

Elderly & Incarcerated in North Carolina*

This Comment examines the growing issue of elder incarceration in North Carolina's prison system, highlighting the unique challenges and dangers faced by the aging incarcerated population. Despite a decline in North Carolina's overall prison population, the number of incarcerated elders has continued to rise, exacerbating health and safety concerns due to the prison system's lack of adequate health care infrastructure. This research aims to identify the causes behind this trend in North Carolina, including failures in the now abolished parole process, the increasing number of life sentences without the possibility of parole, and restrictive standards for compassionate release. Through a four-part analysis, this Comment demonstrates that elder incarceration is both harmful and unnecessary, offering tailored solutions for North Carolina, such as reforms to parole and compassionate release procedures, as well as strategies for mitigating harm to the elderly incarcerated population. By drawing from national comparisons and emphasizing the need for a comprehensive approach, this Comment advocates for systemic changes that prioritize the safety and well-being of incarcerated elders.

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INTRODUCTION

Over the past few decades, the population of incarcerated elders in state prisons has increased both nationally¹ and within North Carolina.² Even as overall prison populations decrease year-to-year, elderly prison populations have continued to increase.³ This trend places more elders in danger. Prisons are not designed to provide ongoing medical care the same way that nursing homes and other caretaking communities are, and as a result, prisons are often inaccessible and dangerous environments for incarcerated elders.⁴

While this upward trend in elder incarceration has been monitored by the government, scholars, and prisoners' rights advocates, few have narrowed their research to specific states.⁵ This Comment seeks to address the problem of elder

1. Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y INITIATIVE (Aug. 2, 2023), <https://www.prisonpolicy.org/blog/2023/08/02/aging/> [<https://perma.cc/W967-JMMA>].

2. Frank R. Baumgartner & Sydney Johnson, *Aging in Place in the Big House: A Demographic Analysis of the North Carolina Prison Population* 10 (Oct. 11, 2020) (unpublished manuscript), <https://fbaum.unc.edu/papers/Baumgartner-Johnson-AgingInPrison-2020.pdf> [<https://perma.cc/GH5K-4KWS>] ("The number of prisoners aged 50 and older, which had never been above 1,500 before 1990, rose to almost 9,000 in 2018. Those 60 and older increased from fewer than 500 in every year before 1988 to over 3,000 in 2020; those over 70 numbered fewer than 100 in every year before 1987, but rose to 650 by 2020.").

3. Rachel Bedard, Joshua Vaughn & Angela Silletti Murolo, *Elderly, Detained, and Justice-Involved: The Most Incarcerated Generation*, 25 CUNY L. REV. 161, 162 (2022) ("Between 2009 and 2019, as the total population of individuals detained in state and federal prison systems decreased by 11.4%, the number of people over age 55 incarcerated in state and federal correctional institutions more than doubled from 75,300 to 180,836.").

4. See generally ACLU, *AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* (2012), https://assets.aclu.org/live/uploads/publications/elderlyprisonreport_20120613_1.pdf [<https://perma.cc/6VCJ-S6QG>] (explaining the injuries that incarcerated elders have suffered as a result of being in jail).

5. See generally Bedard et al., *supra* note 3 (tracking elder incarceration over multiple jurisdictions to demonstrate that it is not just an issue of long sentences, but a cycle of elders interacting with the criminal justice system); L. Beth Gaydon & Monica K. Miller, *Elders in the Justice System: How the System Treats Elders in Trials, During Imprisonment, and on Death Row*, 25 BEHAV. SCI. & L. 677 (2007).

incarceration within North Carolina's prison system, ultimately offering solutions tailored to address the dangers that North Carolina's current system poses to elders.⁶ To do so, this Comment proceeds in four parts. Part I demonstrates why elder incarceration is dangerous and inhumane, and does not further a legitimate policy purpose. Part II situates this issue nationally and discusses the shift of scholarly hypotheses over time that analyze why the elderly prison population continues to increase. Part III considers reasons why North Carolina's legal landscape has led to an increase in elder incarceration. It posits that there are three main reasons why the elder prison population continues to grow in North Carolina: (1) the North Carolina Post-Release Supervision and Parole Commission ("Parole Commission") is failing to release parole-eligible elders who—after parole was abolished in 1994—are left navigating a bureaucratic and dehumanizing parole process; (2) there is an increasingly large population of elders serving life without the possibility of parole ("LWOP") with no mechanism of release; and (3) excessively restrictive standards limit the use of compassionate release.

Finally, Part IV proposes three North-Carolina-specific solutions to address the problem of elder incarceration, considering what other states have done to address the issue. The first solution proposes substantial procedural changes to the legal systems already available in North Carolina—parole, compassionate release, and clemency—to reduce the elderly incarcerated population. The second solution considers how to reduce the inevitable harm inflicted on elderly people who are already incarcerated. The third solution discusses the importance of pursuing multiple avenues to remedy the problem of elder incarceration, including a community call to action. A brief conclusion follows, emphasizing the importance of implementing solutions from all angles to reduce the number of incarcerated elders, and to effectively address the current dangers of elder incarceration.

(showing how elders are treated throughout the justice system); U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., *THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS* (2016), <https://oig.justice.gov/reports/2015/e1505.pdf> [<https://perma.cc/ME34-M6KY>] (reporting that incarcerated people fifty and older are the fastest growing population in prisons as well as the most costly); Rita A. Augustyn, Tusty ten Bensel, Robert D. Lytle, Benjamin R. Gibbs & Lisa A. Sample, "Older" *Inmates in Prison: Considering the Tipping Point of Age and Misconduct*, 21 *CRIMINOLOGY, CRIM. JUST. L. & SOC'Y* 1 (2020) (demonstrating that incarcerated people are aging into the fifty and older category, and after forty they are shown to have significantly less institutional misconduct). None of this prior research is state-specific; alternatively, each focused on the U.S. population as a whole.

6. While there is also much to consider regarding justice-involved elders generally, this Comment focuses on elders who are currently incarcerated, not elders who are, for example, out on parole, held in jail, or who have been in and out of the prison system throughout their lives.

I. ELDER INCARCERATION IS A PROBLEM

There is no singular age that makes someone an “elder” while in prison. While the benchmark age for elder status in the United States is sixty-five,⁷ most incarcerated people are considered elderly at fifty-five years old, or even fifty years old.⁸ For example, North Carolina defines a “geriatric” incarcerated person as being fifty-five years of age or older for the purposes of medical release,⁹ but a North Carolina Department of Correction study on the aging prison population used fifty as the cutoff age for elder status.¹⁰ This inconsistency is due to the phenomenon of accelerated aging. Accelerated aging is the phenomenon that people in prison “present as 10–15 years older than their chronological age due to increased exposure to a variety of risk factors for poor health: substance use, violence, inconsistent access to medical care, and incarceration itself.”¹¹ For the sake of consistency, this Comment considers those ages fifty and older as considered “elderly” or “aging” in prison.¹²

Elder incarceration requires us to reckon with two major problems. First, prisons are unable to cater to the health needs of incarcerated elders.¹³ This results in dangerous and inhumane conditions for those currently incarcerated. Second, the practice of keeping elders incarcerated serves no legitimate policy

7. ZOE CAPLAN & MEGAN RABE, U.S. CENSUS BUREAU, THE OLDER POPULATION: 2020, at 1 (2023), <https://www2.census.gov/library/publications/decennial/2020/census-briefs/c2020br-07.pdf> [<https://perma.cc/Z68E-L4YT>].

8. See U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., *supra* note 5, at 1 (defining “aging inmates” as those age fifty and older, and “younger inmates” as those age forty-nine and younger); Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 238 (2000) (“[E]lderly for the geriatric inmate is considered to be age fifty.”). *But see* RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 9, 16 (2003) [hereinafter ADAY, AGING PRISONERS] (considering incarcerated individuals aged fifty-five and older as elderly); Brie A. Williams, James S. Goodwin, Jacques Baillargeon, Cyrus Ahalt & Louise C. Walter, *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 AM. GERIATRICS SOC’Y 1150, 1151 (2012) [hereinafter Williams et al., *Addressing the Aging Crisis*] (using the fifty-five and older benchmark).

9. N.C. GEN. STAT. § 15A-1369.3 (2023). For a discussion on recent changes to North Carolina’s Medical Release program, see *infra* Section III.C.1.

10. CHARLOTTE A. PRICE, N.C. DEP’T OF CORR., DIV. OF PRISONS, AGING INMATE POPULATION STUDY 4 (2003), <https://www.doc.state.nc.us/dop/Aging%20Study%20Report.pdf> [<https://perma.cc/WU8N-RUBT>].

11. Bedard et al., *supra* note 3, at 166. The accelerated aging phenomenon does not only apply to incarcerated elders; justice-involved adults fifty or older, those who are or have been incarcerated, on probation, and/or on parole, experience a higher prevalence of substance use disorder, other mental illnesses, and co-occurring chronic conditions. Benjamin H. Han, Brie A. Williams & Joseph J. Palamar, *Medical Multimorbidity, Mental Illness, and Substance Use Disorder Among Middle-Aged and Older Justice-Involved Adults in the USA, 2015–2018*, 36 J. GEN. INTERNAL MED. 1258, 1260–61 (2020).

12. This Comment’s use of age fifty and older to define elderly while incarcerated is consistent with other research on elder incarceration in North Carolina. See generally Baumgartner & Johnson, *supra* note 2 (considering individuals fifty years and older to be elderly when tracking increases in elderly prison populations in North Carolina).

13. ADAY, AGING PRISONERS, *supra* note 8, at 105–06.

purpose. Elder incarceration does not reduce crime rates¹⁴ and does not allow incarcerated elders a meaningful opportunity to engage in rehabilitative programs.¹⁵

A. *Medical Care, Disease Prevention, and “Prison Activities of Daily Living”*

There is a major gap between the amount of medical care that incarcerated elders require and the quality and quantity of medical care that prisons are able or willing to provide. Older incarcerated people require more health care than their nonincarcerated counterparts, both in terms of chronic physical health conditions¹⁶ and psychiatric conditions.¹⁷ This leads to an increased need for access to medication, medical appointments, and assistive devices such as wheelchairs, walkers, and canes. Despite this high need for medical care, and despite the constitutional right to basic health care for incarcerated people,¹⁸ prisons often cannot provide incarcerated elders with the care that they require due to staff shortages, cost barriers, and lack of staff training on geriatric needs.¹⁹ For example, Cassie Johnson—a seventy-four-year-old woman incarcerated in North Carolina—is caged in an assisted living unit with other people who are incarcerated with disabilities and medical needs.²⁰ According to Cassie, the prison staff does not help take care of this population unless there is a medical emergency.²¹ She says: “if it weren’t for inmates helping each other, we would be at a loss.”²²

Many state prisons even implement barriers to care. For example, prison guards have been known to deny access to assistive devices to incarcerated people who need them because some guards perceive canes, wheelchairs,

14. Sarah Rakes, Stephanie Grace Prost & Stephen J. Tripodi, *Recidivism Among Older Adults: Correlates of Prison Re-entry*, JUST. POL’Y J., Spring 2018, at 1, 9.

15. U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., *supra* note 5, at 30–31.

16. Williams et al., *Addressing the Aging Crisis*, *supra* note 8, at 1151 (“[R]esearch shows that incarcerated individuals aged 50 and older are significantly more likely to have one or more chronic health conditions or disability than their community-dwelling counterparts.” (citing I.A. Binswanger, P.M. Krueger & J.F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the USA Compared with the General Population*, 63 J. EPIDEMIOLOGY & CMTY. HEALTH 912, 912–19 (2009))).

17. ADAY, AGING PRISONERS, *supra* note 8, at 102–03.

18. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (establishing that to prevail on a constitutional claim of inadequate medical care, prisoners must show that prison officials treated them with “deliberate indifference to serious medical needs”).

19. While there has been less extensive research into the adequacy of elder health care in specific states, in 2016, the Federal Bureau of Prisons found that its institutions “lack[ed] appropriate staffing levels to address the needs of an aging inmate population” and lacked the physical infrastructure to “adequately house aging inmates.” U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., *supra* note 5, at i–ii.

20. See Interview with Cassie Johnson, in North Carolina Correctional Institute for Women (Feb. 2, 2025) (on file with author) [hereinafter Johnson Interview Feb. 2025]. See generally *infra* Appendix.

21. Johnson Interview Feb. 2025, *supra* note 20.

22. *Id.*

walkers, and other assistive devices as weapons.²³ Additionally, many states charge incarcerated people between two and eight dollars to see a doctor.²⁴ North Carolina state prisons currently charge five dollars for “offender initiated” medical and dental services, and seven dollars for “offender initiated emergency visit[s].”²⁵ This seemingly minimal cost barrier is significant for those who are unable able to work a job while incarcerated, a barrier disproportionately borne by elders whose age-related health complications render them unable to work.²⁶

With the elder prison population increasing, the health care that prisons do provide responds mainly to acute emergencies rather than focusing on the

23. Kimberly A. Skarupski, Alden Gross, Jennifer A. Schrack, Jennifer A. Deal & Gabriel B. Eber, *The Health of America's Aging Prison Population*, 40 EPIDEMIOLOGIC REVS. 157, 161 (2018); see also, e.g., Bane v. Va. Dep't of Corr., No. 7:12-CV-159, 2012 WL 6738274, at *1 (W.D. Va. Dec. 28, 2012) (considering whether a prison violated an incarcerated person's Eighth Amendment rights and the Americans with Disabilities Act after the prison took away the incarcerated person's leg brace sleeves and crutch, and refused to give him a wheel chair while he was in solitary confinement); Johnson v. Snyder, 444 F.3d 579, 582 (7th Cir. 2006), *overruled on other grounds by* Hill v. Tangherlini, 724 F.3d 965 (7th Cir. 2013) (permitting an amputee and incarcerated person to use a crutch, but only if he agreed to be caged in solitary confinement “since a crutch could be wielded as a weapon”).

24. Michelle Pitcher, *Should Prisoners Have to Pay for Medical Care During a Pandemic?*, MARSHALL PROJECT (Nov. 2, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/11/02/should-prisoners-have-to-pay-for-medical-care-during-a-pandemic> [https://perma.cc/Q23M-QFZW] (“[O]fficials say they want to discourage prisoners from abusing the medical system or stretching staff too thin.”); *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html#copays> [https://perma.cc/4SQ5-5NXZ] (last updated Feb. 3, 2022); Rachel Crumpler, *Copays Pose a Barrier for Incarcerated People Seeking Medical Care*, NC HEALTH NEWS, <https://www.northcarolinahealthnews.org/2024/09/17/prison-copays-pose-barrier-for-incarcerated-people-seeking-medical-care/> [https://perma.cc/44YA-5AZG] (last updated Sept. 17, 2024).

25. N.C. DEP’T OF ADULT CORR., CHAPTER S, § .1300, OFFENDER CO-PAY POLICY, at III.G.1. (Oct. 24, 2023), <https://public.powerdms.com/NCDAC/tree/documents/2349207> [https://perma.cc/5U6X-3G34] [hereinafter N.C. DEP’T OF ADULT CORR., OFFENDER CO-PAY POLICY]. Incarcerated people who declare an emergency “accrue no copay if they are screened and determined to have a true emergency, deemed as potential of life or limb threatening or that requires immediate medical treatment.” *Id.*

26. Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL’Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [https://perma.cc/A9G7-X2GS]. And even if elders can work while incarcerated, the amount of money that they receive for their work is completely inadequate to cover medical costs. By law, in North Carolina, incarcerated people assigned to full-time jobs cannot make more than \$1.00 per day, unless the “Secretary determines that the work assignment requires special skill or training and then may be paid up to \$5.00 per day.” N.C. DEP’T OF ADULT CORR., CHAPTER E, § .3100, OFFENDER ASSIGNMENT POLICY, at III.G (Jan. 14, 2025), <https://public.powerdms.com/NCDAC/tree/documents/2422734> [https://perma.cc/K897-KH7E]. This means that most elders who are incarcerated need to work for five days in order to afford a single “offender initiated health care” intervention and seven days to afford one “offender initiated emergency visit[.]” See *id.*; N.C. DEP’T OF ADULT CORR., OFFENDER CO-PAY POLICY, at III.G.1.

needed preventative measures or long-term treatments.²⁷ As a result, elders who are incarcerated receive lower-quality health care than their nonincarcerated counterparts.²⁸ Unsurprisingly, incarcerated elders express dissatisfaction with the medical care that they fail to receive.²⁹

The COVID-19 pandemic further illuminated the health hazard that prisons pose to incarcerated elders. Due to overcrowding, a reliance on shared spaces, and old physical infrastructure, such as narrow hallways, prisons became one of the most dangerous spaces during the pandemic.³⁰ Prisons reported an infection rate among incarcerated individuals that was five times greater than the infection rate among the general population.³¹ As a result, public health agencies strongly recommended the immediate release of incarcerated elders, but only ten percent of those eligible were actually released.³² Meanwhile, deaths in prison rose by seventy-seven percent in 2020 relative to 2019,³³ with the largest increase in mortality occurring among those ages fifty and higher.³⁴ The COVID-19 pandemic is a grim example of how a lack of disease prevention in prisons leads to higher death rates of incarcerated elders.

Finally, due to mobility issues associated with aging, even incarcerated elders who are not suffering from illness are often unable to perform what some

27. Press Release, Leah Wang, Prison Pol'y Initiative, Chronic Punishment: The Unmet Health Needs of People in State Prisons (June 2022), <https://www.prisonpolicy.org/reports/chronicpunishment.html> [<https://perma.cc/SCQ6-UHRX>].

28. Melissa Garrido & Austin B. Frakt, *Challenges of Aging Population Are Intensified in Prison*, JAMA HEALTH F., Feb. 2020, at 1, 1 (“[O]lder inmates receive inadequate health care and symptom management. . . . Limited access to clinicians with geriatric expertise means that diagnoses may be missed. Dental health needs, including the need for dentures, may be overlooked, leading to pain and inadequate nutrition. Institutional menus are counterproductive to the management of diabetes and obesity. Other gaps in care arise from suspicion of [incarcerated peoples'] motives or attitudes. Pain medication may be restricted due to concerns that pills will be misused. Unusual behavior that occurs with dementia may be misconstrued as deliberate belligerence.”); *see also, e.g.*, Lisa B. Puglisi & Emily A. Wang, *Health Care for People Who Are Incarcerated*, NATURE REV. DISEASE PRIMERS, July 8, 2021, at 1, 1 (“[E]vidence shows that both screening-detectable and non-screening-detectable cancers are diagnosed at more advanced stages in incarcerated individuals than in the general population, and that distance to treatment centers and cost of cancer care provide substantial challenges to providing guideline-concurrent care.”).

29. ADAY, AGING PRISONERS, *supra* note 8, at 104; Lindsey A. Vandergrift & Paul P. Christopher, *Do Prisoners Trust the Healthcare System?*, HEALTH & JUST., July 3, 2021, at 1, 3 (“In this first known study evaluating healthcare distrust among an incarcerated population, a moderate positive association was found between age and overall distrust.”).

30. Raya E. Kheirbek & Brock A. Beamer, *Incarcerated Older Adults in the Coronavirus Disease 2019 Era: A Call for Advancing Health and Human Dignity*, 32 PUB. POL'Y AGING REP. 149, 150 (2022).

31. *Id.*

32. *Id.* at 151.

33. Naomi F. Sugie, Kristin Turney, Keramet Reiter, Rebecca Tublitz, Daniela Kaiser, Rebecca Goodsell, Erin Secrist, Ankita Patil & Monik Jiménez, *Excess Mortality in U.S. Prisons During the COVID-19 Pandemic*, SCI. ADVANCES, Dec. 1, 2013, at 1, 7 (“This mortality increase is strikingly higher than the 23% increase in mortality among the general population.”).

34. *Id.* (“[T]he largest increases in mortality occurred among those ages 50 to 64 years (65% increase relative to 2019) and 65 years and older (58% increase relative to 2019).”).

call “prison activities of daily living” (“PADL”).³⁵ PADL include hearing orders from staff, dropping to the floor for alarms, standing for count, walking while handcuffed, and climbing onto top bunks.³⁶ As another example, Cassie Johnson and Timothy Tann—a seventy-year-old man incarcerated in North Carolina—are both unable to attend church while incarcerated.³⁷ For Cassie, who is in a wheelchair and on oxygen, the journey from her cell to church is too far and she cannot find any staff member willing to push her wheelchair that distance.³⁸ Timothy uses a walker and is unable to get in and out of the church bathroom.³⁹

Being unable to perform PADL can lead to adverse outcomes. For example, those who cannot perform PADL risk receiving infractions for failing to obey correctional officers.⁴⁰ Some elders who cannot perform PADL even report missing meals due to being unable to get to the dining hall in time.⁴¹ And elders who cannot perform PADL are often unable to work, stripping them of the only way to earn income while incarcerated.⁴²

35. Skarupski et al., *supra* note 23, at 161; *see also* ASHLEY NELLIS, SENT’G PROJECT, NOTHING BUT TIME: ELDERLY AMERICANS SERVING LIFE WITHOUT PAROLE 2, 9 (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Nothing-But-Time-Elderly-Americans-Serving-Life-Without-Parole.pdf> [<https://perma.cc/4QNN-ZHTU>] [hereinafter NELLIS, NOTHING BUT TIME].

36. Skarupski et al., *supra* note 23, at 161.

37. *See* Interview with Cassie Johnson, in North Carolina Correctional Institute for Women (June 29, 2023) (on file with author) [hereinafter Johnson Interview June 2023]; Interview with Timothy Tann, in Southern Correctional Institute (Mar. 3, 2025) (on file with author) [hereinafter Tann Interview Mar. 2025]. *See generally infra* Appendix.

38. *See* Johnson Interview June 2023, *supra* note 37.

39. *See* Tann Interview Mar. 2025, *supra* note 37.

40. N.C. DEP’T OF ADULT CORR., DISCIPLINARY OFFENSES HANDOUT 2 (2014), <https://www.dac.nc.gov/documents/files/disciplinary-offenses-handout/open> [<https://perma.cc/6UKJ-ZYNR>] (listing the failure to obey any lawful order of a prison official as a Class C disciplinary offense).

41. Brie A. Williams, Karla Lindquist, Rebecca L. Sudore, Heidi M. Strupp, Donna J. Willmott & Louise C. Walter, *Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners*, 54 J. AM. GERIATRIC SOC’Y 1, 4 (2006) (“An elderly wheelchair-bound inmate with a history of stroke explained that she often missed meals, because, without someone to help her, she could not get to the dining hall on time.”). Timothy Tann—a seventy-year-old man incarcerated in North Carolina—is unable to eat pork due to his elevated blood pressure levels. *See* Tann Interview Mar. 2025, *supra* note 37. When Southern Correctional Institute serves pork as a meal, they do not provide an alternative and Timothy is forced to skip his meal. *Id.* Timothy said that this happens about three times a week. *Id.* *See generally infra* Appendix.

42. In North Carolina, all “able-bodied” incarcerated people are required to work. N.C. GEN. STAT. § 148-26(a) (2023). Much of the work available to North Carolina’s incarcerated population—including forestry work, construction, farming, road maintenance, and janitorial services—requires manual labor. *Id.* § 148-26; TODD ISHEE, N.C. DEP’T OF ADULT CORR., ADMIN. ANALYSIS UNIT, ANNUAL STATISTICAL REPORT: FISCAL YEAR 2021-2022, at 15–16 tbls.I.6 & I.7 (2023), <https://www.dac.nc.gov/fy-2021-2022-annual-statistical-reports/open> [<https://perma.cc/LEX2-GEB2>].

B. *Elder Incarceration Serves No Legitimate Purpose*

Given all the dangers that elders face while in prison, it is natural to wonder why elders are incarcerated at all. Historically, lawyers and scholars have used two main theories of punishment to justify the carceral system in the United States: retributive theory and utilitarian theory.⁴³ Retributive theory generally embodies the idea that individuals who commit crimes morally deserve to be punished and must be punished in a manner that is proportional to the crime they committed.⁴⁴ Utilitarian theory encompasses concepts like deterrence, rehabilitation, and incapacitation, which focus on providing only as much punishment to the individual as is necessary to protect society from experiencing harm in the future.⁴⁵

Within these frameworks, there are two different types of deterrence that scholars highlight: general deterrence and specific deterrence.⁴⁶ General deterrence is the idea that the threat of incarceration will deter the general public from committing crimes.⁴⁷ Specific deterrence is the idea that incarceration will deter the specific individual who experienced incarceration from committing crimes in the future.⁴⁸

Applying these traditional theories of punishment,⁴⁹ elder incarceration serves no purpose. The utilitarian perspective breaks down when we consider that the likelihood of recidivism significantly decreases with age.⁵⁰ Simply put,

43. Joel Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 595, 595 (1968).

44. *Id.* at 595–96.

45. Jacob Bronshter, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 237–38 (2021).

46. Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 6 (2017).

47. *Id.*

48. *Id.*

49. Many scholars have argued that the traditional theories of punishment no longer serve a legitimate purpose given the inhumanity surrounding prisons generally and the epidemic of overincarceration. *See, e.g.*, Bronshter, *supra* note 45, at 237–38; *see also* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 60–61.

50. Rakes et al., *supra* note 14, at 9 (finding that adults aged forty-five and older are less likely to recidivate relative to their younger peers); Duzbayeva Saltanat Bekbolatkyzy, Dzhansarayeva Rima Yerenatovna, Yergali Adlet Maratuly, Atakhanova Gulzagira Makhatovna & Kevin M. Beaver, *Aging Out of Adolescent Delinquency: Results from a Longitudinal Sample of Youth and Young Adults*, 60 J. CRIM. JUST. 108, 109 (2019) (describing the “age-crime curve,” which reflects a finding that criminal involvement starts around twelve years old, peaks around nineteen, and declines thereafter). *But see* James V. Ray & Shayne Jones, *Aging Out of Crime and Personality Development: A Review of the Research Examining the Role of Impulsiveness on Offending in Middle and Late Adulthood*, 16 PSYCH. RSCH. & BEHAV. MGMT. 1587, 1590 (2023) (highlighting a gap in research regarding people who commit crimes in middle and late adulthood).

elders rarely commit crimes,⁵¹ so keeping elders in prison does very little to ensure public safety. In fact, keeping elders incarcerated may *increase* danger to the nonincarcerated public. Maintaining a large elderly prison population increasingly exposes incarcerated elders to dangerous conditions and disease, resulting in increased health care costs going toward incarcerated elders⁵² and less money to delegate to nonincarcerated elders. This is only exacerbated by incarcerated elders being ineligible to receive Medicaid or Medicare benefits, meaning that their health care costs almost always come out of state correctional budgets⁵³ and general state budgets.⁵⁴ Incarcerating elders is more expensive than incarcerating the younger population,⁵⁵ with annual health care costs of incarcerated elders in North Carolina being *four times higher* than the health care costs of those younger than fifty years old and incarcerated in North Carolina.⁵⁶ If fewer elders were incarcerated, these funds could be reallocated to support public health and safety goals inside and outside of prisons.

Additionally, the utilitarian theory that incarceration serves to rehabilitate incarcerated individuals does not apply to incarcerated elders. Many elders are unable to meaningfully participate in rehabilitation programs. A 2013 study discussing elder incarceration within federal prisons found that federal prisons do not provide programming specifically designed to address the needs of incarcerated elders.⁵⁷ Most programs in both state and federal prisons focus on

51. Yes, of course, there are one-off instances of elders committing violent crimes. *See, e.g.*, Adeel Hassan, *A Murderer Deemed Too Old for Violence Was Just Convicted of Another Killing*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/us/albert-flick-convicted-kimberly-dobbie-murder-maine.html> [<https://perma.cc/PF3W-ZZFA> (staff-uploaded, dark archive)]. But studies show that this is exceedingly rare, *see* Rakes et al., *supra* note 14, at 9, and because it is so rare, the media tends to improperly sensationalize crimes committed by elders, *see* Adam H. Johnson, *Sensationalist Tale of an Elderly Killer Feeds False Narrative*, APPEAL (Aug. 9, 2019), <https://theappeal.org/elderly-killer-feeds-false-narrative-new-york-times/> [<https://perma.cc/QG94-NF7R>] (criticizing *The New York Times* for failing to acknowledge that violent crimes committed by elders are “exceedingly rare”).

52. Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW CHARITABLE TR. (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs> [<https://perma.cc/PMM2-HV2D>].

53. TINA CHIU, VERA INST. JUST., *IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 5* (2010), <https://www.vera.org/downloads/publications/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf> [<https://perma.cc/GQ6K-9Y33>].

54. Studies show that the actual costs of keeping prisons running tend to be higher than what states allocate in their corrections budgets. ACLU, *supra* note 4, at 26–27. When costs exceed the correctional budget, states are forced to tap into other areas of the state budget that are not dedicated to funding incarceration, such as “central administrative funds.” *Id.* at 27.

55. *Id.* at 28.

56. *Id.* Also, in 2013, the Federal Bureau of Prisons estimated that it spent nineteen percent of its total budget (about \$881 million) to incarcerate aging adults. U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., *supra* note 5, at i.

57. U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., *supra* note 5, at 30–31.

pre-release, furthering education, and preparing for future employment.⁵⁸ Pre-release programs do not focus on unique elder issues, such as how to navigate life without employment or how to reintegrate into a community without family support. Similarly, employment-based programs teaching trade skills are often inaccessible to those with physical limitations, which elders are disproportionately likely to experience. This leaves incarcerated elders with furthering education programs and other programming that does not require manual labor. But even when there are programs in which elders can participate, some are incarcerated for so long that they have already completed all the available programs.⁵⁹

Finally, the older incarcerated elders get, the more likely they are to experience cognitive decline, causing the goal of specific deterrence to break down. The prevalence of diseases affecting memory, such as Alzheimer's disease and other types of dementia, is a real concern among the elderly prison population.⁶⁰ Specific deterrence is an impossible task if the elders who are incarcerated do not even remember why they are being punished in prison in the first place.⁶¹

With the rationales of rehabilitation and specific deterrence becoming less applicable as incarcerated people age, general deterrence and retributive principles are left as the driving forces justifying elder incarceration. For general deterrence to work, the public must have some awareness of the

58. See *DAC System-Wide Programs Offered*, N.C. DEP'T ADULT CORR., <https://www.dac.nc.gov/documents/dac-system-wide-programs-offered-2022> [https://perma.cc/GMK3-QSEA (staff-uploaded archive)] (last updated Dec. 20, 2022) (listing the sixty-four North Carolina Department of Adult Correction system-wide programs offered in 2022, about fifty-five of which are geared towards further education and employment opportunities).

59. Cassie Johnson—a seventy-four-year-old woman incarcerated in North Carolina—has completed nearly every program available to her while in prison, some even two or three times over. See Johnson Interview Feb. 2025, *supra* note 20. While incarcerated, Cassie received her associate's degree in business management and trained in cosmetology. See Johnson Interview June 2023, *supra* note 37. However, Cassie no longer has the bandwidth to participate in educational programming and feels that there are no other programs available to her. *Id.* See generally *infra* Appendix.

60. Sara Novak, *Dementia in Prison Is Turning into an Epidemic: The U.S. Penal System Is Badly Unprepared*, SCI. AM. (Sept. 27, 2022), <https://www.scientificamerican.com/article/dementia-in-prison-is-turning-into-an-epidemic-the-u-s-penal-system-is-badly-unprepared/> [https://perma.cc/5E6E-TXXA] (discussing an incarcerated person who was so debilitated with dementia that he could no longer complete the paperwork necessary to apply for parole); Katie Engelhart, *I've Reported on Dementia for Years, and One Image of a Prisoner Keeps Haunting Me*, N.Y. TIMES (Aug. 11, 2023), <https://www.nytimes.com/2023/08/11/opinion/dementia-prisons.html> [https://perma.cc/GL6M-K28F (staff-uploaded, dark archive)] (discussing a federal Memory Disorder Unit built for incarcerated people with Alzheimer's disease and other forms of dementia).

61. Engelhart, *supra* note 60 ("I asked [two incarcerated elders with dementia] if they knew where they were. 'This is a prison,' Mr. Orena said, brightly. 'Why are you here?' I asked. 'I don't remember,' he frowned. 'I don't know.'").

punishment that others face.⁶² For example, person A cannot be deterred by person B's incarceration if person A is not aware of person B's incarceration. But incarcerated elders are less likely to serve as a general deterrence to others because they are so often forgotten. Incarcerated elders are forgotten and neglected by correctional officers,⁶³ they are not adequately represented in data,⁶⁴ they are ignored when they desperately reach out for help,⁶⁵ and they are left behind as their family members—oftentimes their only remaining advocates—pass away.⁶⁶ At what point does keeping an elder in prison stop being a deterrent to those on the outside, and instead become a forgotten story incapable of deterrence?⁶⁷

Finally, elder incarceration undermines retributivism.⁶⁸ Retributivism focuses on the individual and argues that the person who committed the crime deserves to be punished for their wrongdoing.⁶⁹ But the harm of incarceration spreads far beyond the individual who was incarcerated, negatively impacting entire families and communities.⁷⁰ And all the difficulties of caretaking for an

62. See U.S. DEP'T OF JUST., NAT'L INST. OF JUS., NCJ 247350, FIVE THINGS ABOUT DETERRENCE (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/7GJZ-QMA3>] (“Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes.”).

63. Frank Porporino, *Old and Forgotten Behind Bars: Facing the Crisis of the Elderly in Prisons*, JUST. TRENDS (July 27, 2018), <https://justice-trends.press/old-and-forgotten-behind-bars-facing-the-crisis-of-the-elderly-in-prisons/> [<https://perma.cc/Y9FM-LCSP>].

64. Williams et al., *Addressing the Aging Crisis*, *supra* note 8, at 1155 (“Knowledge about the health of older prisoners is limited, and even less is known about risk factors for poor health outcomes in prison.”).

65. For example, Richard Washington—a sixty-four-year-old incarcerated elder in Arizona—died on January 31, 2019, of health complications just six weeks after he filed a court document outlining his lack of treatment for multiple medical conditions. Steven Hsieh, *Arizona Prisoner Dies After Writing ‘I Am Being Killed’ in Court Document*, PHX. NEW TIMES (Feb. 7, 2019), <https://www.phoenixnewtimes.com/news/arizona-prisoner-dies-after-writing-being-killed-in-court-document-11200551> [<https://perma.cc/HD4W-8X2N>]. Washington warned the court: “Notice I am being killed.” *Id.* This is not a rare occurrence. See, e.g., *id.* (noting that another incarcerated person filed a “Notice of Impending Death” just days before dying from mistreated cancer).

66. Timothy Tann has been in prison for forty-four years. See Tann Interview Mar. 2025, *supra* note 37. Since Timothy was incarcerated, he has lost most of his family members, including five siblings and both parents. *Id.* Timothy does not feel like he has anyone inside or outside of prison who is supporting him and, if released, would have nowhere to live. *Id.* See generally *infra* Appendix.

67. See Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex in the USA*, 12 LOLA PRESS: INT’L FEMINIST MAG. 1, 2 (2000) (“But prisons do not disappear problems, they disappear human beings.”).

68. Getting into the weeds of retributive theory is beyond the scope of this Comment. For a comprehensive and detailed argument against retributivism, see generally GREGG CARUSO, *REJECTING RETRIBUTIVISM: FREE WILL, PUNISHMENT, AND CRIMINAL JUSTICE* (2021).

69. Meyer, *supra* note 43, at 595–96.

70. See Elizabeth J. Gifford, *How Incarceration Affects the Health of Communities and Families*, 80 N.C. MED. J. 372, 372 (2019) (discussing the negative health consequences for family and household

elderly family member become amplified when that family member is incarcerated.⁷¹ Elder incarceration does not only punish the individual who committed the crime; it punishes their family members and loved ones as well.

This section has demonstrated, at a minimum, that as people become older while serving sentences that are decades—even lifelong—in length, the policy considerations historically deployed to justify the carceral system deteriorate.

II. ELDER INCARCERATION AS A NATIONAL ISSUE

The elderly prison population has been increasing for decades.⁷² This increase does not reflect the rise of the U.S. median age over time.⁷³ Instead, the elderly prison population has been climbing “at a significantly more rapid rate than that of the overall U.S. population.”⁷⁴ Over time, scholars have developed a range of hypotheses to try to understand why the elderly prison population is increasing so quickly.⁷⁵

In the late twentieth and early twenty-first centuries, scholars hypothesized that the increase in the elder prison population was due to three variables: (1) an increase in elders committing violent crimes;⁷⁶ (2) an increase in the elderly population in the United States as a whole;⁷⁷ and (3) “tough-on-crime” legislation, such as the three-strikes and habitual-offender laws.⁷⁸ Over

members of incarcerated people); Leah Wang, *Both Sides of the Bars: How Mass Incarceration Punishes Families*, PRISON POL’Y INITIATIVE (Aug. 11, 2022), https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/ [<https://perma.cc/R7GP-P5VG>] (“Millions of families and minor children throughout the country are punished emotionally, economically, and otherwise by a loved one’s incarceration.”).

71. Cassie Johnson has three children, two of which monitor her health and wellbeing while she is incarcerated. See Johnson Interview Feb. 2025, *supra* note 20. As Cassie has grown older in prison, she has had to start using a wheelchair and is on oxygen due to breathing difficulties. *Id.* Cassie’s children have advocated for Cassie to get the medical care that she needs. *Id.* See generally *infra* Appendix.

72. In 1991, an estimated 3.4% of the total prison population was aged fifty-five or older. See Widra, *supra* note 1. By 2021, the total prison population aged fifty-five or older rose to an estimated 15.3%. *Id.*

73. *Id.*

74. Williams et al., *Addressing the Aging Crisis*, *supra* note 8, at 1150.

75. See *id.* at 1551; see also Curran, *supra* note 8, at 240–44; Gaydon & Miller, *supra* note 5, at 686; Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release for Elderly Inmates*, 43 STETSON L. REV. 197, 200–01 (2013); Bedard et al., *supra* note 3, at 166.

76. See Ann Goetting, *The Elderly in Prison: Issues and Perspectives*, 20 J. RSCH. CRIME & DELINQ. 291, 292 (1983) (“[I]t also seems to be true that when compared with the general prison population, elderly inmates are more likely to be incarcerated for violence.”).

77. Zoe Caplan, *2020 Census: 1 in 6 People in the United States Were 65 and Over*, U.S. CENSUS BUREAU (May 25, 2023), <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html> [<https://perma.cc/DKB5-22DW>].

78. See Curran, *supra* note 8, at 240–44 (arguing that the increase in elder incarceration is due to increased violent crime perpetuated by elders, an aging U.S. population, and three-strikes laws).

time, the former two hypotheses have been debunked.⁷⁹ Elders are *not* more likely to commit violent crimes due to “common mental and physical reactions to the aging process.”⁸⁰ In fact, the likelihood of committing all crimes decreases as people age.⁸¹

“Tough-on-crime” legislation, as a major cause of increased elder incarceration, remains a leading hypothesis since the 1970s.⁸² More specifically, scholars attribute the aging prison population to the implementation of mandatory minimums and the higher number of life sentences that arose during the Reagan administration through the Comprehensive Crime Control Act of 1984⁸³ and the Violent Crime Control and Law Enforcement Act of 1994.⁸⁴ The idea is that as individuals are punished with longer sentences, those individuals will remain incarcerated longer, will get older, and will eventually become elderly.⁸⁵ As the impact of longer sentencing became clearer, scholars shifted their focus from why more elders became incarcerated in the first place to why more elders were not getting released from prison, considering issues like the inadequacy of parole⁸⁶ and the lack of compassionate release.⁸⁷

Most recently, a group of scholars across disciplines combined past hypotheses—including the “tough-on-crime” policies of the late twentieth century and the inadequacy of prison release mechanisms—into a single

79. *Id.* (debunking the hypothesis that the elderly prison population is rising due to a rise in elders committing crimes); Widra, *supra* note 1 (debunking the hypothesis that elderly prison populations increase because the overall population increases).

80. Curran, *supra* note 8, at 241.

81. See *supra* notes 50–51 and accompanying text; see also Emily Bloomenthal, *The Older You Get: Why Incarcerating the Elderly Makes Us Less Safe*, MEDIUM (Apr. 19, 2022), <https://medium.com/famm/the-older-you-get-why-incarcerating-the-elderly-makes-us-less-safe-ce8cd0a9801> [<https://perma.cc/A2HY-QTLV>]; Dana Goldstein, *Too Old to Commit Crime?*, MARSHALL PROJECT (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> [<https://perma.cc/9NFA-2JBA>].

82. Gaydon & Miller, *supra* note 5, at 686 (identifying mandatory sentencing and three-strike laws as the main reasons for the older prison population); see also Williams et al., *Addressing the Aging Crisis*, *supra* note 8, at 1151 (“This population increase has been attributed to many factors, including mandatory minimum sentencing laws, more older adult arrests, reintroduction of indeterminate and life sentences, and third-strike legislation.”).

83. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

84. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 2, 15, 16, 18, 21, and 34 U.S.C.); see also Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs> [<https://perma.cc/A8KE-QDRK>].

85. See Ferri, *supra* note 75, at 201 (“In other words, the pileup of elderly inmates originates when prisons take in more long-term inmates than they release.”).

86. Matthew Clarke, *Aging Prison Population Finds Parole Elusive*, PRISON LEGAL NEWS (Jan. 8, 2019), <https://www.prisonlegalnews.org/news/2019/jan/8/aging-prison-population-finds-parole-elusive/> [<https://perma.cc/C4N7-BSWW>].

87. Ferri, *supra* note 75, at 201. For a discussion of parole and compassionate release, see *infra* Part III.

hypothesis: the “Most Incarcerated Generation.”⁸⁸ According to Rachael Bedard, Joshua Vaughn, and Angela Silletti Murolo, the Most Incarcerated Generation includes the group of people growing up when “tough-on-crime” legislation was initially passed, and who, as a result, “collectively experienced disproportionate contact with law enforcement” and “were disproportionately vulnerable to arrest.”⁸⁹ This generation was also given longer sentences, experienced increased use of solitary confinement, and faced increasing obstacles to obtaining parole and other forms of release.⁹⁰ This hypothesis further suggests that when individuals of the Most Incarcerated Generation receive relief and are released from prison, they are under constant surveillance through the use of parole supervision and mandated programming and reporting.⁹¹ Constant surveillance then results in re-incarceration, which restarts the cycle all over again and eventually leads to a “decades-long history of justice-involvement.”⁹²

The Most Incarcerated Generation hypothesis encompasses a nationwide generation of justice-involved individuals, offering an explanation as to why the elderly prison population has been increasing nationwide. Part III of this Comment narrows its scope and develops a hypothesis as to why the elderly prison population has been increasing in North Carolina. To do so, it focuses on those who grew up as a part of the Most Incarcerated Generation in North Carolina and who are currently incarcerated in North Carolina’s prisons. These North Carolina residents face additional hurdles due to North Carolina’s 1994 Structured Sentencing reforms⁹³ and the harsh nature of North Carolina’s compassionate and medical release statutes.⁹⁴

III. WHY ARE SO MANY ELDERS INCARCERATED IN NORTH CAROLINA?

The total prison population in North Carolina reached its peak in 2009, when North Carolina’s prisons contained about 41,000 people.⁹⁵ Since then, the total prison population in North Carolina has fluctuated but generally declined, hovering around 30,000 people from 2021 to 2023.⁹⁶ Despite this relative decline in total prison population, the population of people who are fifty years old or older incarcerated in North Carolina’s prisons continues to climb.⁹⁷ Even where there was a significant drop in North Carolina’s total prison population

88. Bedard et al., *supra* note 3, at 164.

89. *Id.* at 173.

90. *Id.*

91. *Id.* at 174.

92. *Id.* at 175.

93. See *infra* Sections III.A, III.B.

94. See *infra* Section III.C.

95. See *infra* Table 1.

96. See *infra* Table 1.

97. See *infra* Table 1.

from 2019 to 2020, the percentage of incarcerated elders increased from 22.1% of the total prison population in 2019 to 24.1% of the total prison population in 2020.⁹⁸ The following table and figure display the increase in the number of incarcerated elders in North Carolina, even while the total prison population in North Carolina decreases.

Table 1: North Carolina Prison Population over Time⁹⁹

	Total Population in North Carolina	Total Prison Population in North Carolina (as of June 30 of Each Year)	Total Prison Population of Incarcerated Elders (Ages 50+) in North Carolina	Percentage of Total Prison Population Made Up by Incarcerated Elders in North Carolina
2009	9.4 million	40,824	5,024	12.3%
2010	9.5 million	40,102	5,265	13.1%
2011	9.6 million	41,030	5,872	14.3%
2012	9.7 million	38,385	6,030	15.7%
2013	9.8 million	37,469	6,319	16.9%
2014	9.9 million	37,665	6,804	18.1%
2015	10 million	37,794	7,180	19.0%
2016	10.1 million	37,440	7,385	19.7%
2017	10.2 million	37,487	7,589	20.2%
2018	10.3 million	37,104	7,807	21.0%

98. *Id.*

99. The estimate of the total population in North Carolina was retrieved from a database known as Federal Reserve Economic Data ("FRED"). *Resident Population in North Carolina (NCPOP)*, FRED, <https://fred.stlouisfed.org/series/NCPOP> [<https://perma.cc/EL3S-ZH5N>] (last updated Dec. 23, 2024, 2:51 PM). The approximate yearly total prison population in North Carolina as of June 30 of each year was retrieved through the North Carolina Department of Adult Correction's website. *NCDAC Administrative Analysis*, N.C. DEP'T ADULT CORR., <https://webapps.doc.state.nc.us/apps/asqExt/ASQ> [<https://perma.cc/3S5V-YRDU>]. The approximate prison population by age was retrieved from the same database. *Id.* Finally, the percentage of incarcerated elders in North Carolina by year was calculated by the author.

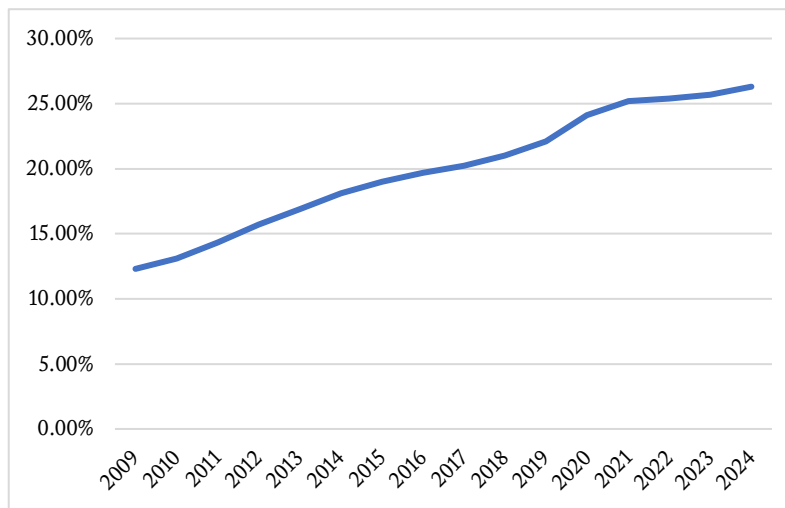
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2019	10.5 million	36,053	7,976	22.1%
2020	10.4 million	31,929	7,699	24.1%
2021	10.5 million	29,415	7,404	25.2%
2022	10.6 million	30,504	7,761	25.4%
2023	10.8 million	31,197	8,015	25.7%
2024	TBD	31,921	8,391	26.3%

Figure 1. Percentage of Elder Prison Population in North Carolina
Growing from 2009 to 2024



There are three main reasons why the elderly prison population continues to grow in North Carolina, each of which are discussed in turn: (1) the North Carolina Post-Release Supervision and Parole Commission (“Parole Commission”) is failing to release parole-eligible elders who—after parole was abolished in 1994—are left navigating a bureaucratic and dehumanizing parole process; (2) there is an increasingly large population of elders serving LWOP with no mechanism of release; and (3) excessively restrictive standards limit the use of compassionate release.

A. *The Effects of Abolishing Parole*

1. From Fair to Structured Sentencing, and Those Stuck In-Between

There are two types of parole: mandatory and discretionary.¹⁰⁰ Under a discretionary parole system, an incarcerated person becomes eligible for parole consideration on a specific date.¹⁰¹ Once the person is eligible, a parole commission will review the person's case and will decide if (and when) the person will be released on parole.¹⁰² Mandatory parole takes away that discretion from the parole commission and automatically releases incarcerated people who meet certain legal conditions.¹⁰³ North Carolina is one of seventeen states to have abolished parole altogether.¹⁰⁴

In 1993, the North Carolina General Assembly passed the Structured Sentencing Act ("SSA"),¹⁰⁵ abolishing parole and replacing it with a post-release supervision system.¹⁰⁶ Under the SSA, those sentenced for felony convictions who have completed one hundred percent of their minimum sentence and at least eighty-five percent of their maximum sentence¹⁰⁷ are automatically

100. See Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/42VA-D6PX>].

101. *Id.*

102. *Id.*

103. *Id.*

104. The following states have abolished discretionary parole: Maine, California, Indiana, Illinois, New Mexico, Minnesota, Florida, Washington, Oregon, Delaware, Kansas, North Carolina, Arizona, Virginia, Ohio, Wisconsin, and Louisiana. *On the Issue of Parole*, CAMPAIGN ZERO (June 11, 2024), <https://campaignzero.org/on-the-issue-of-parole/> [<https://perma.cc/Z7SV-K4XY>] (staff-uploaded archive)]; Emmett Sanders, *An Act of Regression: Louisiana Takes a Giant Step Backward in Parole and Sentencing Reform*, PRISON POL'Y INITIATIVE (Aug. 21, 2024), https://www.prisonpolicy.org/blog/2024/08/21/louisiana_parole_reform/ [<https://perma.cc/387K-724P>]. Mississippi, Colorado, and Connecticut are the only states to have abolished discretionary parole and to later reinstate it. Alexis Watts, *In Depth: Sentencing Guidelines and Discretionary Parole Release*, ROBINA INST. CRIM. L. & CRIM. JUST. (Feb. 23, 2018), <https://robinainstitute.umn.edu/articles/depth-sentencing-guidelines-and-discretionary-parole-release> [<https://perma.cc/PZ94-M5TE>].

105. The Structured Sentencing Act of 1994, ch. 538, 1993 N.C. Sess. Laws 2298 (codified as amended in scattered sections of N.C. GEN. STAT.). The Structured Sentencing Act ("SSA") is currently in effect but has been amended several times, such as through the Justice Reinvestment Act. The Justice Reinvestment Act of 2011, ch. 192, 2011 N.C. Sess. Laws 758 (codified as amended in scattered sections of N.C. GEN. STAT.). For the codified as amended portion of the SSA that is relevant to mandatory post-release supervision, see N.C. GEN. STAT. §§ 15A-1368 to -1368.6 (2023).

106. The Structured Sentencing Act of 1994 § 20.1.

107. *Parole Process*, N.C. DEP'T ADULT CORR., <https://www.dac.nc.gov/our-organization/post-release-supervision-parole-commission/parole-process> [<https://perma.cc/9ELS-E5NZ>] [hereinafter *Parole Process*]. The difference between mandatory parole release under the Fair Sentencing Act ("FSA") and post-release supervision under the SSA is mainly semantics, with some key differences. Parole release is technically an *early* release, so if a person were to violate their condition of parole, their parole could be revoked, and they could be sent back to prison to continue their original prison

released nine or twelve months short of their maximum sentence and must complete a mandatory nine or twelve months of post-release supervision.¹⁰⁸ Those sentenced under the SSA can never be released through discretionary parole,¹⁰⁹ so the only job of the North Carolina Parole Commission in SSA cases is to determine the conditions of a person's post-release supervision.¹¹⁰ But this has not always been the case.

Prior to the SSA, the Fair Sentencing Act ("FSA")¹¹¹ was in effect.¹¹² Under the FSA, both mandatory and discretionary parole were available, so the Parole Commission not only set conditions for those released on parole but also decided if someone was eligible for release on parole in the first place.¹¹³ The overall goal of the FSA was to "make sentences for felonies more consistent and predictable."¹¹⁴ It set particularly harsh presumptive prison sentences for felonies but also allowed judges to depart from those sentences.¹¹⁵ In resistance

sentence. *See* N.C. GEN. STAT. § 15A-1376 (2023). So, a parole violation could result in someone returning to prison for life. *See* Tann Interview March 2025, *supra* note 37. *See generally infra* Appendix. Post-release supervision would never apply to those serving life-sentences, and a violation of post-release supervision usually results in being returned to prison for three months. *See* N.C. GEN. STAT. § 15A-1368.3 (2023). A person who violates post-release supervision cannot be returned to prison for more than their maximum active sentence (either nine, twelve, or sixty months depending on the original offense). *Id.*; *see also* Jamie Markham, *Post-Release Revocation Terms*, UNC SCH. GOV'T: N.C. CRIM. L. BLOG (Oct. 31, 2018), <https://nccriminallaw.sog.unc.edu/post-release-revocation-terms/> [<https://perma.cc/2T68-ZLVV>].

108. The Structured Sentencing Act of 1994 § 20.1. Those convicted of Class B1 through E felonies must be released at least twelve months before their maximum prison term and must complete twelve months of post-release supervision. *Id.* Those convicted of Class F through I felonies must be released at least nine months before their maximum prison term and must complete nine months of post-release supervision. *Id.* Those sentenced under SSA can get out earlier by earning "good time." *Id.* Of course, these mandatory post-release supervision requirements do not apply to those sentenced to life without the possibility of parole ("LWOP"). *Id.* (applying to Class B1 through I felonies and excluding Class A felonies). Also, there are separate mandatory post-release supervision requirements for those convicted of certain sex offenses. *See* N.C. GEN. STAT. § 15A-1340.17(f) (2023).

109. There is only one population that remains parole eligible under the SSA: people "serving sentences of imprisonment for convictions of impaired driving." N.C. GEN. STAT. § 15A-1370.1 (2024).

110. *Parole Process*, *supra* note 107 ("The Commission has no decision-making power as to the offender's time of release under Structured Sentencing. However, it sets conditions for the period of post-release supervision.").

111. The Fair Sentencing Act of 1979, ch. 760, 1979 N.C. Sess. Laws 850 (codified in scattered sections of N.C. GEN. STAT. chapter 15A).

112. *Id.*; *see also* LORRIN FREEMAN, N.C. SENT'G & POL'Y ADVISORY COMM'N, THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION: A HISTORY OF ITS CREATION AND ITS DEVELOPMENT OF STRUCTURED SENTENCING 1-19 (2011), https://www.nccourts.gov/assets/documents/publications/commission_history_aug2011.pdf [<https://perma.cc/9D4G-MSYR> (staff-uploaded archive)].

113. The Fair Sentencing Act of 1979 § 2.

114. FREEMAN, *supra* note 112, at 2. Under the FSA, judges were allowed to depart from the presumptive sentence "if [the judge] found written reasons for aggravation or mitigation." *Id.* A judge could also depart from the presumptive sentence for any reason if the defendant plead guilty. *Id.*

115. *Id.*

to this new sentencing structure, judges began imposing longer sentences.¹¹⁶ The FSA's harsh sentencing outcomes combined with new, tough-on-crime policies such as mandatory minimums for drug offenses and new sentencing requirements for repeat drunk driving convictions led to immense overcrowding in North Carolina's prisons.¹¹⁷

In order to redress these consequences of the FSA, the North Carolina General Assembly passed the SSA, scheduling it to take effect on October 1, 1994.¹¹⁸ While the SSA imposed less harsh sentencing guidelines as compared to the FSA, the SSA also abolished the possibility of parole for those who committed a criminal offense on or after October 1, 1994.¹¹⁹ The SSA does not apply retroactively—it exclusively applies to those who committed criminal offenses on or after October 1, 1994.¹²⁰ So, if a person committed a criminal offense between July 1, 1981 (when the FSA went into effect), and October 1, 1994 (when SSA went into effect), then the FSA would apply and they could still be parole eligible.¹²¹

As a result, there are still people in North Carolina prisons who were subject to harsh FSA sentencing and who now rely on the Parole Commission to grant them parole.¹²² Given that anyone eligible for parole in North Carolina received a criminal conviction prior to October 1, 1994, the youngest person eligible for parole in North Carolina would currently be around forty-three years old.¹²³ Those currently eligible for parole in North Carolina are

116. Judges' frustrations were due to a combination of new good time provisions that "resulted in a defendant's sentence virtually being cut in half," *id.*, and the unprecedented release by the Parole Commission of incarcerated people on parole, see *25th Anniversary Celebration: Twenty-Five Years of Structured Sentencing in North Carolina*, at 2 (N.C. Sept. 27, 2019) (statement of Michelle Hall, Staff, N.C. Sent'g & Pol'y Advisory Comm'n), https://www.nccourts.gov/assets/documents/publications/9_27_2019_minutes.pdf [<https://perma.cc/T3N4-3WFA>].

117. FREEMAN, *supra* note 112, at 2–3.

118. *Id.* at 19–20. While the SSA was originally expected to come into effect on January 1, 1994, a special legislative session expedited that date to October 1, 1994. See Jamie Markham, *A Quarter-Century of Structured Sentencing*, UNC SCH. GOV'T: N.C. CRIM. L. BLOG (Oct. 1, 2019), <https://nccriminallaw.sog.unc.edu/a-quarter-century-of-structured-sentencing/> [<https://perma.cc/B5U2-HB6X>].

119. *Parole Process*, *supra* note 107.

120. See *State v. Whitehead*, 365 N.C. 444, 444, 722 S.E.2d 492, 493 (2012) (holding that the North Carolina General Assembly did not intend for the SSA to apply retroactively).

121. *Id.* at 445, 722 S.E.2d at 493 ("The Fair Sentencing Act . . . governs sentencing for felonies committed between 1 July 1981 and 1 October 1994."). It is worth noting that the FSA has not stayed the same since 1994. In 2013, the FSA was amended to make sure that only individuals who had been convicted of less-serious felonies (Class D through J) could become parole-eligible, and only "after completion of the service of at least 20 years imprisonment." Act of July 25, 2013, ch. 368, § 20, 2013 N.C. Sess. Laws 1431, 1443 (codified at N.C. GEN. STAT. § 15A-1371(a)) (amending the FSA).

122. *Parole Process*, *supra* note 107.

123. The youngest incarcerated persons eligible for parole would have had to commit their offense at thirteen years old prior to October 1, 1994. That person would now, in 2025, be around forty-three

disproportionately over the age of fifty, and all parole-eligible, incarcerated people will be over the age of fifty by 2031.

This population of parole-eligible, incarcerated elders is stuck between the old system of the FSA with parole and the new system of the SSA without parole. They do not benefit from the reduced sentencing guidelines of the SSA because they were sentenced under the FSA and because the SSA is not retroactive.¹²⁴ The people whose sentences the FSA controls are forced to rely on the Parole Commission to determine their parole eligibility¹²⁵—a pursuit which has proven to be a difficult and often hopeless process for many elders.¹²⁶

2. The Parole Process: A Hopeless Bureaucracy

In North Carolina, each parole-eligible individual is assigned a case analyst.¹²⁷ These analysts are not members of the four-person Parole Commission.¹²⁸ Instead, the analysts—each responsible for over 4,000 incarcerated people¹²⁹—consider “all available information on [each] offender’s case” and make written recommendations to the Parole Commission about whether the parole-eligible, incarcerated person should even be considered for parole.¹³⁰ If the assigned analyst does not recommend an incarcerated person for parole review, the Parole Commission typically decides accordingly, and the process ends with a denial of parole.¹³¹

However, if the Commission decides that an incarcerated person should move on to the next step in the parole process, then their case analyst will initiate a parole investigation. During the parole investigation, the case analyst obtains “additional information . . . that could include the offender’s release

years old. This is not a hypothetical. This is an actual person. Andre Demetrius Green was sentenced to life under the FSA when he was thirteen years old. Allen G. Breed, *At 26, Half of His Lifetime in Jail*, STAR NEWS ONLINE, <https://www.starnewsonline.com/story/news/2007/12/11/at-26-half-of-his-lifetime-in-jail/30333258007/> [<https://perma.cc/4D3W-MWWB>] (last updated Dec. 11, 2007, 6:28 AM). Andre is now forty-three years old. *See id.*

124. This is true even where structured sentencing would have resulted in a significantly lower sentence. *See Whitehead*, 365 N.C. at 444, 722 S.E.2d at 493.

125. *Post-Release Supervision and Parole Commission*, N.C. DEP’T ADULT CORR., <https://www.dac.nc.gov/divisions-and-sections/post-release-supervision-parole-commission> [<https://perma.cc/5FP5-7F2P>].

126. *See* Lyle C. May, *Why North Carolina Keeps Many Parole-Eligible Prisoners Behind Bars*, SCALAWAG (July 8, 2019), <https://scalawagmagazine.org/2019/07/nc-parole-death-row/> [<https://perma.cc/C8DV-9JYC>].

127. N.C. DEP’T OF CORR., OFF. OF VICTIM SERVS., A CITIZEN’S REFERENCE GUIDE TO: THE NORTH CAROLINA PAROLE PROCESS 1 (2009), <https://www.dac.nc.gov/documents/files/citizens-reference-guide-north-carolina-parole-process/open> [<https://perma.cc/J63V-F29Z>].

128. *See Post-Release Supervision and Parole Commissioners*, N.C. DEP’T ADULT CORR., <https://www.dac.nc.gov/divisions-and-sections/post-release-supervision-parole-commission/nc-post-release-supervision-and-parole-commission> [<https://perma.cc/5FP5-7F2P>].

129. *See* May, *supra* note 126.

130. *Parole Process*, *supra* note 107.

131. *Id.*

plans, views of law enforcement and court officials, and views of any interested parties[,]” including the District Attorney and any victims.¹³² After completing the parole investigation, the case analyst sends all the information they gathered to each member of the Parole Commission, all of whom subsequently vote independently without discussing amongst each other.¹³³ There are no hearings.¹³⁴ Commissioners do not meet face-to-face with the offender, nor do they meet over the phone.¹³⁵ After the Parole Commission votes, if the parole-eligible, incarcerated person receives a denial—and most do—then they receive a form with a box checked next to one of the four standard reasons for parole denial.¹³⁶ After being denied parole, a parole-eligible, incarcerated person has to wait one to three years, depending on the nature of their criminal conviction, before they can even attempt to restart the parole process.¹³⁷

Cassie Johnson and Timothy Tann are each serving life with the possibility of parole.¹³⁸ Both Cassie and Timothy have been incarcerated for over forty years and have been denied parole over twenty times.¹³⁹ Neither Cassie nor Timothy have met any of the Parole Commissioners, nor have they ever had the opportunity to speak with the Parole Commission making their decision.¹⁴⁰ Each time Cassie and Timothy are denied parole they receive a form letter with a box checked next to one of the four standard reasons for parole denial.¹⁴¹ Despite requests, neither one of them have received further explanation for their parole denials.¹⁴²

132. *Id.*

133. *Myths and Truths About the Parole Process*, N.C. DEP’T PUB. SAFETY, <https://www.ncdps.gov/about-dps/boards-and-commissions/post-release-supervision-parole-commission/myths-and-truths> [<https://perma.cc/H9RN-5GBN>].

134. *Id.* This is not common procedure. For more information on state parole hearings, see Jorge Renaud, *Grading the Parole Release Systems of All 50 States Appendix A*, PRISON POL’Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/parole_grades_table.html [<https://perma.cc/K62T-9MLD>].

135. *Myths and Truths About the Parole Process*, *supra* note 133.

136. The Fair Sentencing Act of 1979, ch. 760, 1979 N.C. Sess. Laws 850 (codified in scattered sections of N.C. GEN. STAT. chapter 15A); *see also Parole Process*, *supra* note 107.

137. Parole-eligible incarcerated people convicted of first- or second-degree murder are reviewed for parole every three years; parole-eligible incarcerated people convicted of “sexually violent offenses” are reviewed for parole every two years; and all other parole-eligible incarcerated people are reviewed each year until parole is granted or until the sentence is fully served. Jamie Markham, *Frequency of Parole Reviews*, UNC SCH. GOV’T: N.C. CRIM. L. BLOG (Jan. 31, 2019), <https://nccriminallaw.sog.unc.edu/frequency-of-parole-reviews/> [<https://perma.cc/F4U2-JF2R>] [hereinafter Markham, *Frequency of Parole Reviews*]; N.C. GEN. STAT. § 14-208.6(5) (2023) (defining “sexually violent offenses”).

138. *See* Johnson Interview Feb. 2025, *supra* note 20; Tann Interview Mar. 2025, *supra* note 37. *See generally infra* Appendix.

139. *See* Johnson Interview Feb. 2025, *supra* note 20; Tann Interview Mar. 2025, *supra* note 37.

140. *See* Johnson Interview Feb. 2025, *supra* note 20; Tann Interview Mar. 2025, *supra* note 37.

141. *See* Johnson Interview Feb. 2025, *supra* note 20; Tann Interview Mar. 2025, *supra* note 37.

142. *See* Johnson Interview Feb. 2025, *supra* note 20; Tann Interview Mar. 2025, *supra* note 37.

The parole process is particularly complicated for elders. For example, responding to the various components of the parole investigation like the “offender’s release plan[]” becomes increasingly difficult as a parole-eligible, incarcerated person ages.¹⁴³ When creating a release plan, incarcerated people include whether they have family or community support outside of prison, whether they will have somewhere to live, and what services they will need to take care of themselves.¹⁴⁴ But incarcerated elders are frequently in prison for a crime they committed at a young age, meaning that many of the people or caretakers they were once connected to on the outside—such as family members, community members, and friends—are also elderly or have passed away.¹⁴⁵ Aging people also require more accommodations to reintegrate into the outside world, making it harder for elders to find a living situation that will qualify as a “release plan.” And without the possibility of getting a job upon release, many elders face financial insecurities that make the concept of leaving prison daunting. The older one gets, the less likely one is to be deemed fit—by the Parole Commission’s standards—for release.

3. Mutual Agreement Parole Program

In addition to the general parole process, almost all parole-eligible incarcerated people who end up being released on parole engage in North Carolina’s Mutual Agreement Parole Program (“MAPP”). Essentially, MAPP is a contract that a potential parolee¹⁴⁶ enters into with the Parole Commission, agreeing to participate in certain programs or activities (often mandatory work or education) in exchange for being released by a certain date.¹⁴⁷ In theory, this agreement sounds great because parole-eligible incarcerated people are given clear directives as to what programs they need to complete in order to

143. *Parole Process*, *supra* note 107.

144. The four possible reasons for parole denial include:

(1) [t]here is a substantial risk that [the incarcerated person] will not conform to reasonable conditions of parole; or (2) [the incarcerated person’s] release at that time would unduly depreciate the seriousness of [their] crime or promote disrespect for law; or (3) [the incarcerated person’s] continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance [their] capacity to lead a law-abiding life if [they are] released at a later date; or (4) [t]here is a substantial risk that [the incarcerated person] would engage in further criminal conduct.

N.C. GEN. STAT. § 15A-1371 (2024).

145. *See supra* note 66 and accompanying text.

146. North Carolina’s Mutual Agreement Parole Program (“MAPP”) is only available to incarcerated people eligible for parole and therefore sentenced pre-SSA. *See* Phillip Vance Smith, II & Timothy Wayne Johnson, *Hope for the Hopeless: The Prison Resources Repurposing Act*, 100 N.C. L. REV. 713, 726 (2022) [hereinafter Smith & Johnson, *Hope for the Hopeless*]. MAPP is not available to people sentenced to LWOP. *Id.*

147. *Mutual Agreement Parole*, N.C. DEP’T ADULT CORR., <https://www.dac.nc.gov/divisions-and-sections/rehabilitation-and-reentry/mutual-agreement-parole> [<https://perma.cc/9VN9-PY3J>].

accomplish their goal of release. But there is a catch: MAPP can be taken away upon receiving a single infraction, and most parole-eligible incarcerated people must be “infraction-free for a period of ninety days prior to being recommended” for MAPP.¹⁴⁸ This system leaves prison employees, like prison guards, with an immense amount of power to impose infractions and delay parole for another one to three years.¹⁴⁹ And this immense power goes entirely unchecked because there is no process to challenge the cancellation of a MAPP contract,¹⁵⁰ meaning a prison can effectively cancel a MAPP contract for any reason.

Because of this complex and fragile parole system, where the Parole Commission has complete discretion to deny parole, and where one wrong step can delay parole, there is a significant amount of parole-eligible elders suck trying to use the near-hopeless parole system to remedy their harsh pre-SSA sentences. As parole-eligible incarcerated people get older, an upsetting question churns in many of their minds of many incarcerated elders: Which will come first—parole or death?

B. *Life Without the Possibility of Parole*

In addition to elderly parole-eligible incarcerated people, there is another group of incarcerated elders who make up a significant portion of the incarcerated population: elders serving life without the possibility of parole (“LWOP”).¹⁵¹ Over the last four decades, scholars have described LWOP as becoming “a routine punishment in the United States,”¹⁵² with the percentage of people serving LWOP nationwide increasing by sixty-six percent between

148. *Id.* Timothy Tann received a MAPP contract in 2005. *See* Interview with Timothy Tann, at Southern Correctional Institute (June 21, 2023) (on file with author). Three months later, Timothy’s MAPP was revoked because a prison guard found cigarettes in Timothy’s locker, despite him being adamant that he does not smoke due to his health conditions. *Id.* Timothy did not receive another MAPP contract for nineteen years after that. *See* Tann Interview Mar. 2025, *supra* note 37. *See generally infra* Appendix.

149. *See* May, *supra* note 126 (“‘Write-ups’ as we call them, are not always serious; they can include failing a drug test, disobeying a direct order, possession of contraband, and disrespecting staff. Some staff who have a vendetta against prisoners will claim the prisoner broke a rule, process a write-up, and the infraction can prevent parole for another year.”).

150. Smith & Johnson, *Hope for the Hopeless*, *supra* note 146, at 726.

151. This section discusses those who have been given LWOP sentences. However, there is also a significant number of people who have been given “virtual life sentences” due to their length of sentence (fifty years or longer) and the age they were when they were sentenced. For more on virtual life sentences, see NELLIS, NOTHING BUT TIME, *supra* note 35, at 5.

152. *Id.* at 2 (quoting Christopher Seeds, *Disaggregating LWOP: Life Without Parole, Capital Punishment, and Mass Incarceration in Florida, 1972-1995*, 52 LAW & SOC’Y REV. 172, 172 (2018)).

2003 and 2020.¹⁵³ As of 2020, 55,945 people were serving LWOP sentences,¹⁵⁴ with about half of that population being fifty years or older.¹⁵⁵

North Carolina is on a similar track. The SSA adopted LWOP sentences in North Carolina.¹⁵⁶ As a result, the number of LWOP sentences increased drastically between 1994 and 2000, and “has remained at a fairly steady level since 2000.”¹⁵⁷ In 2020, 1,569 people in North Carolina were serving LWOP sentences; 37% of those individuals were fifty years old or older.¹⁵⁸ To be clear, defendants in North Carolina are not necessarily being given LWOP as older adults or elders. Instead, compared to every other southern state, North Carolina has sentenced the highest percentage of “emerging adults”—those between the ages of eighteen and twenty-five—to LWOP as compared to any other state in the South.¹⁵⁹ Of course, those who were given LWOP as “emerging adults” are now much older and still incarcerated. North Carolina is one of the states with the “highest percentage of life-sentenced prisoners who are elderly.”¹⁶⁰

The SSA in North Carolina and other harsh national sentencing reforms of the 1990s are blamed for the continued increase in LWOP sentences and the increase in elders currently serving LWOP that followed.¹⁶¹ For example, not only did the SSA abolish discretionary parole and instate LWOP sentences, but it also made either LWOP or the death penalty the *mandatory* sentence for first-

153. ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 15 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [https://perma.cc/CLZ9-5VTJ] [hereinafter NELLIS, NO END IN SIGHT].

154. *Id.*

155. NELLIS, NOTHING BUT TIME, *supra* note 35, at 6.

156. Structured Sentencing Act of 1994, ch. 538, 1993 N.C. Sess. Laws 2298 (codified as amended in scattered sections of N.C. GEN. STAT.). When the SSA was first enacted, it included a safety valve provision for LWOP sentences, whereby defendants sentenced to LWOP could become eligible for parole after twenty-five years of imprisonment. *Id.* § 22. This safety valve provision was repealed just four years later. *See* Act of Oct. 30, 1998, ch. 212, § 19.4(q), 1998 N.C. Sess. Laws 937, 1232 (codified as amended at N.C. GEN. STAT. § 15A-1380.5).

157. Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadidi & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. REV. 279, 295 (2021).

158. NELLIS, NOTHING BUT TIME, *supra* note 35, at 5.

159. Kelan Lyons, *New Report Looks at Life-Without-Parole Sentencing for Young Adults*, NEWS FROM STATES (June 8, 2023, 6:00 AM), <https://www.newsfromthestates.com/article/new-report-looks-life-without-parole-sentencing-young-adults> [https://perma.cc/88XG-4WA2 (staff-uploaded archive)] (“A new report from the Sentencing Project found that 40% of people sentenced to life-without-parole in North Carolina between 1995 and 2017 were ‘emerging adults,’ between the ages of 18 and 25.”).

160. NELLIS, NO END IN SIGHT, *supra* note 153, at 22. Other states with a high percentage of life-sentenced incarcerated elders include Delaware, Maine, Michigan, and New Jersey. *Id.*

161. Frank Baumgartner, Tamira Daniely, Kalley Huang, Sydney Johnson, Alexander Love, Lyle May, Patrice McGloin, Allison Swagert, Niharika Vattikonda & Kamryn Washington, *Throwing Away the Key: The Unintended Consequences of “Tough-on-Crime” Laws*, 19 PERSPS. ON POL. 1233, 1239–41 (2021).

degree murder.¹⁶² And while first-degree murder may seem like a rare sentence, the SSA “gives prosecutors wide discretion . . . to seek LWOP sentences in homicide cases” due to North Carolina’s broad definition of first-degree murder.¹⁶³

In April 2021, incarcerated people serving LWOP in North Carolina were given some hope. North Carolina lawmakers introduced House Bill 697, the Prison Resources Repurposing Act (“PRRA”).¹⁶⁴ The PRRA proposed that North Carolina grant MAPP eligibility to people “sentenced to life imprisonment without parole who [had] already served 20 or more years in prison by August 1, 2021[,]” and who agreed to participate in mandatory education and work programs.¹⁶⁵ In April 2021, the PRRA died in committee.¹⁶⁶ In February 2023, it failed again after being reintroduced,¹⁶⁷ diminishing any hopes of extending parole to those serving LWOP—elderly or otherwise. Had the PRRA passed in 2021, around 223 incarcerated elders would have become parole eligible in North Carolina.¹⁶⁸ With an inadequate parole system and this attempt at reforming LWOP failing, incarcerated elders serving LWOP are often left with only one hope: compassionate release.

C. North Carolina’s Use of Compassionate Release

North Carolina has two separate compassionate release programs: (1) Medical Release¹⁶⁹ and (2) Extension of the Limits of Confinement (“ELC”).¹⁷⁰

162. The Structured Sentencing Act of 1994, ch. 538, 1993 N.C. Sess. Laws 2298 (codified as amended at N.C. GEN. STAT. §§ 15A-1340.10–1340.33); *see also* May, *supra* note 126.

163. Garrett et al., *supra* note 157, at 294.

164. H.B. 697, 155th Gen. Assemb., Reg. Sess. (N.C. 2021).

165. *Id.* Interestingly, the Prison Resources Repurposing Act (“PRRA”) proposes a change that an early version of the SSA proposed but did not end up implementing. *See* Smith & Johnson, *Hope for the Hopeless*, *supra* note 146, at 726 (“An early provision, section 15A-1380.5, provided judicial review of LWOP sentences after twenty-five years of imprisonment under the Structured Sentencing Act, but lawmakers repealed section 15A-1380.5 on December 1, 1998.”).

166. H.B. 697, 155th Gen. Assemb., Reg. Sess. (N.C. 2021); *see also* Phillip Vance Smith, II & Timothy W. Johnson, *Prison Reform Proposal Would Promote Safer Prisons and Safer Communities*, NC NEWSLINE (July 17, 2023, 10:54 AM), <https://ncnewsline.com/2023/07/17/prison-reform-proposal-would-promote-safer-prisons-and-safer-communities/> [<https://perma.cc/E3XS-9G2Q>] [hereinafter Smith & Johnson, *Prison Reform Proposal*] (“In 2021, 18 Democratic NC House Representatives introduced the PRRA as HB 697. The bill died in committee, most likely from lack of bipartisan support.”).

167. H.B. 126, 156th Gen. Assemb., Reg. Sess. (N.C. 2023); *see also* Smith & Johnson, *Prison Reform Proposal*, *supra* note 146 (“NC House Representatives sponsored [the PRRA] once more in 2023 as HB 126, but it failed again, most likely for the same reason.”).

168. Out of the 573 individuals over fifty years old serving LWOP in North Carolina in 2020, 223 have already served twenty years and adds up to 39%. *See* NELLIS, NOTHING BUT TIME, *supra* note 35, at 6–7.

169. N.C. GEN. STAT. §§ 15A-1369 to -1369.5 (2025), *amended in part by* Current Operations Appropriations Act of 2023, ch. 134, sec. 19C.6.(a), § 15A-1369(5), 2023 N.C. Session Laws __, __ (codified as amended at N.C. GEN. STAT. § 15A-1369(5)).

170. *Id.* § 148-4.

Medical Release provides an opportunity for release to those who are “permanently and totally disabled,” “terminally ill,” or “geriatric.”¹⁷¹ ELC, on the other hand, provides an opportunity for those who are “permanently and totally disabled” or “terminally ill” to receive palliative care outside of prison in ninety-day intervals.¹⁷² Under both Medical Release and ELC, those released remain under surveillance until one of four outcomes occurs: (1) their sentence becomes complete; (2) they recover and therefore must go back to complete their sentence in prison (applies to ELC only); (3) they violate a condition of their release and therefore must go back to complete their sentence in prison; or (4) they pass away.¹⁷³

1. Medical Release

Historically, Medical Release has been an extremely high standard to satisfy due to narrow eligibility requirements. For example, before being granted Medical Release by the Parole Commission, the incarcerated person had to show, and the Parole Commission had to find, that the incarcerated person “pose[d] no risk or low risk to public safety.”¹⁷⁴ As a result, many otherwise eligible individuals would be denied due to the Parole Commission finding that they posed some risk to society instead of no risk.¹⁷⁵

171. *Id.* § 15A-1369(5). In these laws, “geriatric” was first defined as age sixty-five or older, but North Carolina recently lowered the qualifying age of “geriatric” individuals to age fifty-five or older. *See infra* note 175 and accompanying text.

172. § 148-4(8). The term “terminally ill” is defined as:

an [incarcerated person] who, as determined by a licensed physician, has an incurable condition caused by illness or disease that was unknown at the time of sentencing and was not diagnosed upon entry to prison, that will likely produce death within six months, and that is so debilitating that it is highly unlikely that the [incarcerated person] poses a significant public safety risk.

Id. The term “permanently and totally disabled” is defined as:

an [incarcerated person] who, as determined by a licensed physician, suffers from permanent and irreversible physical incapacitation as a result of an existing physical or medical condition that was unknown at the time of sentencing and was not diagnosed upon entry to prison, and that is so incapacitating that it is highly unlikely that the [incarcerated person] poses a significant public safety risk.

Id.

173. *See id.* § 15A-1369.

174. *Id.* § 15A-1369(3), (7), (8).

175. Rachel Crumpler, *Expanded Prison Medical Release Eligibility Provides Opportunity for More Sick, Aging Incarcerated People to Go Home Before They Die*, NC HEALTH NEWS (Oct. 2, 2023), <https://www.northcarolinahealthnews.org/2023/10/02/expanded-prison-medical-release-eligibility-provides-opportunity-for-more-sick-aging-incarcerated-people-to-go-home-before-they-die/> [https://perma.cc/NP8S-3SXL] [hereinafter Crumpler, *Expanded Prison Medical Release*] (“Since 2019, 15 to 45 people each year have been denied medical release based on their sentences or risk to public

But the North Carolina General Assembly recently passed the Appropriations Act of 2023 (“Appropriations Act”),¹⁷⁶ changing the language of North Carolina’s Medical Release statute to allow for increased eligibility.¹⁷⁷ For example, to be eligible for release, the Parole Commission no longer must find that the applicant poses *no* risk to society.¹⁷⁸ Instead, under the Appropriations Act, the applicant will be released if the applicant “poses no risk or *low risk* to public safety,” thereby lowering the bar for eligibility.¹⁷⁹ Additionally, the Appropriations Act lowered the age qualifying as “geriatric” by ten years—from sixty-five years old to fifty-five years old.¹⁸⁰ This expands the applicability of Medical Release to an additional 4,057 people currently incarcerated in North Carolina’s prisons between the age of fifty-five and sixty-five.¹⁸¹

While the Appropriations Act increases the likelihood of release for elders experiencing chronic infirmity, incapacitating illness or disease, permanent and total disability, and terminal illness, the Medical Release program remains inaccessible to many incarcerated elders. For example, people incarcerated for first-degree murder, second-degree murder, and other Class A and Class B felonies are excluded from the possibility of Medical Release, regardless of the illness, disability, or level of risk to society.¹⁸² Therefore, because LWOP sentences are reserved for Class A and Class B1 felonies, elders serving LWOP sentences cannot turn to Medical Release for relief.¹⁸³ Additionally, anyone who has committed a sex offense that would require them to register as a sex offender

safety.”). For example, in 2022, ten out of thirty-nine incarcerated people referred to the Parole Commission by the Department of Public Safety’s Division of Adult Corrections were denied. WILLIS J. FOWLER, GRAHAM H. ATKINSON & ERIC A. MONTGOMERY, POST RELEASE SUPERVISION & PAROLE COMM’N, MEDICAL RELEASE PROGRAM REPORT 4 (2022), <https://www.dac.nc.gov/post-release-supervision-and-parole-commissionmedical-release-march2022pdf/open> [https://perma.cc/3HNL-UC2U]. In 2019, out of fifty-four people that the Department of Public Safety’s Division of Adult Corrections considered, only eleven were referred to the Parole Commission; seven were actually released; and two died prior to the Parole Commission making its decision. POST RELEASE SUPERVISION & PAROLE COMM’N, MEDICAL RELEASE PROGRAM REPORT 4 (2019), <https://www.dac.nc.gov/dpsmedical-release-reportpdf/open> [https://perma.cc/92V8-ASCT].

176. Current Operations Appropriations Act of 2023, ch. 134, 2023 N.C. Sess. Laws __ (codified as amended in scattered sections of N.C. GEN. STAT.).

177. See N.C. GEN. STAT. § 15A-1369 (2025), *amended by* Current Appropriations Act of 2023 § 19C.6.(a).

178. See Current Appropriations Act of 2023 § 19C.6.(a).

179. *Id.* (emphasis added).

180. *Id.*

181. *NCDAC Administrative Analysis*, *supra* note 99 (calculating 4,057: click the “Start Generating Reports” button; then select “Prison,” “Population,” and “12-31-2023” from the dropdown menus; click the “Define Report” button; then choose “Age” for “Add Item(s) ->” and click the “Continue” button; then input “55” for the first number and “65” for the second number; then click the “View Report” button).

182. N.C. GEN. STAT. § 15A-1369.2(b) (2024) (left unamended by the Appropriations Act of 2023).

183. *Id.* §§ 15A-1340.10 to -1340.23.

under North Carolina law is ineligible for Medical Release.¹⁸⁴ Excluding those with sex offenses from Medical Release leaves a significant number of people who are aging while incarcerated ineligible for the possibility of release.

Finally, because the Appropriations Act was passed so recently, and because Medical Release is ultimately left to the complete discretion of the Parole Commission, it is still unclear whether the portions of the law amended by the Appropriations Act will actually result in an increased number of medical releases.

2. Extension of the Limits of Confinement

Under ELC, incarcerated people who are deemed “permanently and totally disabled” or “terminally ill” may be released in ninety-day intervals to receive palliative care.¹⁸⁵ Therefore, the biggest difference between ELC and Medical Release is that Medical Release is meant to lead to permanent release,¹⁸⁶ while ELC provides a form of temporary release requiring the incarcerated person to return back to prison after receiving care.¹⁸⁷ Similarly to the new language for Medical Release, people eligible for ELC must no longer pose a *significant* public safety risk.¹⁸⁸ And similarly to Medical Release, there are limitations. To be eligible for ELC under the “permanently and totally disabled” or “terminally ill” provision, the incarcerated person must be in minimum custody and must be accepted into hospice or receive similar palliative care in the community.¹⁸⁹ Additionally, the illnesses or diseases that qualify for ELC must have been unknown and undiagnosed at the time of sentencing.¹⁹⁰ While these limitations exclude a significant number of otherwise-eligible elders from participating in ELC—unlike Medical Release—there are technically no limitations based on the type of conviction.¹⁹¹

Another unique aspect of ELC is that the Secretary of the Department of Adult Correction (“Secretary”) decides whether a person will be released under

184. *Id.*

185. *Id.* § 148-4(8); N.C. DEP’T OF ADULT CORR., CHAPTER Q, § .0400, EXTENSION OF LIMITS OF CONFINEMENT TO RECEIVE PALLIATIVE CARE POLICY, at III.B.12 (June 2, 2023), <https://public.powerdms.com/NCDAC/tree/documents/2422887> [<https://perma.cc/AD3E-VS6N>] [hereinafter N.C. DEP’T OF ADULT CORR., EXTENSION OF LIMITS OF CONFINEMENT].

186. That being said, if a person suddenly recovers from their condition so much so that they would no longer be eligible for Medical Release, then the Parole Commission can initiate a revocation hearing. See N.C. GEN. STAT. § 15A-1369.5(a) (2024).

187. N.C. DEP’T OF ADULT CORR., EXTENSION OF LIMITS OF CONFINEMENT, *supra* note 185, at III.B.12.

188. *Id.* at II.

189. *Id.* at III.A.2.

190. *Id.* at III.A.1.

191. Of course, the more serious the crime, the more likely the person is to be imprisoned in medium- or maximum-security prisons, making them ineligible for Extension of the Limits of Confinement (“ELC”). See *id.* at III.A.2.

ELC instead of the Parole Commission.¹⁹² Having the Secretary decide whether to extend ELC to an incarcerated person not only makes for a more streamlined process with seemingly less bureaucratic delay,¹⁹³ but also allows the Secretary to use ELC in a more flexible manner within the boundaries of section 148-4 of the General Statutes of North Carolina. For example, during the COVID-19 pandemic, Secretary Todd Ishee expanded ELC eligibility to help reduce the spread of COVID-19 in prisons.¹⁹⁴ That being said, ELC is still used sparingly.¹⁹⁵

* * *

Putting this all together, it is easy to see why North Carolina now faces an epidemic of elder incarceration. Many of the elders who now sit in North Carolina's prisons grew up in the late twentieth century as a part of the Most Incarcerated Generation.¹⁹⁶ Those who were sentenced in North Carolina before 1994, under the FSA, were given harsh sentences, but were given some hope through the possibility of parole. Those who were sentenced in North Carolina after 1994, under the SSA, were increasingly given LWOP sentences, with no possibility of parole.

Now this population is older, and North Carolina's laws are not expansive enough to provide adequate relief. Those who are eligible for parole are not being let out. The parole system is too bureaucratic, and the Parole Commission has too much discretion. And those who were given LWOP sentences have little hope because the Medical Release and ELC programs are far too exclusive.

While reforms such as the Appropriations Act's expansion of Medical Release and the expansion of ELC during the COVID-19 pandemic are

192. *Id.* at I, III.B.9. Under Medical Release, the Parole Commission decides whether an applicant will be released. N.C. DEP'T OF ADULT CORR., CHAPTER Q, § .0300, MEDICAL RELEASE OF ILL AND DISABLED OFFENDERS POLICY, § .0304(n) (Dec. 13, 2023), <https://public.powerdms.com/NCDAC/tree/documents/2145217> [<https://perma.cc/8ZEV-VAME>].

193. *See* N.C. GEN. STAT. § 148-4(8) (2024) ("The Secretary shall act expeditiously [and] shall make a good faith effort to reach a determination within 30 days of receiving notice of the [incarcerated person]'s terminal condition.").

194. Greg Thomas, *ELC: Reducing Prison Population to Lower the Risk of COVID-19*, N.C. DEP'T PUB. SAFETY, <https://www.ncdps.gov/blog/2020/09/24/elc-reducing-prison-population-lower-risk-covid-19> [<https://perma.cc/GVM3-YW2Q>] (last updated Mar. 3, 2021). To be released under ELC during the pandemic, an incarcerated person had to fall within one of the following categories: (1) pregnant; (2) sixty-five and older with a release date in 2020–22; (3) have a 2020 or 2021 release date and "underlying health conditions deemed by CDC that increase a person's risk of severe illness from COVID-19"; (4) already on home leave with a 2020 or 2021 release date; or (5) already on work release with a 2020 or 2021 release date. *Id.*

195. Remy Servis, *North Carolina's Extended Limits of Confinement: Woefully Underutilized in the Face of COVID-19*, AWAKEN (Oct. 26, 2020), <https://awakenwfu.com/2020/10/26/nc-extended-limits-confinement/> [<https://perma.cc/LAY9-3HUU>] ("These [COVID-19] criteria have led to the release of just 1% of the NC prison population, or less than 8 inmates per state prison—a completely negligible impact that has not seriously forwarded the state's goal of reducing prison volume.").

196. *See supra* note 88–92 and accompanying text.

certainly a step in the right direction, they do not go far enough. North Carolina is going to have to make changes from every angle if it wants to address elder incarceration, thereby making our communities—both inside and outside of prison—safer.

IV. PROPOSED SOLUTIONS TO THE PROBLEM OF ELDER INCARCERATION IN NORTH CAROLINA

This Comment proposes three solutions to address the issue of elder incarceration in North Carolina. The first solution focuses on using the legal tools already in place in North Carolina—parole, compassionate release, and clemency—to reduce the number of elders incarcerated throughout North Carolina. The second focuses on harm reduction. This solution considers what North Carolina’s prisons need to do to make their facilities less harmful to the elders that they cage, drawing inspiration from policies that other states have proposed or implemented to reduce the harm of elder incarceration. Finally, the third solution considers community care and how legal practitioners, prisoners’ rights advocates, human rights advocates, health care advocates, and empathetic community members can work together as a community to redress elder incarceration in North Carolina.

A. *Using Legal Tools to Reduce North Carolina’s Elder Prison Population*

In 2024, there are around 8,391 people over the age of fifty incarcerated in North Carolina’s prisons.¹⁹⁷ Some of these individuals are parole-eligible under the FSA, others may be eligible for some form of compassionate release, but most are serving LWOP and other extreme sentences that make the possibility of release unrealistic.¹⁹⁸ North Carolina already has legal tools to reduce the number of incarcerated elders. But to make an actual impact in reducing elder incarceration, these legal tools need to be implemented in a way that promotes release. The following subsections discuss how North Carolina’s parole and compassionate release systems can be altered to reduce the elderly population, as well as an additional legal tool that should be implemented to reduce elder incarcerations: clemency.

1. Using the Parole System

North Carolina’s parole system does not have to be a hopeless bureaucracy. The Parole Commission is an independent agency.¹⁹⁹ Aside from general guidelines set out in the FSA dictating factors to consider when determining

197. See *supra* Table 1.

198. See *supra* Part III.

199. N.C. DEP’T OF CORR., OFF. OF VICTIM SERVS, *supra* note 127, at 1.

parole,²⁰⁰ and laws providing how often a person is eligible for parole review depending on the charged crime,²⁰¹ the Parole Commission determines what parole procedures should be in place.

To reduce elder incarceration, some states have implemented “Elder Parole” or “Geriatric Parole.” For example, Mississippi has a Geriatric Parole law entitling people age sixty and older who have served at least ten years of their sentence (provided that they have served at least a quarter of that sentence) to an automatic parole hearing.²⁰² Similarly, California has an Elderly Parole Program for people aged fifty and older who have “served a minimum of 20 years or more of continuous incarceration.”²⁰³ At an elderly parole hearing in California, the hearing panel must “give special consideration to the individual’s age, time served, and diminished physical condition.”²⁰⁴ Finally, New York recently proposed a new bill requiring parole interviews within sixty days of an incarcerated elder’s fifty-fifth birthday, so long as they have completed at least fifteen years of their sentence.²⁰⁵

In North Carolina, parole-eligible elders may be considered for parole every one to three years depending on their conviction.²⁰⁶ North Carolina should join the trend of providing increased opportunities for parole to elders by allowing each individual aged fifty and older to be considered for parole every year regardless of the conviction. This would require the Parole Commission to consistently consider a parole-eligible elder’s case.

But increasing the frequency of parole review only leads to a decrease in the elder prison population if the Parole Commission gives each parole-eligible elder meaningful review. The Parole Commission determines whether a person will be released on parole without ever speaking to them in person, or even over the phone.²⁰⁷ This is not meaningful review. The standardized denial form does not give the incarcerated person the opportunity to understand what the

200. See The Fair Sentencing Act of 1979, ch. 760, N.C. Sess. Laws 850 (codified in scattered sections of N.C. GEN. STAT. chapter 15A).

201. See Markham, *Frequency of Parole Reviews*, *supra* note 137.

202. MISS. CODE ANN. § 47-7-3(1)(h)(iii) (2024). See generally REBECCA SILBER, ALISON SHAMES & KELSEY REID, VERA INST. OF JUST., AGING OUT, USING COMPASSIONATE RELEASE TO ADDRESS THE GROWTH OF AGING AND INFIRM PRISON POPULATIONS (2017), <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirmary-Prison-Populations%E2%80%94Full-Report.pdf> [https://perma.cc/4TC5-AS6B] (“Mississippi’s 2014 [Justice Reinvestment Initiative] legislation granted automatic geriatric parole hearings for anyone 60 or older who has served 10 years and was not sentenced to an excludable offense.”).

203. CAL. PENAL CODE § 3055(a) (2024).

204. CAL. DEP’T OF CORR. & REHAB., FACT SHEET 2, https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2022/03/Elderly-Parole-Fact-Sheet3_18-1.pdf [https://perma.cc/2Q9F-V5PW].

205. S.B. 2423, 2023–24 Leg., Reg. Sess. (N.Y. 2023).

206. See Markham, *Frequency of Parole Reviews*, *supra* note 137.

207. See *supra* notes 134–35 and accompanying text.

reasoning was behind that denial, nor what they can do to improve their chances of release by the next review.²⁰⁸

If anything, this process dehumanizes those asking to be released on parole. The Parole Commission can swiftly deny a person parole without ever considering them as a human—and without giving them any individualized reasoning. To make the consideration of parole-eligible elders effective—and meaningful—in decreasing elder incarceration, the Parole Commission must begin facing each parole-eligible elder in person and allowing them to speak or allowing an advocate to speak on their behalf. Ideally, this would look like a formal hearing. But, even just having an informal conversation in person would make parole review more meaningful. And if they deny parole, the Parole Commission needs to give the elder individualized feedback on how they can improve their chances of release—not just check a box on a standardized form.

Finally, to make parole an effective legal mechanism for reducing elder incarceration, the Parole Commission must consider an individual's age and health status, and how these factors reduce the likelihood of recidivism. Currently, it is up to the discretion of the Parole Commission to decide an individual's parole status based on a variety of factors such as “the nature and circumstances of the crime, the previous criminal record, prison conduct, prison program participation, input from court officials, victims, and other interested parties.”²⁰⁹ But this discretionary system has not—and will not—reduce elder incarceration in North Carolina.²¹⁰ Historically, discretionary parole commissions fluctuate in terms of release rates, but usually err on the side of denial, keeping more parole-eligible people in prison than necessary.²¹¹ Instead, once a parole-eligible incarcerated person reaches age fifty, the Parole Commission should be required to consider the incarcerated person's age and health status, and how those two factors can significantly reduce the likelihood of recidivism. To be effective, the process must go so far as to *presume* parole approval for those over the age of fifty unless the Parole Commission determines there are special circumstances that require a denial.²¹²

208. See *supra* note 136 and accompanying text.

209. *Parole Process*, *supra* note 107.

210. See *supra* Section III.A.2.

211. See Emmett Sanders, *No Release: Parole Grant Rates Have Plummeted in Most States Since the Pandemic Started*, PRISON POL'Y INITIATIVE (Oct. 16, 2023), <https://www.prisonpolicy.org/blog/2023/10/16/parole-grants/> [<https://perma.cc/DA32-YBB4>] (finding that out of the twenty-seven states with discretionary parole, only nine were more likely to grant parole in 2022 as compared to 2019, and the majority of states denied parole at higher rates). The Parole Commission just started providing monthly data on the cases that it reviews for parole, and the outcome of each case. See *Discretionary Parole Reviews*, N.C. DEP'T ADULT CORRECTION, <https://www.dac.nc.gov/divisions-and-sections/post-release-supervision-and-parole-commission/discretionary-parole-reviews> [<https://perma.cc/5FNH-6LAV>]. During December 2024, the Parole Commission considered releasing thirty-six people eligible for discretionary parole—the majority of them elders. *Id.* The Commission released two. *Id.*

212. And of course, these reasons should be disclosed in writing to the applicant.

Through incorporating these new procedural policies into the already-existing parole process, North Carolina could significantly reduce the number of parole-eligible elders currently caged in North Carolina's prisons. However, parole cannot be the only solution. As the people sentenced under the FSA are released or pass away, the parole-eligible community in North Carolina's prisons will substantially decrease.²¹³ Therefore, it is important to also consider how the use of compassionate release and clemency may be able to reduce elder incarceration.

2. Expanding Compassionate Release

In 2023, the Appropriations Act implemented a few changes to increase eligibility for compassionate release in North Carolina.²¹⁴ However, several exclusions to both the Medical Release and the ELC programs persist.²¹⁵ By excluding people who have committed certain serious offenses from accessing compassionate release, the North Carolina prison system undermines the purpose of these programs, which are: (1) allowing extremely sick individuals to “die with dignity” outside of prison and surrounded by loved ones;²¹⁶ and (2) treating health concerns that the prison systems are not prepared or qualified to manage.²¹⁷

To effectively use compassionate release to lower the elderly and ill prison population, the program exceptions should be eliminated. Medical Release should be expanded to allow people with *any* class of conviction to apply instead of excluding people with Class A or Class B felonies, people with LWOP sentences, and people with certain sexual offenses.²¹⁸ Similarly, ELC should not exclude people in medium- or maximum-security prisons.²¹⁹ Since both Medical Release and ELC require a finding that the incarcerated person poses a minimal risk to public safety,²²⁰ there is no need for these exclusions. If the Secretary or the Parole Commission decides that the person applying for Medical Release or ELC poses a danger to public safety despite their illness or disability, then

213. See *supra* notes 119–20 and accompanying text; see also TODD ISHEE, N.C. DEP'T OF ADULT CORR., ADMIN. ANALYSIS UNIT, ANNUAL STATISTICAL REPORT FISCAL YEAR 2022-2023, at 22 (2023), <https://www.dac.nc.gov/annual-statistical-report-fy-2022-23/open> [<https://perma.cc/M8ZU-9DVA>] (“As the proportion of the prison population sentenced prior to Structured Sentencing continues to decrease, parole exits will diminish over time.”).

214. See *supra* notes 176–81 and accompanying text.

215. See *supra* Section III.C.

216. Ronald Aday & Azrini Wahidin, *Older Prisoners' Experiences of Death, Dying and Grief Behind Bars*, 55 HOW. J. CRIME & JUST. 312, 312 (2016).

217. See Crumpler, *Expanded Prison Medical Release*, *supra* note 175.

218. See *supra* notes 182–84 and accompanying text.

219. See *supra* note 189 and accompanying text.

220. Medical Release requires that the person pose “no risk or low risk” to public safety. See *supra* note 179 and accompanying text. ELC requires that the person no longer pose a “significant” risk to public safety. See *supra* note 188 and accompanying text.

the person will not be released through these programs. But currently if a person has a Class B felony, even if they are near-death and completely disinhibited, then they will not be eligible for Medical Release.²²¹ Additionally, both Medical Release and ELC set conditions of release for and supervise anyone who is released under these programs.²²² These safety precautions should allow anyone—even those with serious felony offenses or those caged in higher security prisons—an opportunity for compassionate release review.²²³

There are also more minimal amendments that these programs could implement to target elder incarceration. For example, under both Medical Release and ELC, a “terminally ill” incarcerated person is someone whose condition “will likely produce death within nine months.”²²⁴ This time-period is too short and should be eliminated to reflect the national definition of “terminally ill” which does not include a time limit.²²⁵ Additionally, the ELC requirement that the qualifying disease or illness not be one that was diagnosed or known during sentencing²²⁶ should be eliminated. This policy ignores the reality of progressing illnesses and unnecessarily keeps people who are terminally ill in prison. Generally, aiming to make the compassionate release programs as broad as possible would not only aid in decreasing the elder prison population and preserving resources but would also keep taxpayers’ money from going towards funding the costly health needs of incarcerated elders while simultaneously furthering the purposes of having compassionate release programs.

221. See *supra* notes 182–83 and accompanying text.

222. See *supra* note 173 and accompanying text.

223. A natural concern to opening-up Medical Release and ELC review to everyone is that there may not be enough resources to conduct all these review hearings. But the Medical Release and ELC programs already have procedures built into screen applicants before a formal review hearing. For example, to be considered for ELC, the incarcerated person must be referred to the Secretary of the Department of Adult Correction (“Secretary”) by a licensed physician and the Department of Adult Correction’s medical director. N.C. GEN. STAT. § 148-4 (2024). Only then will the Secretary consider the person for ELC. *Id.* Additionally, any incarcerated person applying for Medical Release must be referred by the Department of Adult Correction to the Commission. *Id.* § 15A-1369.3(a). The Department of Adult Correction will refer an incarcerated person to be considered by the Parole Commission only after the department’s medical director examines the person and prepares a written diagnosis. *Id.* § 15A-1369.3(1). So, for both programs, the Parole Commission does not use resources to make a formal decision until the applicant has met several conditions.

224. *Id.* § 15A-1369(8).

225. See, e.g., 18 U.S.C. § 3582(d)(1) (“In this subsection, the term ‘terminal illness’ means a disease or condition with an end-of-life trajectory.”). There are plenty of states that require incarcerated people to be terminally ill to qualify for compassionate release but who do not set any sort of time limit. See MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE COMPASSIONATE RELEASE IN THE STATES 28–33 (2018), <https://famm.org/wp-content/uploads/2023/12/Exec-Summary-Report.pdf> [<https://perma.cc/7YFS-BPH6>] (listing Mississippi, Nebraska, New Hampshire, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wisconsin).

226. § 148-4(8).

3. Advocating for Commutation Through Clemency

In North Carolina, most incarcerated elders are ineligible for parole and do not qualify for any form of compassionate release.²²⁷ Almost all elders serving LWOP sentences are in this category.²²⁸ If parole does not become more meaningful, and if compassionate release is not expanded, then the only legal tool that North Carolina has left in place to address this population is executive clemency. Article III, Section 5(6) of the North Carolina Constitution authorizes the governor to grant clemency for any criminal offense.²²⁹ Executive clemency in North Carolina takes several forms,²³⁰ but the one most relevant to incarcerated elders is a commutation.²³¹ If the governor decides to commute a person's sentence, they may do one of three things: (1) change the nature of the sentence given to the individual (for example, from a death sentence to a LWOP sentence); (2) reduce the sentence by a certain number of days or years; or (3) make an individual parole-eligible.²³² The governor has complete discretion over when to commute a sentence and by how much,²³³ and there are no clear criteria outlining what the governor considers when reviewing a clemency petition.²³⁴

While the concept of clemency seems promising, incarcerated people in North Carolina tend to view clemency as a last-ditch effort because clemency is rarely granted. The number of sentences that North Carolina governors commute is frustratingly low. For example, in 2023, then Governor Roy Cooper commuted one person's sentence.²³⁵ In 2022, he commuted six people's sentences.²³⁶ The recent lack of commutations is not necessarily a new trend—

227. See *supra* Sections III.A, III.B.

228. See *supra* Section III.B.

229. N.C. CONST. art. III, § 5(6).

230. There are two types of clemency in North Carolina: pardons and commutations. Ben Finholt & Jamie Lau, *Everything You Need to Know About Clemency in North Carolina*, WILSON CTR. FOR SCI. & JUST. DUKE L. (Sept. 17, 2021), <https://wsj.law.duke.edu/news/everything-you-need-to-know-about-clemency-in-north-carolina/> [<https://perma.cc/LG5F-DZBS>]. Pardons take on three forms: pardons of forgiveness, unconditional pardons, or pardons of innocence. *Relief from a Criminal Conviction (2025 Edition)*, UNC SCH. GOV'T, <https://www.sog.unc.edu/resources/microsites/relief-criminal-conviction/pardons> [<https://perma.cc/MC27-A9CL>].

231. Executive pardons may also be relevant to incarcerated elders, but they are rare and granted in only very specific circumstances. To learn more about pardons in North Carolina, see *Relief from a Criminal Conviction (2023 Edition)*, UNC SCH. GOV'T, <https://www.sog.unc.edu/resources/microsites/relief-criminal-conviction/pardons> [<https://perma.cc/MC27-A9CL>]; see also Finholt & Lau, *supra* note 230.

232. See *id.*

233. N.C. CONST. art. III, § 5(6).

234. See Finholt & Lau, *supra* note 230.

235. N.C. Commutation Order No. 0629452 (Dec. 20, 2023), <https://governor.nc.gov/darnell-cherry-commutation-order/open> [<https://perma.cc/DQH8-CVEX>].

236. N.C. Commutation Order Nos. 1461781, 0774159, 0726624, 0842223, 0472249, 0889909 (Dec. 20, 2022), <https://governor.nc.gov/december-commutations-document/open> [<https://perma.cc/GG9P-2CBA>].

the number of commutations plummeted at the turn of the twenty-first century.²³⁷

Almost all of the sentences Governor Cooper commuted were based on recommendations from the Juvenile Sentence Review Board, meaning that the incarcerated people were children at the time they were sentenced for their crimes.²³⁸ While commuting the sentences of those who were harshly sentenced as children heads in the right direction, commutations should be expanded and pushed further to include other demographics like incarcerated elders who were given harsh sentences under the FSA or LWOP sentences under the SSA.

Before leaving office, Governor Cooper followed in former President Joe Biden's footsteps²³⁹ by commuting the sentences of fifteen people on North Carolina's death row.²⁴⁰ Nine were elders.²⁴¹ The use of executive clemency to protect the lives of adults who are incarcerated is hopeful. But Governor Cooper commuted all of these sentences to LWOP, meaning that all fifteen people commuted will grow old in prison. In order to use the power of executive clemency to reduce the elder prison population in North Carolina, future governors must commute the sentences of elders who are serving LWOP, regardless of whether they were sentenced as children or not. And we, as constituents, have the power to persuade future governors to use their executive clemency power more liberally.²⁴²

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237. See Finholt & Lau, *supra* note 230.

238. See Press Release, Governor Roy Cooper, Governor Cooper Commutes Sentences and Issues Pardons of Forgiveness (Dec. 20, 2022), <https://governor.nc.gov/news/press-releases/2022/12/20/governor-cooper-commutes-sentences-and-issues-pardons-forgiveness> [<https://perma.cc/7RMJ-UYN4>]. To learn more about the Juvenile Sentence Review Board, see N.C. Exec. Order No. 208 (Apr. 8, 2021), <https://governor.nc.gov/documents/files/executive-order-no-208/open> [<https://perma.cc/D8FV-RZE4>].

239. Will Weissert & Darlene Superville, *Biden Gives Life in Prison to 37 of 40 Federal Death Row Inmates Before Trump Can Resume Executions*, ASSOCIATED PRESS, <https://apnews.com/article/biden-death-row-commutations-trump-executions-f67b5e04453cd1aa6383c516bc14f300> [<https://perma.cc/9XKK-WBWC> (staff-uploaded archive)] (last updated Dec. 23, 2023, 6:11 PM).

240. *Outgoing North Carolina Governor Commutes 15 Death Row Sentences*, NPR (Dec. 31, 2024, 4:55 PM), <https://www.npr.org/2024/12/31/g-s1-40663/north-carolina-governor-roy-cooper-commutes-death-row-sentences> [<https://perma.cc/VYS6-42VQ>].

241. Press Release, Governor Roy Cooper, Governor Cooper Takes Capital Clemency Actions (Dec. 31, 2024), <https://governor.nc.gov/news/press-releases/2024/12/31/governor-cooper-takes-capital-clemency-actions> [<https://perma.cc/74YG-LR4U>].

242. For an example of activists pushing Governor Cooper to utilize his clemency powers, see Kelan Lyons, *In NC, One Man—Gov. Roy Cooper—Has the Power to Empty Death Row. But Will He Do It?*, NC NEWSLINE (Dec. 11, 2023, 5:55 AM), <https://ncnewsline.com/2023/12/11/in-nc-one-man-gov-roy-cooper-has-the-power-to-empty-death-row-but-will-he-do-it/> [<https://perma.cc/F4GK-245W>]; see also Press Release, N.C. Coal. to Abol. Death Penalty, NC Campaign for Death Row Commutations Ends with a Historic Grant of Clemency (Dec. 13, 2024), <https://nccadp.org/nc-campaign-for-death-row-commutations-ends-with-a-historic-grant-of-clemency/> [<https://perma.cc/7AJM-P9EG>].

Overall, lawmakers in North Carolina have been unwilling to use legal tools to amend the laws that are contributing to North Carolina's elderly and incarcerated population.²⁴³ But even if each one of this Comment's legal proposals were implemented tomorrow, there are still 8,391 elders in North Carolina's prisons who need help now.²⁴⁴ That is why implementing harm reduction practices and engaging in community care is imperative.

B. *Reducing Harm*

Despite what can be done to reduce elder incarceration using the legal mechanisms presently available in North Carolina, the truth is that many elders will die while incarcerated.²⁴⁵ To minimize the number of elders that die while incarcerated, North Carolina's prisons need to dedicate resources to remedy the inhumane conditions that elders face while incarcerated.²⁴⁶

Other states facing increased elder incarceration have tried to cope by implementing prison hospice care,²⁴⁷ senior living programs,²⁴⁸ memory disorder prison units,²⁴⁹ dementia units,²⁵⁰ or even contracting with private

243. See, e.g., *supra* notes 164–68 and accompanying text (discussing the failed attempts to pass the PRRRA in North Carolina).

244. See *supra* Table 1.

245. See Wyatt Stayner, *Dying Behind Bars—Another Form of Capital Punishment*, PRISON JOURNALISM PROJECT (May 4, 2023), <https://prisonjournalismproject.org/2023/05/04/more-people-aging-dying-in-prison/> [<https://perma.cc/2P69-DYK5>] (finding that people aged fifty-five and older made up sixty-three percent of prison deaths in 2019 while those aged fifty-five and older made up thirty-four percent of prison deaths in 2001).

246. This section is not meant to be an alternative to reducing the number of incarcerated elders through release. However, given the sheer number of elders who are currently incarcerated and how many middle-aged folks with long sentences will age into being incarcerated elders, North Carolina's prisons must reconfigure to meet the needs of this population. If North Carolina's prisons do not change, then the prisons will increasingly become centers of human rights violations. See Jamie Fellner, *Aging Behind Bars: Prison, Punishment, Parole, and Human Rights*, in *AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY* 10, 10–14 (Samuel K. Roberts ed., 2015), <https://www.issueab.org/resources/22902/22902.pdf> [<https://perma.cc/GD5V-RV6D>].

247. *Our Work*, HUMANE PRISON HOSPICE PROJECT, <https://humanepriprisonhospiceproject.org/> [<https://perma.cc/74CJ-KNJ7>].

248. *Senior Living Program*, N.Y. STATE DEP'T CORR. & CMTY. SUPERVISION, <https://doccs.ny.gov/programs/senior-living-program> [<https://perma.cc/NL6Q-AC8H>].

249. *First of Its Kind Memory Disorder Prison Unit: Federal Inmates Certified as Certified Nursing Assistants, Federal Correctional Staff Certified with Specialized Certification*, PR NEWswire (Dec. 2, 2019, 9:03 AM), <https://www.prnewswire.com/news-releases/first-of-its-kind-memory-disorder-prison-unit-federal-inmates-certified-as-certified-nursing-assistants-federal-correctional-staff-certified-with-specialized-certification-300964099.html> [<https://perma.cc/3TXD-PEHV>].

250. Michael Hill, *New York Prison Creates Dementia Unit*, BOS. GLOBE (June 3, 2007), http://archive.boston.com/news/nation/articles/2007/06/03/new_york_prison_creates_dementia_unit/ [<https://perma.cc/7FLG-A6KP>].

nursing homes.²⁵¹ In 2021, North Carolina provided funding for a palliative care unit in Central Prison, but as of 2023, only three of the seventy-seven needed caretaker positions had been filled.²⁵² Ultimately, without enough resources, younger incarcerated people and prison guards end up providing medical care to older incarcerated people—caretaking that should only be dedicated for a health professional.²⁵³ Implementing a prison hospice program would help keep people safe as they grow older or as the illnesses of those ineligible for compassionate release progress.

Prison-specific policies can also be implemented to make sure that incarcerated elders struggling to survive will not go unnoticed. For example, prisons should consider requiring that the Department of Adult Corrections perform physical and mental check-ins after age fifty to make sure that medical needs do not go unaddressed, and to flag people who may be eligible for compassionate release. Even though North Carolina's prison guards are not nurses, guards should still be trained in elder-specific care and should learn the warning signs of cognitive decline.²⁵⁴ Additionally, visitation privileges should be expanded for elders who have illnesses but are not granted compassionate release. Cutting off an incarcerated elder from their family and friends equates to cutting off an incarcerated elder from their fiercest advocate. Expanded visitation privileges will allow family members and friends to monitor North Carolina's ability to provide adequate care to and accommodations for elders. Finally, North Carolina needs to implement programing and education opportunities geared towards elders, such as fall prevention programs, financial

251. See *Feds: No Medicaid Reimbursement for Prisoners at Rocky Hill Nursing Home*, HARTFORD COURANT, <https://www.courant.com/2015/09/05/feds-no-medicaid-reimbursement-for-prisoners-at-rocky-hill-nursing-home/> [https://perma.cc/6B2M-X8AM (staff-uploaded, dark archive)] (last updated Dec. 12, 2018, 6:28 PM); see also Michael Ollove, *Elderly Inmates Burden State Prisons*, STATELINE (Mar. 17, 2016, 12:00 AM), <https://stateline.org/2016/03/17/elderly-inmates-burden-state-prisons/> [https://perma.cc/S9T2-3MFB].

252. Kelan Lyons, *Prison System Palliative Care Unit Has Filled Just Three of 77 Jobs*, NC NEWSLINE (Feb. 24, 2023, 6:46 AM), <https://ncnewsline.com/briefs/prison-system-palliative-care-unit-has-filled-just-three-of-77-jobs/> [https://perma.cc/CF47-3SWC].

253. See James Kelliher, *No Place for Old Men: Advocating for Reform and Care for Aging Incarcerated People in North Carolina*, CAROLINA PUB. PRESS (Aug. 17, 2023), <https://carolinapublicpress.org/61124/no-place-for-old-men-advocating-for-reform-and-care-for-aging-incarcerated-people-in-north-carolina/> [https://perma.cc/BJ9A-H4LJ] (“My day starts early with a check-in with my first patient prior to breakfast. I push him in his wheelchair to chow calls (meal time), medication calls, and all appointments, and I bring him his change of clothes. If another orderly is unavailable, I cover his patient also. When someone is incontinent and has an accident, I clean the affected area. I’m on call 24/7. For this, I get paid \$1 a day.”).

254. See Gary Cornelius, *Special Populations in Corrections: Elderly Inmates*, LEXIPOL (Mar. 22, 2024), <https://www.lexipol.com/resources/blog/special-populations-in-corrections-elderly-inmates/> [https://perma.cc/K5DU-55P2] (“Correctional officers should be familiar with how to safely manage elderly inmates, including communication, notifying mental health and medical staffs, dealing with inmates suffering from dementia, and keeping older inmates safe from violent, predatory inmates.”).

exploitation and elder abuse prevention, and bereavement support groups for elders who experience the loss of loved ones both inside and outside of prison.²⁵⁵

But when it comes to harm-reduction solutions, caution is necessary. Ultimately, solutions focusing on harm-reduction are not enough on their own to remedy the problem of elder incarceration in North Carolina, or elsewhere. At the same time, change to incarceration policies come incrementally. In the meantime, it is our duty to care for our incarcerated neighbors humanely while they remain caged as we await the more sweeping procedural de-carceration changes that this Comment proposes.

C. *Engaging in Community Care*

Elder incarceration in North Carolina can feel like a lost cause, especially when considering the sheer number of elders locked in North Carolina's prisons and how resistant the North Carolina General Assembly has been to even take small steps to address the problem.²⁵⁶ But it does not have to be a lost cause, so long as we supplement broader procedural changes with community care.

While discussing my research with others, colleagues ask me whether it might be more humane to leave elders in prison rather than release them into a world that does not have the medical and social systems in place to sufficiently care for, house, or feed low-income elders with criminal records. My short answer is no—I do not think that it would be more humane to leave elders in prison.²⁵⁷ At the same time, I can see why someone would raise that question.

This Comment advocates for releasing more incarcerated elders through the legal mechanisms of parole, compassionate release, and clemency. But, if society cannot care for elderly people upon being released, then more elders will become unhoused and face dangerous living conditions. This is why community care is so important.

255. The First Step Act's guide to programming approved the following programs for elders: (1) "Money Smart for Older Adults" to help "provide awareness among older on how to prevent elder financial exploitation and to encourage advance planning and informed financial decision-making"; (2) "A Matter of Balance," a program to help "build self-efficacy related to strength and mobility by decreasing fall-related fears"; and (3) "Arthritis Foundation Walk with Ease" meant to "reduce the pain and discomfort of arthritis" while increasing "balance, strength, and walking pace." U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, REENTRY SERVICES DIV., FIRST STEP ACT APPROVED PROGRAMS GUIDE 34, 58, 60 (2023), https://www.bop.gov/inmates/fsa/docs/fsa_guide_eng_2023.pdf [<https://perma.cc/F8EU-SCM6>]. The North Carolina Department of Health and Human Services already has an Adult Day Services program offered "to individuals with cognitive and/or physical impairments to promote social, physical and emotional well-being." *Adult Day Services*, N.C. DEP'T HEALTH & HUM. SERVS., <https://www.ncdhhs.gov/divisions/aging/adult-day-services> [<https://perma.cc/264D-LE7Z>]. This program should be expanded to the incarcerated elder population.

256. See, e.g., *supra* notes 164–68 and accompanying text (discussing the failed attempts to pass the PRRA in North Carolina).

257. See *supra* Section I.A.

In the context of incarceration, community care focuses on the systems that health care and social work can create to aid the re-entry of formerly incarcerated people into life outside of incarceration.²⁵⁸ There are already organizations and individuals practicing community care in North Carolina. For example, North Carolina's prisoners' and civil rights organizations fought to release elderly and otherwise vulnerable incarcerated people from North Carolina's prisons during the COVID-19 pandemic.²⁵⁹ Local re-entry organizations such as Benevolence Farm and NC-Cure are working to find housing, employment, and other basic needs for recently released people.²⁶⁰ And recently, former Governor Cooper signed Executive Order 303, establishing Reentry 2030, an initiative aiming to improve reentry success for people leaving prison and for those under community supervision.²⁶¹ These are all forms of community care and are all imperative to redressing the problem of elder incarceration in North Carolina.

But we—as community members—can also practice community care. Pen pal programs, phone calls, and consensually sharing the stories of incarcerated elders is community care. Connecting currently or formerly incarcerated elders with other community members who experienced the North Carolina prison system is community care. Picking up elders from prison when they are released is community care. And sending books to incarcerated people in North Carolina

258. See Lisa B. Puglisi, Liz Kroboth & Shira Shavit, *Reentry and the Role of Community-Based Primary Care System*, in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 429, 429–40 (Robert B. Greifinger ed., 2d ed. 2022). But the concept of community care is not limited to re-entry. For a more general a discussion of community care, see *Community Care*, MENTAL HEALTH AM., <https://www.mhanational.org/bipoc-mental-health/community-care> [<https://perma.cc/926Y-GDS9>].

259. For example, in *Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. 2020), the American Civil Liberties Union of North Carolina filed suit on behalf of eleven incarcerated people to gain release from a North Carolina federal prison during the COVID-19 pandemic. *Id.* at 590. The petitioners lost, and one of the incarcerated elders ended up dying of COVID while incarcerated. *Id.* at 609; see also *Emancipate NC Files Suit to Release Incarcerated People During COVID-19 Crisis*, EMANCIPATE NC (Apr. 8, 2020), <https://emancipatenc.org/emancipate-nc-files-suit-to-release-incarcerated-people-during-covid-19-crisis/> [<https://perma.cc/CVE9-5JFV>]; *The Prison COVID Lawsuit*, DISABILITY RTS. N.C. (Mar. 29, 2021), <https://disabilityrightsncc.org/resources/the-prison-covid-lawsuit/> [<https://perma.cc/C3QN-J4HT>] (outlining a lawsuit brought by Disability Rights North Carolina, Emancipate NC, the American Civil Liberties Union of North Carolina, Forward Justice, and the National Juvenile Justice Network “to ensure that the Governor, the Secretary of NC DPS, and the Parole Commissioners take necessary action to protect people from contracting COVID-19 in NC prisons”).

260. See NC-CURE, <https://www.nccure.org/> [<https://perma.cc/X7UN-82K7>] (supporting people in prison and their loved ones, advocating against all forms of inhumane treatment of incarcerated people); BENEVOLENCE FARM, <https://benevolencefarm.org/> [<https://perma.cc/6A3V-DBJ4>] (providing housing for formerly incarcerated women regardless of their conviction, and focusing on rural-reentry, fair housing, and fair employment initiatives); N.C. COAL. FOR ALTS. TO DEATH PENALTY, <https://nccadp.org/> [<https://perma.cc/VD28-PNZU>] (advocating for Governor Cooper to commute the sentences of those held on North Carolina's death row).

261. N.C. Exec. Order No. 303 (Jan. 29, 2024), <https://governor.nc.gov/executive-order-no-303/open> [<https://perma.cc/C4CW-JYDT>].

is community care.²⁶² A coalition of informed and concerned community members must make sure that the elders of North Carolina's prisons are not forgotten.

Ultimately, supporting newly released elders requires a combination of reforming procedural and legal statutes, implementing programs to reduce harm, and mobilizing communities around North Carolina.

CONCLUSION

Elder incarceration, nationally and in North Carolina, needs to be addressed. Keeping elderly people incarcerated does not make our communities safer and does not lower recidivism rates, leaving the state of elder incarceration in North Carolina without purpose. It is dangerous and inhumane. This Comment untangled the legal mechanisms that caused this epidemic and demonstrated how to use those same legal mechanisms to undo the harm that they have caused. For example, North Carolina must consider the unique status of elders when considering their release for parole and should provide concrete and actionable reasons for denying someone parole. Compassionate release should be accessible to elders with all types of convictions in order to reduce the extreme medical costs that stem from keeping elders incarcerated. And the governor of North Carolina should use their commutation powers to reduce LWOP sentences, or to make those sentences parole eligible. But reforming legal procedures will only do so much. Helping elders in North Carolina's prisons will require a combination of legal reform, harm-reduction, and community care. Elder incarceration in North Carolina is and should be considered an epidemic. For the safety of our communities—inside and outside of prison—legal and nonlegal advocates must come together to tackle this problem from all angles.

JULIANA WHITTINGTON**

262. The Prison Books Collective in Durham gathers and donates free books to incarcerated people in North Carolina and Alabama. See PRISON BOOKS COLLECTIVE, <https://prisonbooks.info/> [<https://perma.cc/NJF2-LTX4>].

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APPENDIX

The following life stories were scattered throughout the Comment but are told in full below. Both Cassie Johnson and Timothy Tann provided their consent.

Cassie Johnson: Cassie is a seventy-four-year-old woman incarcerated in North Carolina. In 1980, Cassie was convicted of first-degree murder after she tragically shot and killed a police officer. Cassie was sentenced to life in prison with the possibility of parole. But Cassie has been denied parole over twenty-three times. Each time she is denied, she receives a form letter stating that paroling her would depreciate the law with no further explanation. Cassie has never had the opportunity to speak with the Parole Commission. Cassie has never been given a MAPP. She has been incarcerated for forty-four years.

Since entering prison, Cassie's health has declined. She is in a wheelchair and on oxygen. Cassie thinks that her breathing difficulties are due to a combination of getting COVID-19 and breathing in the mold in the assisted-living unit. Cassie has congestive heart failure, Chronic Obstructive Pulmonary Disease, Asthma, and Bronchitis.

In prison, Cassie cannot attend church because the church is not wheelchair accessible. Instead, Cassie prays in her cell. Cassie cannot have in-person visitors because the journey from the assisted-living unit and the visitor's center is too hard on her health. In the assisted-living unit, Cassie says that "if it weren't for inmates helping each other, we would be at a loss."

Throughout her time in prison, Cassie earned an associate's degree in business management and trained in cosmetology. She has taken as many programs as possible, some two or three times over. She led AA groups as a volunteer and worked as a clerk for the prison's program director. Now, Cassie cannot participate in any programming or work due to her health and because the educational programs are too advanced.

The North Carolina Parole Commission is currently deciding whether Cassie will be released on parole. If Cassie is released, she will live with one of her three children. Cassie is remorseful for her crime and prays for the family of the police officer every day. Cassie said: "If I could change places with the police officer then I would."

Upon our interview ending, Cassie said: “I am no longer a threat to society. When will you find it in your heart to let me go?”²⁶³

Timothy Tann: Timothy is a seventy-year-old man incarcerated in North Carolina. In 1980, Timothy was convicted of first-degree burglary and was sentenced under pre-Fair Sentencing Act sentencing laws to life in prison with the possibility of parole. Timothy appealed his case to the Supreme Court of North Carolina, which affirmed his charges.²⁶⁴ If Timothy was sentenced to the same crime today, he would have been sentenced under the Structured Sentencing Act to *at most* eleven and a half years.²⁶⁵ Timothy has been incarcerated for forty-four years.

In 1995, Timothy was released on parole for eight months. He was sent back to prison after missing his curfew which was set for 6:00 PM. Timothy explained that he had only left his house past curfew to pick up his nieces and nephews from his sister’s house after his sister experienced a medical emergency.

Since coming back to prison, Timothy has been denied parole almost every year. In 2005, Timothy was given a MAPP contract. Five months later the contract was revoked because Timothy received a possession of tobacco infraction. After that, Timothy did not hear any updates for nineteen years until October 2024 when he was given a three-year MAPP contract.

Since entering prison, Timothy’s health has declined. In 2023, he began using a cane to walk. In 2025, he had to begin using a walker. Timothy is unable to go to church because his walker does not fit into the church bathroom. Because of his high blood pressure, Timothy is unable to eat pork. On days when the prison is serving pork, Timothy misses his meals. In the past few years, Timothy has experienced falling, oftentimes in the shower. He said that falling is a common occurrence among fellow incarcerated elders.

Timothy has experienced the death of his mother, father, two sisters, and three brothers. Timothy’s surviving sister has dementia. If Timothy is released, he will not have anywhere to live. Despite this, Timothy still hopes to be released

263. All information regarding Cassie Johnson was gathered during interviews conducted by the author with Cassie Johnson on June 29, 2023, and February 3, 2025. Notes from these interviews are on file with the author. Cassie Johnson consented to her name and information being shared in this Comment.

264. *State v. Tann*, 302 N.C. 89, 100, 273 S.E.2d 720, 727 (1981).

265. This calculation assumes that Timothy would get the highest sentence possible in the aggravated range. A more likely sentence would be lower. This calculation takes into account Timothy’s prior record level.

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in 2027. He plans to return to the town where he grew up and to attend his mother's old church. He says that he currently "take[s] it day by day" and will continue to "take it day by day."²⁶⁶

266. All information regarding Timothy Tann was gathered during interviews conducted by the author with Timothy Tann on June 21, 2023, and March 3, 2025. Notes from these interviews are on file with the author. Timothy Tann consented to his name and information being shared in this Comment.

