

Good morning, Senator Bibby- Center, Representative Salisbury and distinguished Members of the Joint Standing Committee on Criminal Justice and Public Safety
My name is Mark Dion, I am a resident of Portland, and I am here today to speak in favor of passage for LD178:

An Act to Support Re-entry and Reintegration into the Community.

As one post release client put to me: “When does the punishment stop?”

My answer: “It doesn’t”

As a defense attorney I sincerely appreciate the work of this Committee in designing an administrative path for an incarcerated individual to rejoin the community from which she, he or they have been disenfranchised from. Clearly the intent behind this LD promises a notable reform of our current correctional policies and practice.

If I may be permitted to speculate for just a moment, I would wager that the public debate on this LD both under this Dome and back in our respective communities will be vigorous and focus largely on our individual and collective understanding of what we mean when we talk about just punishment. Determining the fair contours of a just penalty for any crime is not so easy a task as one would assume. We flirt with the idea of rehabilitation but in a large degree we exercise a consistent commitment to the promises of punitive retribution.

It will not only be the due process mechanics outlined in this Bill that will be up for debate but the implicit moral perspective that underpins a decision to release an incarcerated felon contrary to the judicially imposed terms of a lawful sentence. This moral question of what justice “*might be*” exists in constant tension with the legal rationale for punishment where we sanction not only the act of a crime but the “*entirety*” of the guilty person’s humanity as well.

Just take careful notice of what occurs with the imposition of a felony conviction. We sentence someone for a crime but a release from incarceration is not a release from conviction. Despite any evidence of presumed individual rehabilitation, the status of conviction continues to punish the person with a permanent state of civic exclusion upon their return to the free world. So much for the implicit promise of earned re-integration.

Paraphrasing the client conversation, I mentioned at the onset of my testimony, punishment does not end its grip on a convicted person very easily if at all.

A quick aside. I cannot discuss parole without some mention of the conduct that prompts this discussion in the first place.

Legislatures are so very fond of felonies. They rarely if ever meet one that does not appeal to them. Legislators act on an idea that defendants engage in an ad hoc cost benefit analysis of their anticipated behavior in their decision to commit a crime. In my experience that is a rare case indeed.

Instead, I have to report that most of my clients victimize others and themselves on an altar of ill designed, ill-conceived and largely impulsive behavior often distorted by the effects of poly substance use.... that's why many if not all of them end up in the system. Under those conditions, they have little ability or awareness to contribute to the advanced calculation of the social consequences of their crime.

The social consequences of a felony conviction have an irreparable adverse impact on a felon's access to employment and housing. You can't make it if you can't get a job or have a landlord willing to rent despite your felony status.

Will the promise of parole help us tell a different story? I hope so.

I do support the *idea* of parole, but I live in the real world of convicted felons.

Please consider that this LD applies 3096 words to describe parole primarily as a function of administrative law. The word justice, other than when coupled to the idea of "restorative "is painfully absent. If the adoption of this proposal is to be a transformative shift in our questions surrounding the moral legitimacy of extended and in some cases terminal incarceration, then we need to be intentional in defining our expectations for justice in the administration of a parole system.

I urge the Committee to adopt a Section #4 under §5822 *Parole by Board* that would clearly express the overarching justice principle that should govern the work and agency of the Board. The allocation of such a moral principle would allow you to express your collective understanding of the purpose for incarceration and the role parole should play in our criminal justice system.

Telling us why this policy must exist, as a matter of justice, and the outcome expected from its application will inform incarcerated individuals, stakeholders, community members and legal practitioners as to the moral purpose driving this initiative into law.

I defend my clients not only by responding to the expressed elements of a criminal statute, but I also argue how justice would want that law applied. One day someone's petition for the safe harbor of parole will only be realized if they can advance an argument predicated on the expression of moral principle that the Legislature took great care to incorporate into their construction of this statute.

"Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." ¹ Supreme Court Justice Benjamin N. Cardozo

I think Cardozo's comment is helpful in assessing the legal metaphor expressed in the criteria for parole eligibility in §5823, 1.C

¹ Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J)

What exactly is meant when we say, “not *incompatible with the welfare of society*”? Isn’t the question of societal incompatibility the starting point for incarceration to begin with?

How then is that standard to be satisfied? A yes or no response seems inadequate. What offer of proof would sustain an applicant’s petition when governed by this overly broad language? Is the understanding of that standard reserved to the subjective thinking of the future members of the Parole Board or does the Legislature have a responsibility to add the flesh of objectivity to those statutory bones?

The other two eligibility standards do appropriate to themselves some semblance of objectivity by relying on accessible sentencing calculations and reports from third parties to influence their final decision. At least tangible numbers, reports, and risk instruments can be refuted, accepted or modified in arriving at a finding on the question of parole suitability. Less is the case for reliable predictability when one considers the diverse perceptions at play in the determination of the present status of society’s welfare. Can a metaphor be a controlling variable in fashioning a judgement on a petitioner’s application for community release?

Can a Board’s denial for parole status turn on a social condition that we, in this room today, would be hard pressed to define in a manner where consensus in that understanding could be achieved? I hope not.

For parole to be successful a corresponding investment in increasing access to jobs, housing, social services, and voluntary, community-based substance use disorder treatment and mental health out-patient services will do much to sustain the parolee’s successful placement in the community and by extension improve the condition of public safety for all of us.

Let me close with this final thought:

Parole, beyond the legal and bureaucratic, is a public affirmation of hope.
You can strip a human being of everything
but if hope exists
then the promise of individual dignity does not perish
but willfully survives one more day.

Thank you for your attention.