

**THE CENTER ON
RACE
INEQUALITY
& THE LAW
NYU SCHOOL OF LAW**

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The Center on Race, Inequality, and the Law

Presented Before

The New York State Senate Committee on Crime Victims, Crime and Correction and The Senate Standing
Committee on Judiciary

*Submitted for December 7, 2022 Joint Public Hearing on Parole Justice: How the Elder Parole and Fair &
Timely Parole Bills Will Improve Parole Release Laws and Public Safety in New York State*

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Introduction

The Center on Race, Inequality, and the Law (CRIL) at New York University School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. We believe that the racism that permeates our present-day legal system has deep roots. Accordingly, the Center uses public education, research, advocacy, and litigation to highlight and dismantle structures and institutions that have been infected by racial bias and plagued by inequality.

The Center focuses, in part, on the intersection of race, bias, and the criminal legal system, including the exercise of discretion by actors within that system. We view the parole system, in New York and nationwide, as a site where the opportunity for relief from the violence of the criminal legal system has been undermined by inequities borne disproportionately by people of color and our aging loved ones, amongst other marginalized groups. Through appropriate measures, however, parole carries with it the potential to dramatically reduce the number of people in prison and return those people to their loved ones and communities, to the benefit of us all.

We must improve and expand mechanisms for release by changing the standard that governs parole release and creating new avenues of parole-eligibility for people serving “death-by-incarceration” sentences. The Elder Parole (S.15A/A.8855A) and Fair and Timely Parole (S.7514/A.4231) bills currently before the New York Legislature are two powerful, yet simple and straightforward, responses to this charge. Passing these bills into law will not guarantee release for anyone; it would bring New York closer to ensuring

that every person who appears before the parole board is afforded a meaningful opportunity to obtain release.

Bloated and Biased: The State of Prison and Parole in New York

As of November 29, 2022, there are a total of 31,213 people locked inside 44 state prisons across New York.¹ According to the most recent *Under Custody* report by the New York State Department of Corrections and Community Supervision (DOCCS), of the total population recorded in 2021, approximately 12,400 people are serving indeterminate sentences (about 36% of the incarcerated population), 7,130 have been sentenced to a maximum of life in prison (about 21% of the incarcerated population), and 305 are serving life sentences without the possibility of parole (about 1% of the incarcerated population).² For perspective, at the end of 2021, 23 states had smaller total prison populations than New York's indeterminate population alone.³

For those serving a maximum of life in prison, parole is the only way they can achieve release, short of a gubernatorial pardon. In addition to this group, there are those serving life without parole and those serving sentences that extend beyond one's natural life (such as 100 years to life), which are "virtual life" sentences. Due to perverse administrative and structural problems running throughout the parole system, the large majority of these incarcerated individuals will age, languish, and die in captivity, with no chance of ever obtaining freedom.

Data shows that death by incarceration has only hastened. Indeed, one report notes that "40% of all deaths behind bars since 1976 of people 55 and older happened in the last ten years," roughly 33% of whom had served at least 15 years inside.⁴ This phenomenon is compounded by the disturbing reality that, despite some decreases in the overall prison population over the course of the last decade, the aging population has increased, with adults over 50 nearly doubling over the course of the last 30 years⁵ and the total average age of those inside increasing by 11.4% since March 2008.⁶

¹ See N.Y. ST. DEP'T OF CORR. & CMTY. SUPERVISION, DOCCS FACT SHEET (Nov. 1, 2022), [doccs-fact-sheet-november-2022.pdf \(ny.gov\)](https://www.doccs.ny.gov/fact-sheet-november-2022).

² See N.Y. ST. DEP'T OF CORR. & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION AS OF JAN 1, 2021 (Apr. 2022), [under-custody-report-for-2021.pdf \(ny.gov\)](https://www.doccs.ny.gov/under-custody-report-for-2021). See also CTR. ON RACE, INEQ., & THE L. & THE PAROLE PREPARATION PROJECT, THE PROBLEM WITH PAROLE: NEW YORK STATE'S FAILING SYSTEM OF RELEASE, at 5 (2021), <https://drive.google.com/file/d/1BstQpE8BufZ2HiqqJ2fNL1E2ieaJ7Nfr/view> ("An indeterminate sentence [is a] sentence with a range of years (for example, two to four years, or five to fifteen years). Those with indeterminate sentences are eligible for release after serving the minimum number of years required by their sentence but may be held until they reach the maximum expiration date of their sentence").

³ VERA INST. OF JUST., PEOPLE IN PRISON IN WINTER 2021-22, at 3-4 (Feb. 2022), https://www.vera.org/downloads/publications/People_in_Prison_in_Winter_2021-22.pdf.

⁴ COLUM. U. CTR. FOR JUST., NEW YORK STATE'S NEW DEATH PENALTY: THE DEATH TOLL OF MASS INCARCERATION IN A POST EXECUTION ERA, at 4 (Oct. 2021), <https://centerforjustice.columbia.edu/sites/default/files/content/New%20York%27s%20New%20Death%20Penalty%20Report.pdf>.

⁵ See THE OSBORNE ASS'N, THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION 10 (2018), <http://www.osborneny.org/resources/the-high-costs-of-low-risk/hclr/>.

⁶ See OFF. OF THE N.Y. ST. COMPTROLLER, NEW YORK STATE'S AGING PRISON POPULATION: SHARE OF OLDER ADULTS KEEPS RISING, at 4 (Jan. 2022), <https://www.osc.state.ny.us/reports/new-york-states-aging-prison-population-share-older-adults-keeps-rising>.

The fatal nature of incarceration has been brought into sharp relief as we adjust to the new realities created by the COVID-19 pandemic. Overcrowding and poor access to quality healthcare turned New York's prisons into hotspots for COVID-19, which has run rampant throughout the incarcerated population.⁷ This population has been kettled in an environment that facilitates the spread of the deadly virus.⁸ As of November 25, 2022, DOCCS reported that there are 11,474 confirmed cases of COVID-19 and 47 COVID-related deaths amongst individuals who are incarcerated.⁹ To make matters worse, the disease is particularly dangerous for elderly people inside prison, who are at a heightened risk of harm and yet are unable to follow other basic safety measures and federal guidelines outlining best practices related to COVID-19 exposure.¹⁰

These realities underscore the life-saving opportunities presented by the promise of parole. Unfortunately, that promise remains unmet for most incarcerated people. As with the broader criminal legal system, racial and age-related disparities can be seen throughout Parole Board decisions. Despite similar backgrounds and convictions for similar crimes, people of color are released at lower rates than their white counterparts. One 2021 report noted that, of white New York parole applicants, 47% were granted parole, compared to 37% of Black and 36% of Latinx applicants.¹¹

Furthermore, even though aging and elderly incarcerated people are at higher risk of harm to their health¹² and present a lower risk of threat to public safety,¹³ they are released at rates similar to younger populations. Between 2018 to 2020, the parole release rate for those aged 55 years or older was 40%.¹⁴ For those 54 years and under the release rate was 41%.¹⁵

The consistency in release rates, despite dramatic differences in the age of each population is at odds with what the available data tells us about recidivism. A plethora of research evinces that aging and elderly people pose no credible threat to public safety. Even elders who have been convicted of the most serious violent crimes present virtually no risk of committing future harm. "[B]etween 1985 and 2012, 98.1% of elderly people previously convicted of murder and released on parole committed no new offense."¹⁶

⁷ See *Letter To New York Legislators: Pass the Elder Parole and Fair And Timely Parole Bills To Protect Public Health*, UCLA LAW COVID BEHIND BARS DATA PROJECT (Feb, 24, 2022), https://uclacovidbehindbars.org/assets/feb-24-final_-letter-to-senator-stewart-cousins-and-speaker-heastie-ucla-covid-behind-bars-data-project-feb-1120221.pdf. See generally THE COVID PRISON PROJECT TRACKS DATA AND POLICY ACROSS THE COUNTRY TO MONITOR COVID-19 IN PRISONS, THE COVID PRISON PROJECT, <https://covidprisonproject.com/> (last visited Nov. 29, 2022).

⁸ *Supra* note 7.

⁹ DOCCS COVID-19 REPORT, N.Y. ST. DEP'T OF CORR. & CMTY. SUPERVISION, <https://doccs.ny.gov/doccs-covid-19-report> (last visited Nov. 29, 2022).

¹⁰ See generally COVID-19 RECOMMENDATIONS FOR OLDER ADULTS, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/aging/covid19-guidance.html> (last visited Nov. 29, 2022).

¹¹ See Benjamin Heller, Cherrell Green, Shirin Purkayastha et. al, TOWARD A FAIRER PAROLE PROCESS EXAMINING PAROLE DENIALS IN NEW YORK STATE, VERA INST. OF JUST., at 10 (December 2021) <https://www.vera.org/downloads/publications/toward-a-fairer-parole-process-report.pdf>.

¹² Gloria Oladipo, *New York's ageing prisoners languish with poor medical care and little hope*, THE GUARDIAN (Aug. 20, 2022), <https://www.theguardian.com/us-news/2022/aug/20/prison-reform-aging-parole-medical-care-valerie-gaiter>.

¹³ *Supra* note 5 at 18.

¹⁴ CTR. ON RACE, INEQ., & THE L. & THE PAROLE PREPARATION PROJECT, *supra* note 2 at 15.

¹⁵ *Id.*

¹⁶ *Id.*

Denying meaningful opportunities for parole also makes no sense financially: rather than provide legitimate chances for the elderly to demonstrate they are ready to leave prison, New York spends between \$100,000 and \$240,000 to incarcerate just one older person each year (*at minimum* \$40,000 higher than those below that age range).¹⁷ As we noted in our 2021 report, *The Problem with Parole: New York State's Failing System of Release*, “[t]hese numbers mean that hundreds and thousands of aging and elderly people remain in prison despite their undeniable suitability for release and that DOCCS continues to pay for their care.”¹⁸

Without a meaningful retooling of the parole system, we are condemning people to death by incarceration, a fate that is not only an inhumane deprivation of one’s right to life¹⁹ but also one that runs counter to the original purpose of the parole system.

A System Warped: The Parole System Has Unworkable Legal and Administrative Standards, Dulling Hope of Release

The system of parole was originally designed to allow people inside to demonstrate that they had undertaken rehabilitative efforts, and in turn, were ready to be released from prison so that they could return to their communities. Yet today, that purpose has been largely ignored. Instead, parole has become an apparatus of the State’s perpetual punishment mechanism – effectually snuffing out the possibilities of release, irrespective of the applicant’s achievements or growth while incarcerated.

Part of the problem rests with the Parole Board and the standards that inform its work. The deficiencies of the current standards ensure that the Parole Board maintains a narrow focus on ‘the nature of the crime’ that brought someone into prison in the first place, a static factor that can never be changed. During the parole review process, parole commissioners must hew to a prejudicial legal standard where release is allowed *only where* it “is not incompatible with the welfare of society,” and where it “will not so deprecate the seriousness of [their] crime as to undermine respect for the law.”²⁰ The fixed nature of an applicant’s crime of conviction renders it an unyielding consideration bearing an outsized weight in the parole release determination. Parole applicants are routinely denied release because of this factor,

¹⁷ See PEOPLE’S CAMPAIGN FOR PAROLE JUSTICE, KEY FACTS ON PAROLE JUSTICE IN NEW YORK, <https://static1.squarespace.com/static/6035a572a46712378cdd1538/t/606607692b9d8a5e8e4ff6be/1617299306087/PCPJ+-+Key+Facts+Detailed+%281%29.pdf>, (last visited Nov. 29, 2022).

¹⁸ CTR. ON RACE, INEQ., & THE L. & THE PAROLE PREPARATION PROJECT, *supra* note 2 at 15.

¹⁹ See *generally* COMPLAINT TO U.N. SPECIAL RAPPORTEUR ON DEATH BY INCARCERATION, (Sept. 15, 2022) https://drive.google.com/file/d/1QdC2WIKr_7u4zkTn-2-2_jqjNg7mla42/view. “The United States’ use of [death by incarceration (DBI)] sentences violates a range of international human rights. First, the disproportionate imposition of DBI sentences on racial minorities, in particular Black and Latinx people, violates the prohibition against racial discrimination. Second, by arbitrarily and permanently sentencing individuals to prison terms that result in their premature death, DBI sentences violate individuals’ right to life. Third, as recognized by numerous international human rights bodies, by depriving individuals of their right to hope and to rehabilitation, DBI sentences violate the international prohibition against torture and cruel, inhuman, and degrading treatment. The devastating consequences on an individual’s right to family life further exacerbate the cruelty of DBI sentences. Finally, the failure of DBI sentences to serve any legitimate purpose further demonstrates that such sentences are an impermissibly arbitrary deprivation of liberty. To comply with international human rights standards, the United States must abolish DBI and restore incarcerated individuals’ right to hope.”

²⁰ N.Y. Exec. Law § 259-i(2)(c)(A).

subjecting them to a demoralizing and never-ending string of parole denials by the Parole Board that last, in some cases, for decades.²¹

Placing undue weight on the facts of the underlying crime in the course of a parole release determination not only contravenes the original intent of the parole process, but it unnecessarily duplicates the court's assessment of the appropriate punishment at the time of the conviction. The sentencing judge is tasked with assigning the terms of sentence that they believe would satisfy the purposes of punishment. This makes sense given that the sentencing judge has a deeper connection to, and familiarity with, the facts and circumstances that surround the offense. Parole commissioners, by focusing on the facts of the underlying offense and the conviction, unjustifiably transforms the Parole Board into a second sentencing court. That is not the Board's ambit or charge. As we note in our report, "[t]he parole system only makes sense if the focus of parole commissioners is on information that was unavailable to the judge at the time of sentencing: how the applicant has grown and changed since that sentencing."²²

Moreover, the legal standard applied by the Parole Board invites arbitrary and discriminatory decision-making by commissioners. Firstly, there is no guidance as to when a parole decision is "compatible with the welfare of society" or "deprecate[s] the seriousness of the offense." Such an amorphous standard fosters reflexive parole denials in cases that require deep attention, forethought, and care. Secondly, since the Parole Board commissioners are nominated by the governor, they are political appointments, and thus may make decisions that align with the governor's interests, creating a troubling conflict of interest.²³ Finally, Parole Board commissioners often have deeply carceral backgrounds, frequently coming from prosecutorial or law enforcement ranks.²⁴ This serves only to maintain the status quo and keep people in prison long past the moment they had the ability to be freed.

Given all these considerations, the current parole system fosters an environment that guarantees perpetual punishment. Many people will wither inside while the system ignores "any consideration of evidence that an incarcerated person has matured, demonstrated rehabilitation, and is otherwise prepared to return to loved ones and contribute to our communities."²⁵ In order to engender humanity and equity, the New York State legislature must take action by addressing the inequities baked into the state's parole hearing process.

Recommendations

1. The New York State Legislature Must Pass Elder Parole (S.15A/A.8855A)

The passage of Elder Parole (S.15A/A.8855A) would make it such that once a person has reached the age of 55 and has served at least 15 years of their sentence or sentences in prison, this person will be eligible to go before the Parole Board.²⁶ As we note in our report:

"Aging people who are not yet eligible for parole, or people who will never be eligible in their natural life but have served decades in prison, should have an opportunity to return home and reunite with their families. Expanding access to parole must include

²¹ The New Yorker, *The Dehumanizing Theatre of the Parole Process | The New Yorker Documentary*, YOUTUBE (Nov. 17, 2021), <https://www.youtube.com/watch?v=jBbs3R7VUwg>.

²² CTR. ON RACE, INEQ., & THE L. & THE PAROLE PREPARATION PROJECT, *supra* note 2 at 11.

²³ *Id.* at 12.

²⁴ *Id.*

²⁵ *Id.* at 10.

²⁶ S. 15A, 2021-22 Leg., Reg. Sess. (N.Y. 2021).

a focus on the growing proportion of New York’s prison population, which is over the age of 55, and those who are otherwise seriously ill or infirm. Requiring parole interviews of all incarcerated people aged 55 and older where they have served at least 15 years is consistent with the very low recidivism risks posed by this demographic and presents a more fiscally responsible use of tax-payer dollars than the ongoing incarceration of the elderly. And it will incentivize good behavior by people who now have new hope of possible parole release and recognize that good behavior can help make that a reality.”²⁷

2. The New York State Legislature Must Pass Fair and Timely Parole (S.7514/A.4231)

The passage of Fair and Timely Parole (S.7514/A.4231) would make it such that the Parole Board must render a decision on release based on who the person is today, and that release should presumptively occur unless the person “presents a current and unreasonable risk or such risk cannot be mitigated by parole supervision.”²⁸ This bill gives people the chance to demonstrate transformation beyond the worst moments of their lives, and instead center the accomplishments that they have achieved over the course of their time inside. Additionally, it allows people to rejoin their communities, share knowledge and wisdom, and rebuild their families – the key ingredients to public safety. As we note in our report:

“Changing our default question from “why release?” to “why continue confinement?” is critical to ensuring the release of people who pose no risk to public safety...People are languishing in prison after decades of repeated parole denials. A person’s freedom should not be determined solely by the nature of their crime of conviction—something that no one can change. The majority of people who appear before the Board, especially those serving life sentences, pose no risk to public safety and should be released to their communities. This statutory shift will establish that norm.”²⁹

Conclusion: Parole Justice is a Necessary Step in Fighting Systemic Oppression

Marginalized communities continue to be harmed by a criminal legal system riddled with inequities throughout each phase of the process, but these same communities are responding with solutions. Parole justice is an integral part of the larger fight for racial justice, reparative justice and community safety. Facilitating our elders’ return home means more hands at the dinner table, more presents at birthday parties, more cheers at graduations, and more knowledge in our homes and communities. Parole justice means more energy put towards achieving the promises of freedom that so many have fought to receive and maintain. We believe that the Elder Parole and Fair and Timely Parole bills are steps towards a reparative future by ensuring that every person who enters the system has a meaningful opportunity for that freedom.

**This testimony is adapted from The Problem with Parole: New York State’s Failing System of Release, a joint report by The Center on Race, Inequality, and the Law and the Parole Preparation Project.*

²⁷ CTR. ON RACE, INEQ., & THE L. & THE PAROLE PREPARATION PROJECT, *supra* note 2 at 19.

²⁸ S. 7514, 2021-22 Leg., Reg. Sess. (N.Y. 2021).

²⁹ CTR. ON RACE, INEQ., & THE L. & THE PAROLE PREPARATION PROJECT, *supra* note 2 at 18-19.