPB%20website.pdf> [<https://perma.cc/8Z88-8NYN>]. In stark contrast, before Washington abolished parole, the parole board heard 5,000 cases annually. Sara Bernard, *Inside the Fight to Bring Parole Back to Washington State*, SEATTLE WEEKLY (Feb. 22, 2017, 1:30 AM), <https://www.seattleweekly.com/news/inside-the-battle-to-bring-parole-back-to-washington-state/> [<https://perma.cc/P67U-V9AW>].

recruitment.¹⁰⁴ His young life had been defined by abandonment by his father when he was an infant, the imprisonment of his mother when he was a toddler, and the death of his grandmother at age ten.¹⁰⁵ Eugene then became a “junior mascot” for the Crips street gang and came to perceive them as his real family.¹⁰⁶ Those family members trained him to be an inner-city soldier.¹⁰⁷ He was shot by rival gang members when he was thirteen years old.¹⁰⁸ He was a school dropout by the age of fifteen.¹⁰⁹ He had a lengthy juvenile history by the age of sixteen.¹¹⁰ Then, when Eugene was eighteen years old, he conspired with two fellow Crips to kill two rival gang members.¹¹¹ Those rivals were subsequently murdered by Eugene’s confederates.¹¹² His culpability was considered to be below that of his two codefendants, but the judge determined that the appropriate term of confinement was a sixty-five-year sentence.¹¹³

Upon entering the Department of Corrections at the age of twenty, the fact that Eugene would not be released until he was at least seventy-six years old meant there was little incentive for him to demonstrate prosocial behavior; yet, Eugene’s behavior highlights the U.S. Supreme Court’s recognition that “as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”¹¹⁴ From the age of twenty

¹⁰⁴ Letter from Foster Pepper PLLC to Washington State Clemency and Pardons Board and to Governor Inslee (Sept. 7, 2018) (on file with author) at 2.

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 11.

¹¹² *Id.* at 12.

¹¹³ The sixty-five-year sentence is an aggregate of three convictions, two counts of first-degree murder, and one count of conspiracy to commit first-degree murder, for which he received three consecutive terms of 284, 283, and 213 months of confinement. *See* Letter from Foster Pepper PLLC to Washington State Clemency and Pardons Board and to Governor Inslee, *supra* note 104, at 13.

¹¹⁴ *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

to twenty-six, he received sixty-five infractions; from age twenty-seven to thirty-eight, he received eleven; from age thirty-nine to forty-five, he received none.¹¹⁵ Eugene's behavioral transformation, given his intrinsic desire to change, followed that of other teenagers sentenced to de facto life sentences. As members of the Indeterminate Sentence Review Board explained regarding the maturation of the brain and the behavior of prisoners:

[I]t's very common for the first ten years that we see them acting out in a variety of ways. Acting out for lack of a better term. That they're not conforming with prison. Often violence, fighting, gang activity, but what we consistently see is at some point . . . the vast majority, at some point, something happens in their mind and they make a decision that they don't want to live that way anymore. And then there's a shift, and that seems to happen somewhere between age 25-30.¹¹⁶

At the same time that Eugene's behavior reformed, mitigating evidence developed. First, one of his codefendants was resentenced to a term of confinement that resulted in him being freed.¹¹⁷ This occurred even though that defendant's culpability was deemed by the original sentencing judge to be more egregious than that of Eugene's. Second, developments in neuroscience revealed that the brain is not fully developed until approximately age twenty-five. By this logic, the actions of youths do not equate to those committed by fully formed adults because of their capacity for change, among other things.¹¹⁸ Third, developments in caselaw revealed

¹¹⁵ Letter from Foster Pepper PLLC to Washington State Clemency and Pardons Board and to Governor Inslee, *supra* note 104, at 19.

¹¹⁶ Senate Human Services, Reentry & Rehabilitation Committee, *Work Session: Experience in Implementing the Miller Fix in Washington; Public Hearing: SB 5120, SB 5164, SB 5144*, TVW, at 1:27:05 (Jan. 24, 2019), <https://www.tvw.org/watch/?clientID=9375922947&eventID=2019011232@autoStartStream=true> [<https://perma.cc/YG3E-47GA>].

¹¹⁷ Letter from Foster Pepper PLLC to Washington State Clemency and Pardons Board and to Governor Inslee, *supra* note 104, at 19.

¹¹⁸ *Id.* at 14.

that the sentencing judge had the discretion to run Eugene's terms concurrently as opposed to consecutively.¹¹⁹ This judicial decision was not made until fourteen years after Eugene's sentencing hearing occurred, but had it been recognized at the time, it would have enabled the judge to reduce Eugene's term given his reduced level of culpability. Finally, the evidence detailing the etiology of Eugene's criminality was irrelevant at his original sentencing hearing.¹²⁰ Today, these factors coupled to "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and [a]" sentencing court must exercise its discretion to decide when that is."¹²¹

In 2018, Eugene's efforts to become a "good man" rather than a "good convict" became relevant to the calculus of punishment when his case was presented to the Washington Clemency and Pardons Board. His petition highlighted that he had dropped out of school at age fifteen, but upon pursuing higher education in the penitentiary, he came to be described by one of his professors as "one of the most intellectually gifted, hardworking, and thoughtful students I have ever taught."¹²² He had become a gang interventionist and a mentor to other prisoners.¹²³ Amongst the dozens of supporters in the audience was Dr. Raquel Pinderhughes, a Professor of Urban Planning at San Francisco State University.¹²⁴ Dr. Pinderhughes is a nationally recognized expert on the green economy and designer of an

¹¹⁹ See *In Re Mulholland*, 166 P.3d 677, 680–83 (2007) (holding a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence).

¹²⁰ WASH. REV. CODE § 9.95.100 (1983); See *State v. Law*, 110 P.3d 717, 718 (2005) ("Factors which are personal and unique to the particular defendant, but unrelated to the crime, are not relevant under the SRA.").

¹²¹ *State v. O'Dell*, 358 P.3d 359, 368 (2015).

¹²² Letter from Foster Pepper PLLC to Washington State Clemency and Pardons Board and to Governor Inslee, *supra* note 104, at 5.

¹²³ *Id.* at 5–6.

¹²⁴ Washington State Clemency and Pardons Board, *Quarterly Hearing: Commutation - Eugene Youngblood; Pardon - Charles DeJohn, Michael D. Ormsbee* (January 14, 2019), <https://www.tvw.org/watch/?eventID=2019061030>.

environmental sustainability program called Roots to Success that is offered in prisons across the country.¹²⁵ Eugene had become one of seven Master Trainers in the program, and in her view, he was “the most serious, mature, and effective instructor” amongst them.¹²⁶ She further explained before the Board:

Over the past nine years in which this program has existed, I have worked in hundreds of prisons. I have trained thousands of incarcerated instructors to teach their peers. Mr. Youngblood is one of two instructors that I would identify as an extraordinary teacher and professional. Let me repeat this, Eugene is one of two individuals out of thousands of people that I have trained who I would identify as truly extraordinary. His seriousness of purpose, his dedication, his work ethic, his professional behavior, his commitment to help others...is extraordinary and exemplary. I hear this from staff...I hear this from his students...and I hear this from the teachers he has trained.¹²⁷

Judith Mandel, a former prosecutor who represented Eugene when she was a public defender, had remained in contact with him throughout his confinement. Out of thousands of former clients, this was the first time she had ever felt compelled to come before the Board and advocate for a prisoner’s release, and she declared, “I am a witness to Eugene’s struggles, his commitment to educate himself, to understand his existential dilemmas, and to deeply self-reflect on his decision to make judgments commensurate with his need to live as a mature man.”¹²⁸ The Kitsap County Prosecuting

¹²⁵ Letter from Foster Pepper PLLC to Washington State Clemency and Pardons Board and to Governor Inslee, *supra* note 104, Appendix A (Letter of Support – Raquel Pinderhughes – Roots of Success – 12-2-17).

¹²⁶ *Id.*

¹²⁷ Washington State Clemency and Pardons Board, *Quarterly Hearing: Commutation - Eugene Youngblood; Pardon - Charles DeJohn, Michael D. Ormsbee*, *supra* note 124 (statement of Raquel Pinderhughes). <https://www.tvw.org/watch/?clientID=9375922947&eventID=2019061030&startStreamAt=5055&stopStreamAt=5116&autoStartStream=true>.

¹²⁸ *Id.*

Attorney's Office, which tried and convicted Eugene, had also taken a hard look at the case and acknowledged, "Mr. Youngblood has set forth a persuasive statement of facts, easily compelling one to believe that at least one of the goals of sentencing has been achieved—that is rehabilitation."¹²⁹

While Eugene could have taken the opportunity to highlight his transformation and accolades when given the opportunity to speak to members of the Board, he chose to instead focus on the harm that he caused and to give voice to his remorse. Overwhelmed with emotion, he said:

I would like to say to [my teenage victims'] family, friends, and even their community, that I am truly sorry and remorseful for the murders that were committed and the senseless loss of their lives on December the 20th 1991 . . . [I'm ashamed that] I had the opportunity to take responsibility . . . and be accountable at the time I was sentenced, and I wasn't man enough to do it. . . . At the time of my sentencing, I could only see Mr. Tyrone Darcheville and Mr. Randall as mutual combatants—meaning . . . we were all gang members . . . and therefore I minimized their lives. . . . It took me about ten years into my incarceration before I could finally realize that I was more than just a gang member. That I was someone's father. That I was someone's son. That I was someone's nephew. And it was coming to that realization that made me realize that Mr. Darcheville and Mr. Randall were also someone's sons. Someone's father. Someone's nephew. And while I've had the opportunity to make extraordinary change in my life, to leave gang membership behind, to start helping people, they haven't had that opportunity. And the reason they haven't had that opportunity is because . . . my choices . . . led to them losing their lives.¹³⁰

Eugene's case demonstrates the beauty and resiliency of the human spirit. Humans have the unique capacity to change despite facing the most

¹²⁹ Washington State Clemency and Pardons Board, *Quarterly Hearing, June 2018: Commutation - Eugene Youngblood; Pardon - Charles DeJohn, Michael D. Ormsbee*, *supra* note 124 (statement of Paul Heer, Attorney, Foster Pepper PLLC).

¹³⁰ *Id.* (statement of Eugene Youngblood, Petitioner).

challenging circumstances. A healthy justice system must have a mechanism to recognize and reward positive change. Ultimately, the circumstances surrounding his original crime and sentencing, the release of his codefendant, his transformation while in prison, and the subsequent development of mitigating evidence demonstrate that what once seemed just had become an injustice. The Clemency and Pardons Board found these circumstances to be extraordinary and voted unanimously that the Governor commute Eugene's sentence.¹³¹ But while the clemency process provided a mechanism for Eugene's review, it does not have the capacity to handle the large number of incarcerated individuals who are also in need of relief.

IV. THE POWER AND OPPORTUNITY PROSECUTORS HAVE TO VALIDATE REDEMPTION AND CORRECT SENTENCES THAT DO NOT SERVE A VALID PURPOSE

This year, there have been nationwide calls for reform to the criminal justice system, from the enforcement stage, to bail, to charging and more. While front-end reforms are necessary, it is also crucial that we not forget the individuals who have already been through the trial and appellate processes and are serving long sentences that no longer serve a purpose. By actively using 6164,¹³² prosecutors have an opportunity and responsibility to do just that.

As shown through Jeremiah's and Eugene's cases, maturation happens over time and a healthy justice system must account for that. On the most basic level, recognizing and rewarding redemption incentivizes prosocial behavior, which is likely to improve how people in prison do their time.¹³³ Moreover, the absence of a process that formally acknowledges rehabilitation and growth is another form of injury that many incarcerated

¹³¹ *Id.* Governor Inslee followed the Clemency and Pardons Board recommendation, granting Eugene Youngblood a conditional commutation on December 7, 2021.

¹³² WASH. REV. CODE § 9.94A.030 (2020).

¹³³ A. Mitchell Polinsky, *Deterrence and the Optimality of Rewarding Prisoners for Good Behavior* 2–3 (Stanford Inst. for Econ. Pol'y, Working Paper No. 15-023, 2015).

individuals experience in the system. Among the incarcerated population, there is a palpable sense that the system is designed solely to respond to them when things go wrong, rather than to support a path to ensuring things go right. The absence of a process that celebrates and rewards positive progress reinforces that idea.

Further, like human beings, our system of punishment is fallible. Our understanding of what constitutes just punishment evolves over time, as does our understanding of how our system impacts those who are involved in it. A healthy justice system must account for those changes. Through 6164, prosecutors have the power to address inequities in sentencing outcomes based on how our sentencing practices and laws have evolved. For example, when the Persistent Offender Act was first enacted in 1993, prosecutors did not believe they had discretion to offer plea bargains, so none were given for the first few years the law was in effect.¹³⁴ After a few years passed, prosecutors started using discretion when deciding to charge a defendant with a third strike offense and began offering plea bargains as an alternative to life in prison.¹³⁵ The effect of the change in the practices of prosecutors meant that there were dozens of individuals who were given life sentences with no plea offer from 1993 to 1996.¹³⁶ If these individuals had committed the exact same crime five years later, they may have received a plea offer and presumably a shorter sentence. Changes in prosecutors' charging and litigation practices cannot be addressed through the appellate process, but the inequitable outcomes for defendants are very real, particularly for those serving very long sentences. This is precisely the kind of inequity or harm a prosecutor should move to correct under 6164.

¹³⁴ See Washington State Clemency and Pardons Board, *Quarterly Hearing: Commutation—Orlando Ahmes, Tina Weaver* (June 13, 2014), <https://www.tvw.org/watch/?eventID=2014061031> [<https://perma.cc/K8T4-Y4SN>] (testimony of King County Prosecuting Attorney Dan Satterberg at clemency hearing of Orlando Ames).

¹³⁵ *Id.*

¹³⁶ *Id.*

Finally, in a post-conviction process there may be a greater potential for victim healing through restorative justice practices, which prosecutors could use to facilitate their decision-making process about re-sentencing. Unlike during the trial and sentencing, where the adversarial process is at its peak and emotions are raw for the victim and defendant, when many years have passed and the defendant has found a path to rehabilitation, the defendant's remorse will be genuine. Additionally, with the passage of time, the victim may be more open to and may find healing in an apology from the defendant.

Rewarding rehabilitation and correcting outdated sentences will provide more, not less, stability in our community. It will bring people home to their families and end long separations. It will allow those who have found a path to rehabilitation to give back to their community by sharing their skills, experience, and wisdom with that community. And it will restore some faith in the criminal justice system that has been eroded by hopeless sentences with no meaningful opportunity for review.

V. CONCLUSION

The data regarding our system of punishment in Washington over the past thirty years is clear. Removing a parole option for most prisoners and systematically increasing prison sentences left us with a costly and overcrowded system that fails to make victims whole and communities safer. Fortunately, a diverse group of stakeholders are motivated to find a way to restore mercy and justice to our system. As Los Angeles County District Attorney George Gascon said in support of California's resentencing efforts, "The pursuit of justice is timeless, therefore this policy will correct historic wrongs. Mass incarceration has broken families and trapped communities in cycles of trauma and poverty. We must begin undoing those failed policies by taking a second look at extreme

sentences.”¹³⁷ It is important that future legislative changes support incarcerated individuals’ continued rehabilitation and decrease the overall size of the prison population. But while widespread legislative change is necessary, through 6164, Washington prosecutors have been given a tool to begin delivering just outcomes immediately in cases where an individual’s sentence no longer serves the interests of justice. Prosecutors have an unprecedented opportunity to help undo mass incarceration. But bringing about this result will require them to turn away from retributive philosophies and to embrace a new role in the administration of justice—for as William Faulkner aptly observed, “You cannot swim for new horizons until you have courage to lose sight of the shore.”¹³⁸

¹³⁷ Press Release, Fair and Just Prosecution, Prosecutors Announce Groundbreaking Resentencing Efforts to Reduce U.S. Mass Incarceration Epidemic (Dec. 7, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/12/FJP-Sentencing-Review-Press-Release.pdf> [<https://perma.cc/KD7H-6DJ3>].

¹³⁸ *Three Famous Short Novels by William Faulkner*, PENGUIN RANDOM HOUSE, <https://www.penguinrandomhouse.com/books/48434/three-famous-short-novels-by-william-faulkner/> [<https://perma.cc/B6KM-NMWR>].

