

Administrative Prison Terms and the Cycle of Carceral Legislating

MICHAEL T. FAHY*

TABLE OF CONTENTS

I. INTRODUCTION	712
II. THE REAGAN TOKES LAW AND OHIO’S CYCLE OF CARCERAL LEGISLATING	715
A. <i>The Reagan Tokes Law’s Administrative Prison Terms</i>	716
B. <i>The RTL in Context: Ohio’s Cycle of Carceral Legislating</i>	720
III. ADMINISTRATIVE PRISON TERM SCHEMES FAIL CONSTITUTIONAL REVIEW AND EXACERBATE MASS INCARCERATION.....	725
A. <i>New Law, Same Old Mistakes: The RTL Revives Unconstitutional “Bad Time” Administrative Prison Terms</i>	726
1. <i>The RTL Violates Separation of Powers Principles</i>	727
2. <i>The RTL Undermines Procedural Due Process Rights of Incarcerated Individuals</i>	731
B. <i>Administrative Prison Terms Increase Lengths of Stay and Exacerbate Mass Incarceration</i>	734
1. <i>The RTL Will Lead to Increased Lengths of Stay in Prison</i>	734
2. <i>Long-Term Incarceration Needlessly Perpetuates Mass Incarceration</i>	736
IV. LEGISLATIVE AND POLICY SOLUTIONS FOR THE RTL	739
A. <i>Remedy Separation of Powers and Due Process Issues</i>	739
1. <i>Judicial Review of Additional Terms</i>	740
2. <i>Meaningful Internal Appealability of Infraction and Extension Decisions</i>	741
3. <i>Align Due Process Rights Under the RTL with Parole Revocation Hearings</i>	742
B. <i>Reduce Maximum Terms in Consecutive Sentencing</i>	743

* Chief Articles Editor, *Ohio State Law Journal*; J.D. Candidate, The Ohio State University Moritz College of Law, Class of 2023. This Note is dedicated to a group of people incarcerated at Allen Oakwood Correctional Institution in Lima, Ohio who inspired this topic. For initial topic development, I thank Doug Berman, Sean Hill, and David Singleton. For their valuable feedback and comments, I thank Marcus Andrews, Nikki Baszynski, Patrick Clark, and Michael Zuckerman. For their scrupulous edits, I thank the editors of the *Ohio State Law Journal*, especially Anna Armao. Any errors are my own. For their patience and joy, I thank Erica and Ziti (the dog, not the pasta).

C. <i>Preserve the Presumption of Release</i>	743
V. AFTER THE RTL: DECARCERATION AND JUDICIAL DISCRETION, WITHIN LIMITS	744
A. <i>Enact a Second Look Sentencing Law</i>	745
B. <i>Expand the Presumption of Release to Parole</i>	747
C. <i>Lower and Level Felony Sentencing Ranges</i>	749
VI. CONCLUSION.....	750

I. INTRODUCTION

Over the past half-century, Ohio lawmakers have enacted a patchwork of criminal sentencing reforms, vacillating between definite and indefinite schemes and navigating court rulings striking down unconstitutional aspects of the state's criminal punishment system.¹ Most recently, the Ohio General Assembly created a new sentencing system for some felony offenses under which additional prison terms can be added to an incarcerated person's sentence solely at the discretion of the prison bureaucracy that imprisons them.² This novel scheme, enacted through 2018 legislation now known as the Reagan Tokes Law ("RTL"),³ empowers prison administrators, rather than judges, to

¹ See *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 362–63 (Ohio 2000) (holding Ohio's "bad time" statute unconstitutional on separation of powers grounds); *State v. Foster*, 845 N.E.2d 470, 490–94 (Ohio 2006) (holding several Ohio sentencing statutes unconstitutional on Sixth Amendment grounds in accordance with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005)). See generally OHIO CRIM. SENT'G COMM'N, CRIMINAL JUSTICE REFORM IN OHIO (Apr. 2019), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/CJReformOhioCupp2019.pdf> [<https://perma.cc/85XE-EU8J>] (describing the history and political context of criminal sentencing reform in Ohio since the 1970s).

² See *infra* Part II.A. This Note generally uses the term "incarcerated person" rather than "prisoner" to emphasize that the people who make up the state's prison population are defined by more than the conditions of their confinement. For a nuanced discussion of the complexities around labeling people as "prisoners," see, for example, Michael L. Zuckerman, *When the Conditions Are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. CIN. L. REV. 1, 3 n.7 (2021).

³ See *infra* Part II.A (discussing the General Assembly passing the Reagan Tokes Act, now known as the RTL). The RTL is named after Ohio State University senior Reagan Tokes, who in February 2017 was abducted, robbed, raped, and murdered after leaving work at a restaurant in the Short North neighborhood of Columbus, Ohio. Dean Narciso, *Brian Golsby Guilty on All Counts in Murder of Ohio State Student Reagan Tokes*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/courts/2018/03/13/brian-golsby-guilty-on-all/12990816007/> [<https://perma.cc/4NKS-VN2B>] (Mar. 14, 2018). The horrific end to Reagan's life became national news in part because the man who would be convicted of her murder, Brian Golsby, had recently been released from prison and was accused of committing a string of armed robberies in the weeks leading up to the murder. Jerry Revish,

independently impose additional prison terms beyond an incarcerated person's presumed release date.⁴ Resembling Ohio's defunct "bad time" prison sentence extension statute (held unconstitutional by the Supreme Court of Ohio in 2000),⁵ the RTL's administrative prison term scheme similarly violates separation of powers principles and undermines incarcerated people's procedural due process rights.⁶ This Note argues, in part, that the Supreme Court of Ohio should hold the law unconstitutional and cautions lawmakers in any state against creating similar administrative prison term systems.⁷

Regardless of whether the law survives judicial scrutiny, the RTL showcases a deeper problem with Ohio's criminal sentencing system. Ohio, like many other states, finds itself repeating a cycle of carceral legislating,⁸ which I

Failure to Protect: The Violent Past of Reagan Tokes' Accused Killer (Part 1), 10WBNS, <https://www.10tv.com/article/news/investigations/10-investigates/failure-protect-violent-past-reagan-tokes-accused-killer/530-903693df-a2e6-424a-a038-ee1d53f80693> [https://perma.cc/9RLR-D5V5] (June 16, 2017); *Unchecked Evil*, NBC NEWS (June 25, 2019), <https://www.nbcnews.com/dateline/video/full-episode-unchecked-evil-62618693649> [https://perma.cc/ZJQ9-UVL9]. Following media reports about Mr. Golsby's "violent past" and his record of fifty-two behavioral infractions during his incarceration, lawmakers introduced the Reagan Tokes Act (RTA) "to ensure this never happens again." *Press Conference - Reagan Tokes Act*, OHIO CHANNEL, at 04:14–04:18 (Sept. 27, 2017), <https://www.ohiochannel.org/video/press-conference-reagan-tokes-act> [https://perma.cc/MXW8-NKZ3] (statement of Ohio State Representative Jim Hughes); *accord* Revish, *supra*.

⁴In late 2018, the legislature enacted parts of the RTA (now known as the Reagan Tokes Law or RTL) including a novel, nominally "indefinite" sentencing scheme for some felony convictions. *See* OHIO REV. CODE § 2967.271(B)–(C) (2022); Bennett Haebler, *Portion of Reagan Tokes Act Signed into Law*, 10WBNS, <https://www.10tv.com/article/news/local/portion-reagan-tokes-act-signed-law/530-81b86e2c-dd67-4e7f-a53d-d24d08fa34bd> [https://perma.cc/A6AZ-AMDE] (Jan. 7, 2019). Under the act's sentencing scheme, an incarcerated person's presumed release date is the end of their minimum prison term, less any earned credit for good behavior. OHIO REV. CODE § 2967.271(B) (2022). Under certain statutory conditions, state prison officials may impose additional prison terms up to the person's statutory maximum term, which is automatically calculated as 150% of the minimum term. *Id.* § 2967.271(C); *see infra* Part II.A.

⁵*See Bray*, 729 N.E.2d at 362–63.

⁶*See infra* Part III.A. On March 16, 2022, the Supreme Court of Ohio held that constitutional challenges to the Reagan Tokes Law's indefinite sentencing scheme are ripe for judicial review immediately after sentencing, even before an incarcerated person is administratively extended beyond their presumed minimum term. *State v. Maddox*, No. 2020-1266, slip op. at 12–13 (Ohio Mar. 16, 2022).

⁷This Note serves as a novel critique of administrative prison terms wherever they may exist, though the author was unable to locate a similar criminal sentencing scheme in any state. Even so, the assessment of administrative prison terms presented here applies to any present or future sentencing system under which prison administrators are granted the sole authority to impose an additional term of imprisonment beyond the incarcerated person's presumed released date.

⁸*See, e.g.,* DANIELLE SERED, VERA INST. OF JUST., ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 6–7

define as lawmaking that defaults to long-term imprisonment and ever-harsher criminal punishments instead of creative, data-driven public safety solutions. By enacting the RTL, the state retreated from recent legislative progress toward reducing the state's prison population, representing the latest in a string of counteracting criminal legal system reforms.⁹ Facing impulses to project a "law and order" political ethos and to center sentencing reform around victims,¹⁰ but also pressures to reduce the state's fiscal and moral burden of incarcerating more than 43,000 people,¹¹ Ohio lawmakers move back-and-forth between flirting with decarceration and exacting harsher criminal punishments.¹²

The RTL perpetuates this cycle and represents a public safety buck-passing endemic to criminal sentencing reform in Ohio. By creating a novel sentencing system in which lawmakers can shift blame for recidivism onto prison administrators, the legislature can harvest political credit for addressing the public safety concerns arising from the murder of Reagan Tokes while failing to address the ills of mass incarceration decried by many of those same lawmakers.¹³ Meanwhile, trial judges left out of the RTL's prison term

(2017), <https://www.vera.org/downloads/publications/accounting-for-violence.pdf> [<https://perma.cc/H9T3-9DPB>] (providing examples of the "two rising tides" in criminal justice policy in the U.S.—the resurgence of "law and order" rhetoric and policy and a "consensus and growing momentum" around reducing the U.S.'s reliance on incarceration).

⁹ See *infra* Part II.B. If the RTL withstands constitutional scrutiny, the law will likely lead to increased lengths of stay in prison and undercut the decarceral effects of prior reforms meant to divert people away from entering the prison system. See *infra* Part III.B.

¹⁰ See generally Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31 (2008) (questioning the benefits of victim-centric elements of the criminal legal system to victims and communities). Laws named after victims like the RTL are typically enacted after a public tragedy that garners significant media attention, leading the "vulnerabilities and needs of victims" to "define the appropriate conditions for government intervention." See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 75–77 (2007). In response to victim-vindication efforts in the Ohio legislature, State Representative Bill Seitz wisely called for a more nuanced approach to crime-related legislation and rejected "a knee-jerk reaction to vastly increase penalties when there's no evidence that increasing those penalties will result in any reduction in the number of sad cases in the future." Andy Chow, *Ohio Lawmakers Who Want Sentencing Reform Also Increase Penalties for Crime*, WOSU (Aug. 10, 2021), <https://news.wosu.org/politics/2021-08-10/ohio-lawmakers-who-want-sentencing-reform-also-increase-penalties-for-crime> [<https://perma.cc/2QBT-UG3Y>].

¹¹ OHIO DEP'T OF REHAB. & CORR., *POPULATION COUNT SHEETS—2022-10-18* (2022), <https://drc.ohio.gov/Portals/0/1165.pdf> [<https://perma.cc/LF4U-ZRDX>].

¹² See *infra* Part II.B.

¹³ See, e.g., Chow, *supra* note 10; Jackie Borchardt, *Proposed Reforms Could Divert 3,400 Offenders from Ohio's Overcrowded Prisons. Not Everyone Is on Board*, CLEVELAND.COM (Apr. 24, 2017), https://www.cleveland.com/metro/2017/04/proposed_reforms_could_divert.html [<https://perma.cc/9D3H-YDNL>]; see also *infra* Part II.A (describing the RTL's novel sentencing scheme).

extension process must navigate Ohio's chaotic sentencing landscape with limited sentencing data and an inability to correct over-punishment.¹⁴

Lawmakers across the United States can glean criminal sentencing reform lessons from Ohio's experience with the RTL and its pervasive cycle of carceral legislating. As highlighted by the RTL, Ohio lawmakers lack consistent, coherent goals in criminal sentencing reform. Using Ohio and the RTL as a case study, this Note argues that states should enact sentencing reforms that transition away from misguided, punitive sentencing laws and toward systems of bounded judicial discretion that will lead to decarceration.¹⁵ By enacting second look resentencing laws, extending the presumption of release to parole, lowering felony sentencing ranges, and increasing sentencing transparency, lawmakers can empower judges to reduce the prison population while curbing disparities and discrimination associated with broad judicial sentencing discretion.¹⁶

In Part II, this Note describes the RTL's novel indefinite sentencing scheme, highlights the cyclical history of criminal sentencing reform in Ohio, and traces the state's prison population since the late twentieth century. Part III then addresses the legal and policy issues surrounding the RTL, arguing that the law is unconstitutional, will increase lengths of stay in prison, and fails to address mass incarceration. Part IV suggests legal and policy changes to the RTL that would alleviate some of the law's most troublesome aspects in the event the law survives constitutional scrutiny. In Part V, this Note proposes a long-term criminal sentencing reform agenda focused on achieving sustainable decarceration by reducing lengths of stay in prison. Ultimately, this Note serves both as a novel critique of administrative prison terms and as a roadmap for breaking cycles of carceral legislating through decarceration-centered sentencing reform.

II. THE REAGAN TOKES LAW AND OHIO'S CYCLE OF CARCERAL LEGISLATING

Competing political impulses drive Ohio's history of criminal sentencing reform. On the one hand, state lawmakers and policy advocates have acknowledged Ohio's high rate of incarceration—and its associated fiscal

¹⁴ See *infra* Parts II.B, V.C.

¹⁵ See *infra* Part V.

¹⁶ For these long-term sentencing solutions, see the discussion in Part V. For a discussion of trial court sentencing disparities in Ohio, see Michael P. Donnelly, *Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform*, 54 AKRON L. REV. 223, 228–34 (2020). In part, the issue is that “Ohio’s trial court judges are imbued by the Ohio legislature with enormous power to sentence defendants to prison.” *Id.* at 228. It is an “inherent weakness in this system . . . that this discretion is usually unburdened by governing principles or standards.” *Id.*

burden—and have pursued reforms aimed at reducing prison overcrowding.¹⁷ On the other hand, lawmakers continue to propose and enact pro-incarceration legislation that threatens to reverse any gains made toward decarceration.¹⁸ As a result, the Ohio criminal code now resembles a “morass of inconsistencies” and fails to advance a consistent vision for criminal sentencing policy.¹⁹

Part II.A first examines the details of the RTL’s novel criminal sentencing system, highlighting its unique procedures and its empowerment of administrative officials rather than judges. Part II.B situates Ohio’s cyclical sentencing reform history in the context of the state’s prison population since the 1970s.

A. *The Reagan Tokes Law’s Administrative Prison Terms*

On December 21, 2018, then-Governor John Kasich signed into law Senate Bill 201 (S.B. 201), which included most major portions of the Reagan Tokes Act (now known as the RTL).²⁰ Most significantly, the RTL introduced a new prison sentencing scheme for people convicted of qualifying first- and second-degree felony offenses that are ineligible for life sentences.²¹ Under the RTL, the sentencing judge selects a “minimum term” of imprisonment from the

¹⁷ See, e.g., Dara Lind, *The Prison Was Built to Hold 1,500 Inmates. It Had Over 2,000 Coronavirus Cases*, PROPUBLICA (June 18, 2020), <https://www.propublica.org/article/the-prison-was-built-to-hold-1500-inmates-it-had-over-2000-coronavirus-cases> [https://perma.cc/XP8W-7EP3]; Borchardt, *supra* note 13 (describing reform advocates’ political challenges in convincing some lawmakers and prosecutors to support a decarceration-focused reform strategy to address overcrowding).

¹⁸ Marc Kovac, *ACLU: Ohio Lawmakers Continue to Pursue Legislation That Would Send More People to Prison*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/politics/state/2021/02/17/aclu-ohio-lawmakers-pass-bills-would-more-people-overcrowded-prisons/6765174002/> [https://perma.cc/R4YZ-YAZQ] (Feb. 18, 2021).

¹⁹ Tim Young, *Rewriting the Ohio Criminal Code: Success, Failure, and Lessons Learned*, 30 FED. SENT’G REP. 154, 154 (2017).

²⁰ Associated Press, *Governor Signs Portion of Reagan Tokes Act into Law*, WCBE (Dec. 23, 2018), <https://www.wcbe.org/post/governor-signs-portion-reagan-tokes-act-law> [https://perma.cc/25RW-R79B]; TERRENCE O’DONNELL, OHIO GOVERNOR SIGNS “ALTERNATE EMPLOYER ORGANIZATION” LEGISLATION (Jan. 2021), <https://www.dickinson-wright.com/-/media/files/news/2021/01/client-alert--alternate-employer-organization-legi.pdf> [https://perma.cc/Q2N8-URBP]. In addition to reforms to Ohio’s felony sentencing law, S.B. 201 included new rules and a study related to Ohio’s Global Positioning System (GPS) monitoring of people convicted of crimes, a program to reduce the number of “homeless offenders,” and a statewide tracking system for the processing of sexual assault examination kits. JEFF HOBDAV, OHIO LEGIS. SERV. COMM’N, FINAL ANALYSIS: AM. SUB. S.B. 201, Gen. Assemb. 132, Reg. Sess., at 17–18 (2019).

²¹ OHIO CRIM. SENT’G COMM’N, SB 201—THE REAGAN TOKES LAW: INDEFINITE SENTENCING QUICK REFERENCE GUIDE 1 (2019), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/SB201QRG.pdf> [https://perma.cc/3P7A-7PJF]. The RTL describes these qualifying terms as “non-life felony indefinite prison terms.” OHIO REV. CODE § 2967.271 (2022).

applicable sentencing range depending on the level of the qualifying felony offense.²² A “maximum term” is then calculated automatically by taking 50% of the minimum term and adding it to the minimum term (in other words, 150% of the minimum term).²³ In a basic example, a judge might sentence a person convicted of felonious assault under Ohio Revised Code § 2903.11 to a minimum term of six years in prison, selecting that term from the statutorily permitted range of two to eight years.²⁴ Under the RTL, the person’s maximum sentence is then automatically set at nine years.²⁵

Indefinite (or “indeterminate”) sentencing schemes are nothing new.²⁶ In the United States, indefinite statutory systems developed in the late nineteenth century and quickly became the dominant form of criminal sentencing through the 1970s.²⁷ Under a traditional indefinite sentence, a state’s parole authority decides to release the incarcerated person some time at or beyond the minimum term and at or before the maximum term.²⁸ Parole boards often base their decisions to grant or deny parole on factors like the likelihood the person will commit new crimes, the person’s age, the length of their incarceration, and the seriousness of the original offense.²⁹ In practice, however, parole authorities may deny release based primarily on the seriousness of the offense or the offender’s refusal to accept guilt, even when they have demonstrated rehabilitation.³⁰ In contrast, a person serving a definite (or “determinate”)

²² OHIO REV. CODE § 2929.14(A)(1)(a) (2022). For non-life first-degree felony offenses, judges must select a minimum prison term between three and eleven years. *Id.* For non-life second-degree felony offenses, judges must select a minimum prison term between two and eight years. *Id.* § 2929.14(A)(2)(a).

²³ *Id.* §§ 2929.14(B)(1), 2929.144.

²⁴ *Id.* § 2903.11 (D)(1)(a). As a second-degree felony, the minimum prison term for a felonious assault conviction is between two and eight years. *Id.* § 2929.14(A)(2)(a).

²⁵ $(6 + (6 \times 0.5) = 9, \text{ or } 6 \times 1.5 = 9)$. The sentencing math gets much more complicated when considering multiple convictions, concurrent vs. consecutive sentencing, and multiple convictions requiring a mix of definite and indefinite RTL terms. *See generally id.* § 2929.14. Because the complexities of these formulas are not the focus of this Note, this basic example will suffice.

²⁶ *See generally* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 1:2 to :3, Westlaw (database updated Sept. 2022).

²⁷ *See id.* § 1:2.

²⁸ *See* W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 906 (2009). The U.S. Supreme Court has long upheld the constitutionality of executive control over discretionary parole release. *See* *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

²⁹ CAMPBELL, *supra* note 26, § 15:8; *see also* OHIO ADMIN. CODE 5120:1-1-07(B) (2022) (detailing information the Ohio Parole Board should consider in making parole decisions).

³⁰ CAMPBELL, *supra* note 26, § 15:8.

sentence must be released after a fixed (or “flat”) term of years.³¹ Many states, including Ohio, utilize both definite and indefinite schemes.³²

The RTL does not fit neatly in either category. Instead, the law is best described as a modified definite or “definite plus” sentencing scheme masquerading as an indefinite sentencing scheme.³³ People sentenced to RTL prison terms maintain a presumption of release from prison at the expiration of their minimum term, less any “earned time” for good behavior.³⁴ The presumption of release may be rebutted at an administrative hearing, but only at the discretion of the Ohio Department of Rehabilitation and Correction (ODRC) (the state’s prison agency) and only under certain statutory conditions based solely on the incarcerated person’s disciplinary record and security level while in prison.³⁵ The presumption of release therefore distinguishes RTL administrative prison terms from traditional indefinite sentencing because, unlike traditional discretionary parole, the state *must* grant release unless the person’s prison conduct and security record allows for rebuttal.³⁶ The RTL

³¹ Ball, *supra* note 28, at 906–07. In several recent decisions, the U.S. Supreme Court conflated the concepts of definite and indefinite sentencing with judicial discretion. *Id.* at 907–08; *see also id.* at 907 n.69 (noting that states, in addition to the U.S. Supreme Court, often fail to distinguish these concepts in their sentencing guidelines).

³² *See* OHIO CRIM. SENT’G COMM’N, *supra* note 1, at 1–4; CAMPBELL, *supra* note 26, § 4:1. State legislatures generally enjoy broad discretion over their state’s criminal sentencing systems, resulting in a wide variance of substantive and procedural details across states. *Id.*

³³ The sentencing statute implementing the RTL’s sentencing scheme describes the terms as “indefinite.” OHIO REV. CODE § 2929.14(A)(1)(a) (2022). Although the terms are indefinite in the sense that a person sentenced under the RTL cannot know for sure when they will be released, the minimum term functions as a “definite” term in the sense that the sentenced person expects release at the expiration of the minimum term and in how the judge explicitly sets the minimum while the maximum is calculated automatically. *See, e.g., id.* § 2929.144(A)(1).

³⁴ *Id.* § 2967.271(B). In this way, the “minimum” RTL term resembles a definite sentence under which an incarcerated person expects the state to release them after a definite term of years. *See* Ball, *supra* note 28, at 906–07.

³⁵ OHIO REV. CODE § 2967.271(C) (2022); *see also* OHIO CRIM. SENT’G COMM’N, *supra* note 21, at 6. ODRC is an executive branch agency responsible for administering and supervising Ohio’s state prison system with a director who is appointed by the governor. *About the ODRC Director*, OHIO DEP’T OF REHAB. & CORR., <https://drc.ohio.gov/About/Director> [<https://perma.cc/NQB9-X2FC>]. ODRC can rebut the presumption of release of a person incarcerated under the RTL only if ODRC finds that the person either (1) “committed institutional rule infractions that involved compromising the security” of a state prison or the safety of staff and inmates, and they continue to pose a threat to society, (2) ODRC has placed the person in “extended restrictive housing” at any time in the year prior to the hearing, or (3) the person’s security level is classified as three or higher, with one being the lowest and five being the highest and most restrictive. OHIO REV. CODE § 2967.271(C)(1)–(3) (2022).

³⁶ OHIO REV. CODE § 2967.271(C) (2022).

rebuttal process proscribes no parole-like factors such as showing remorse, accepting responsibility, or the seriousness of the original offense.³⁷

If ODRC officials successfully rebut the presumption of release, ODRC may impose an additional term of imprisonment, so long as the incarcerated person's stay in prison does not exceed the maximum term announced at sentencing.³⁸ The legislature empowered ODRC to set its own policies and procedures for administering these rebuttal and extension hearings.³⁹ Like the statute authorizing ODRC to administer the additional term process, ODRC's hearing policy includes no procedures for obtaining the representation of counsel or appealing ODRC's decision to impose additional prison time.⁴⁰

In effect, the RTL empowers ODRC officials to rely almost exclusively upon the agency's own information and judgment in deciding whether to impose an additional term of imprisonment,⁴¹ resulting in several procedural concerns. First, the administrative hearing officer's decision regarding rebuttal is final and not subject to administrative appeal.⁴² Second, the additional term hearing process is not subject to any form of judicial review.⁴³ Other than the potential to provide written input regarding the incarcerated person's additional term hearing, sentencing judges are completely isolated from the process of

³⁷ See *id.*

³⁸ *Id.* § 2967.271(D).

³⁹ *Id.* See generally OHIO DEP'T OF REHAB. & CORR., 105-PBD-15, ADDITIONAL TERM HEARING (2021) [hereinafter ODRC 105-PBD-15], [https://www.drc.ohio.gov/Portals/0/Policies/DRC%20Policies/105-PBD-15%20\(Additional%20Term%20Hearing\).pdf?ver=Gz75sKWzGCobQw8xCxCWg%3D%3D](https://www.drc.ohio.gov/Portals/0/Policies/DRC%20Policies/105-PBD-15%20(Additional%20Term%20Hearing).pdf?ver=Gz75sKWzGCobQw8xCxCWg%3D%3D) [https://perma.cc/JGY3-UCRG] (detailing ODRC's policies and procedures for what "Additional Term Hearing[s]" required under the RTL). Under this policy, ODRC vests the power to impose additional prison terms solely in the Parole Board chair or their designee, later described as a Parole Board hearing officer. *Id.* at 3–7. In addition to Parole Board staff, the only other people allowed to participate in the hearings are the incarcerated person (unless the hearing officer determines "for good cause shown" that they are not allowed to attend), special needs facilitators such as an interpreter or translator ("if required"), and mental health or security personnel (if "deemed appropriate"). *Id.* at 5.

⁴⁰ See OHIO REV. CODE § 2967.271 (2022) (including no statutory right to counsel or right to appeal the administrative decision to impose an additional term of imprisonment). See generally ODRC 105-PBD-15, *supra* note 39, at 5–7 (lacking a guarantee of counsel and is non-appealable).

⁴¹ See OHIO REV. CODE § 2967.271(D) (2022); see also ODRC 105-PBD-15, *supra* note 39, at 4 (allowing for certain stakeholders such as victims, judges, and prosecutors to provide input that the hearing officer shall review prior to initiating the hearing but leaving full decision-making power to the hearing officer).

⁴² ODRC 105-PBD-15, *supra* note 39, at 7; see also OHIO JUD. CONF., THE REAGAN TOKES LAW (Mar. 2019), <http://www.ohiojudges.org/Document.ashx?DocGuid=24fd5ed9-b7fe-4b36-882c-3f613a36c4ab> [https://perma.cc/KK83-XJJM] (reflecting the Ohio Judicial Conference's understanding that administrative extension hearings under the RTL are non-appealable).

⁴³ See OHIO REV. CODE § 2967.271 (2022) (providing no judicial review of the process).

extending the incarcerated person's length of stay beyond the minimum prison term even if they personally imposed the original sentence.⁴⁴ Third, the statutory conditions ODRC must prove to extend a prison term all relate to violations of ODRC's own prison conduct rules, bringing rulemaking, prosecution, and adjudication powers under the power of one executive agency.⁴⁵ This Note explores the constitutionality of this structure in Part III.A.

Although judges have no role in deciding whether to impose an additional prison term under the RTL, judicial approval *is* required when ODRC recommends an earned reduction of the incarcerated person's sentence.⁴⁶ Based on the "exceptional conduct" of a person incarcerated under an RTL sentence, ODRC may notify the sentencing court of the agency's recommendation to grant a reduction in the person's minimum prison term.⁴⁷ Similar to the process for imposing an additional prison term, an incarcerated person recommended for an earned reduction of their sentence enjoys a rebuttable presumption that the court will grant the reduction.⁴⁸

In sum, the RTL introduces a novel sentencing scheme for certain qualifying offenses. The legislature granted people sentenced under the RTL a presumption of release at the expiration of their minimum term, rebuttable only by administrative officials at ODRC.⁴⁹ Although states commonly sentence people under indefinite sentencing schemes with broad judicial deference, the RTL's presumption and rebuttal process distinguishes the system and complicates the law's constitutionality.⁵⁰

B. *The RTL in Context: Ohio's Cycle of Carceral Legislating*

The RTL represents the latest in a string of offsetting criminal legal system reforms that have failed to produce a sustained reduction in Ohio's prison

⁴⁴ ODRC 105-PBD-15, *supra* note 39, at 4. Under this policy, a judge who expressed a desire during sentencing for the convicted person to serve no more than the minimum sentence because of strong mitigating circumstances would have no decision-making power to see their preference carried out during the additional term hearing process. *See id.*

⁴⁵ OHIO REV. CODE § 2967.271(C) (2022); ODRC 105-PBD-15, *supra* note 39, at 6.

⁴⁶ OHIO REV. CODE § 2967.271(F)(1) (2022).

⁴⁷ *Id.*

⁴⁸ *Id.* The presumption of reduction is rebuttable based on a set of factors similar to the rebuttable presumption of release factors, with additional considerations regarding the incarcerated person's rehabilitative programming and post-release housing plans. *Id.* § 2967.271(F)(4); *see also supra* note 35 and accompanying text (describing the presumption of release rebuttal factors).

⁴⁹ *See generally* OHIO CRIM. SENT'G COMM'N, *supra* note 21; OHIO REV. CODE § 2967.271 (2022).

⁵⁰ *See generally* State v. Maddox, No. 2020-1266 (Ohio Mar. 16, 2022).

population.⁵¹ This history resembles a pendulum, swinging back and forth between reforms aimed at reducing the population of Ohio's overcrowded prisons and retributive, punishment-focused reforms leading to longer terms of imprisonment. While this pendulum swings, Ohio's prison population holds steady around 43,000,⁵² exceeding the capacity of the state's prison infrastructure.⁵³

Like most states, Ohio relied primarily on an indefinite criminal sentencing scheme throughout the twentieth century.⁵⁴ Under this system, the state incarcerated 9,185 people by 1970.⁵⁵ Judges selected minimum and maximum terms of imprisonment from applicable statutory ranges, and the Ohio Parole Board decided when to release the incarcerated person after the minimum was surpassed.⁵⁶ This sentencing scheme still applies today for some felony offenses that are eligible for life sentences.⁵⁷

During the "tough on crime" era of the late 1970s and 1980s, Ohio enacted several mandatory sentencing statutes including mandatory prison time for

⁵¹ See Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2776 (2020) (finding a nearly stagnant change of negative one percent in Ohio's rate of imprisonment between 2007 and 2017).

⁵² See *infra* notes 68–73 and accompanying text.

⁵³ John Caniglia, *Ohio Prisons Hit with First Coronavirus Case as Officials Fight to Prevent Its Spread*, CLEVELAND.COM (Mar. 30, 2020), <https://www.cleveland.com/corona-virus/2020/03/ohio-prisons-hit-with-first-coronavirus-case-as-officials-fight-to-prevent-its-spread.html> [<https://perma.cc/KVA3-9QAY>].

⁵⁴ See CAMPBELL, *supra* note 26, § 1:3; JOHN WOOLDREDGE, FRITZ RAUSCHENBERG, TIMOTHY GRIFFIN & TRAVIS PRATT, IMPACT OF OHIO'S SENATE BILL 2 ON SENTENCING DISPARITIES 4–5 (Apr. 2002), <https://www.ojp.gov/pdffiles1/nij/grants/202560.pdf> [<https://perma.cc/YPS5-VCRS>].

⁵⁵ PATRICK A. LANGAN, JOHN V. FUNDIS, LAWRENCE A. GREENFELD & VICTORIA W. SCHNEIDER, U.S. DEP'T OF JUST., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 11 (May 1988), <https://www.ojp.gov/pdffiles1/Digitization/111098NCJRS.pdf> [<https://perma.cc/D72V-GH54>]. As of 2021, Ohio's prisons held 3,150 people incarcerated on indefinite sentences, accounting for 7.2% of the state's prison population. See BUREAU OF RSCH. & EVALUATION, OHIO DEP'T OF REHAB. & CORR., INSTITUTION CENSUS 2021, at 8 (Jan. 2021), <https://drc.ohio.gov/portals/0/institutional%20census%20report%20jan%202021%20final.pdf> [<https://perma.cc/FTP8-Z7K5>].

⁵⁶ WOOLDREDGE, RAUSCHENBERG, GRIFFIN & PRATT, *supra* note 54, at 4–5.

⁵⁷ See, e.g., OHIO REV. CODE § 2929.03 (2022) (aggravated murder); see also OHIO ADMIN. CODE 5120:1-1-03 (2022) (listing the conditions under which a person may become eligible for parole). For example, the legislature requires trial courts to sentence people convicted of aggravated murder to either life imprisonment without parole or life imprisonment with eligibility for parole after twenty, twenty-five, or thirty years in prison. OHIO REV. CODE § 2929.03(A)(1)(b)–(d) (2022) (imposition of sentence for aggravated murder). As of July 2021, Ohio's prisons held 2,580 people who were sentenced to "old law" indeterminate prison terms in or before 1996. See OHIO DEP'T OF REHAB. & CORR., 2021 ANNUAL REPORT 40 (2021) [hereinafter ODRC ANNUAL REPORT 2021], <https://drc.ohio.gov/Portals/0/ODRC%20Annual%20Report%202021.pdf> [<https://perma.cc/CFS8-GCHJ>].

certain drug offenses.⁵⁸ The state's prison population ballooned beyond the state's prison capacity to 19,930 by 1986,⁵⁹ prompting the construction of new prisons that would also quickly become overcrowded.⁶⁰ By the late 1980s, a large minority of states had shifted to determinate sentencing systems focused on the crime committed rather than on the character or potential redeemability of the offender.⁶¹ Ohio followed suit in the mid-1990s, driven by a sense that the state's indefinite sentencing system was confusing and by a concern that an incarcerated person's actual time served was determined more by unelected Parole Board officials than by judges.⁶² In 1995, the legislature passed a "truth-in-sentencing" law (Senate Bill 2 or S.B. 2) shifting Ohio to definite (or "determinate" or "flat time") criminal sentencing for most felonies.⁶³

The legislature included in S.B. 2 a law colloquially known as the "bad time" statute under which prison administrators could add time on top of an incarcerated person's definite sentence based on the administrators' own findings of fact and law regarding the person's conduct while in prison.⁶⁴ In 2000, the Supreme Court of Ohio struck down this law in *State ex rel. Bray v. Russell*.⁶⁵ In effect, the law empowered executive branch officials to "prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime," acting as "judge, prosecutor, and jury."⁶⁶ This violated separation of powers principles because "trying, convicting, and sentencing inmates for crimes committed while in prison" is an exercise of judicial power, not executive power.⁶⁷

By the time S.B. 2 took effect in 1996, Ohio's prison population had leaped to 46,174.⁶⁸ This number held steady after the court's decision in *Bray* (45,684

⁵⁸ OHIO CRIM. SENT'G COMM'N, *supra* note 1, at 1; *see also* CAMPBELL, *supra* note 26, § 1:3.

⁵⁹ LANGAN, FUNDIS, GREENFELD & SCHNEIDER, *supra* note 55, at 13.

⁶⁰ OHIO CRIM. SENT'G COMM'N, *supra* note 1, at 1.

⁶¹ *See* CAMPBELL, *supra* note 26, § 1:3.

⁶² OHIO CRIM. SENT'G COMM'N, *supra* note 1, at 2–3.

⁶³ *Id.*

⁶⁴ OHIO REV. CODE ANN. § 2967.11 (West 2000) (repealed 2009), *invalidated by* *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000); *see also* Stephanie D. Weaver, Note, *Will Bad Times Get Worse? The Problems with Ohio's Bad Time Statute*, 17 N.Y.L. SCH. J. HUM. RTS. 341, 345 (2000) (describing the political and legislative context of the "bad time" statute).

⁶⁵ *Bray*, 729 N.E.2d at 361.

⁶⁶ *Id.* at 362.

⁶⁷ *Id.* The court discarded the "bad time" statute while leaving intact the rest of S.B. 2's definite sentencing framework. *See id.* (holding OHIO REV. CODE § 2967.11 unconstitutional but not commenting on other parts of S.B. 2's definite sentencing framework); *see also* OHIO CRIM. SENT'G COMM'N, *supra* note 1, at 2–4 (explaining the history of S.B. 2 and its "bad time" provision).

⁶⁸ CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP'T OF JUST., PRISONERS IN 1996, at 3 (1997), <https://bjs.ojp.gov/content/pub/pdf/p96.pdf> [<https://perma.cc/2EUT-9QGW>].

in June 2001)⁶⁹ and remains relatively close today (43,809 in October 2022)⁷⁰ after hovering around 50,000 between 2008 and 2018.⁷¹ Although the prison population fell by over 10% during the first year of the COVID-19 pandemic,⁷² the population has since levelled off (and even slightly increased), and the state's prisons are still over capacity.⁷³

Throughout this sustained period of a high prison population, the Ohio legislature has enacted criminal justice reforms aimed at diverting people away from the prison system alongside other laws perpetuating “mass incarceration by a thousand cuts,” such as those inventing new crimes and punishing people more harshly depending on the type of victim or the offender's criminal record.⁷⁴ With 2011's House Bill 86, the Ohio legislature advanced decarceration goals by eliminating the differences in penalties for crack and powder cocaine, reducing penalties for certain drug offenses and expanding eligibility for judicial release.⁷⁵ These and other moderate changes to the criminal sentencing and punishment code focusing on “low level, non-violent drug offenses” have likely contributed at least somewhat to flattening the growth of Ohio's prison population.⁷⁶ In 2016, however, lawmakers enacted Senate Bill

⁶⁹ ALLEN J. BECK, JENNIFER C. KARBERG & PAIGE HARRISON, U.S. DEP'T OF JUST., PRISON AND JAIL INMATES AT MIDYEAR 2001, at 3 (Apr. 2002), <https://bjs.ojp.gov/content/pub/pdf/pjim01.pdf> [<https://perma.cc/8UF9-WK33>].

⁷⁰ OHIO DEP'T OF REHAB. & CORR., *supra* note 11, at 2.

⁷¹ OHIO LEGIS. SERV. COMM'N, OHIO FACTS 85 (Sept. 2018), <https://www.lsc.ohio.gov/documents/reference/current/ohiofacts/2018/ohiofacts2018.pdf> [<https://perma.cc/4YDM-GPUZ>].

⁷² Karen Kasler, *Inmate Population Decreases During Pandemic, but ACLU Still Concerned*, WOUB (Dec. 7, 2020), <https://woub.org/2020/12/07/inmate-population-decreases-during-pandemic-but-aclu-still-concerned/> [<https://perma.cc/9UAY-Q3W2>].

⁷³ Associated Press, *Ohio Prisons Director: Inmate Population Still Too High*, U.S. NEWS (Feb. 12, 2021), <https://www.usnews.com/news/best-states/ohio/articles/2021-02-12/ohio-prisons-director-inmate-population-still-too-high> (on file with the *Ohio State Law Journal*). On March 16, 2021, about one year after the start of the pandemic, the population was 43,197. OHIO DEP'T OF REHAB. & CORR., POPULATION COUNT SHEETS—2021-03-16 (Mar. 2021), <https://drc.ohio.gov/Portals/0/1073.pdf> [<https://perma.cc/U38C-6JK3>]. By October 18, 2022, the population had increased to 43,809. OHIO DEP'T OF REHAB. & CORR., *supra* note 11, at 2.

⁷⁴ ACLU OF OHIO, OHIO'S STATEHOUSE-TO-PRISON PIPELINE: 133RD GENERAL ASSEMBLY (2019–2020), at 1 (Feb. 2021), https://www.acluohio.org/sites/default/files/STPP_Report2021_2021-0204.pdf [<https://perma.cc/BRR3-6FQ9>]; Chow, *supra* note 10.

⁷⁵ FREDRICK BUTCHER & KRYSTEL TOSSONE, CASE W. RSRV. UNIV. BEGUN CTR. FOR VIOLENCE PREVENTION RSCH. & EDUC., IMPACT OF HOUSE BILL 86 & SENTENCING-RELATED LEGISLATION ON THE INCARCERATED POPULATION IN OHIO 1–4 (May 2018), https://case.edu/socialwork/begun/sites/case.edu.begun/files/2018-09/OCSC-Impact-of-House-Bill-86-7-2018_0.pdf [<https://perma.cc/Y7XX-KTHE>].

⁷⁶ ALL. FOR SAFETY & JUST., AMS. FOR PROSPERITY OHIO & BUCKEYE INST., BUILDING ON OHIO'S SENTENCING CHANGES TO KEEP PRISON POPULATIONS IN CHECK 1–2 (Mar. 2019), https://allianceforsafetyandjustice.org/wp-content/uploads/2019/03/OhioReport-Booklet-final_preview-pages.pdf [<https://perma.cc/V2Z3-B893>]; Andy Chow, *Ohio Senate Passes*

97, creating a new category of “violent career criminals” and increasing mandatory prison terms for offenses involving firearms.⁷⁷ Pivoting again in 2018, the legislature changed the overriding purpose of felony sentencing to include “promot[ing] the effective rehabilitation of the offender,” increased judicial flexibility for low-level felony offenses, and increased opportunities for criminal record expungement.⁷⁸ But then, in 2021, the Ohio House of Representatives passed House Bill 3 (known as Aisha’s Law) which would lead to longer prison terms by expanding the definition of aggravated murder to include instances of domestic violence.⁷⁹ The pendulum of criminal legal system reform swings back and forth, representing the push and pull of Ohio lawmakers’ political impulses.

The RTL began as a bipartisan attempt to reconcile some of Ohio lawmakers’ conflicting attitudes on criminal sentencing policy as represented by this legislative quagmire. In 2015, the Ohio General Assembly created the Ohio Justice Recodification Committee and tasked it with developing

Criminal Justice Reform Bill, STATEHOUSE NEWS BUREAU (July 1, 2020), <https://www.stateneews.org/government-politics/2020-07-01/ohio-senate-passes-criminal-justice-reform-bill> [<https://perma.cc/WE5V-FQWM>]; see also Alex Fraga, *Tracing Incarceration Rates in Ohio from 2010 to 2021*, TABLEAU PUBLIC, <https://public.tableau.com/app/profile/alex.fraga/viz/TracingIncarcerationRatesandReforminOhiofrom2010to2021/timelin> edashboard [<https://perma.cc/89US-Z3ED>] (Feb. 18, 2021) (overlying Ohio’s prison population with criminal legal system reform legislation since 2010).

⁷⁷ JEFF HOBDA, OHIO LEGIS. SERV. COMM’N, AM. SUB. S.B. 97, Gen. Assemb. 131, Reg. Sess., at 1 (2016), <https://www.legislature.ohio.gov/download?key=5638&format=pdf> [<https://perma.cc/9BJ2-XE4K>].

⁷⁸ OHIO REV. CODE § 2929.11(A) (2022); Joseph R. “Randy” Klammer, *Ohio SB 66 Expands Expungement Eligibility—but It Truly Does Much More*, OHIO STATE BAR ASS’N (Dec. 28, 2018), <https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/section-newsletters/ohio-sb-66-expungement-eligibility/> [<https://perma.cc/D4P4-MBTH>]. In the closing weeks of 2020, lawmakers also reduced some collateral consequences of criminal convictions, limited the use of incarceration as a punishment for “technical” probation violations, and expanded intervention in lieu of conviction programs for people with substance addictions. Laura Bischoff, *Ohio Makes Big Changes on Criminal Justice Changes*, DAYTON DAILY NEWS (Feb. 7, 2021), <https://www.daytondailynews.com/local/ohio-makes-big-leaps-forward-on-criminal-justice-changes/OEF64PF5XNBZPGOTPESHY3IXOI/> [<https://perma.cc/3NRC-XXG3>].

⁷⁹ Laura Hancock, *Ohio House Passes Aisha’s Law, Named After Beloved Shaker Heights Teacher Who Was Murdered by Her Ex-Husband*, CLEVELAND.COM (Oct. 27, 2021), <https://www.cleveland.com/open/2021/10/ohio-house-passes-aishas-law-named-after-beloved-shaker-heights-teacher-who-was-murdered-by-her-ex-husband.html> [<https://perma.cc/U553-5AHD>]. Although the full extent of this bill’s effect on the length of prison terms is difficult to project, dozens of people are killed each year in connection with intimate partner violence. See KENNETH STEINMAN, OHIO DEP’T OF HEALTH, INTIMATE PARTNER VIOLENCE AND HOMICIDE IN OHIO 1 (Oct. 2016), https://odh.ohio.gov/wps/wcm/connect/gov/b098681c-5552-4f27-b14e-67bac4278b74/FS-Intimate-Partner-Violence-and-Homicide-in-Ohio-final.pdf?mod=ajperes&convert_to [<https://perma.cc/YFK4-5PA4>] (reporting an average of eighty-one homicides related to intimate partner violence per year in Ohio from 2012 to 2014).

recommendations to simplify the state's criminal code.⁸⁰ A bipartisan coalition of state- and national-level policy advocates united in calling for the Committee to recommend changes to Ohio's criminal code focused on reducing the prison population and the state's fiscal burden from holding people in prison.⁸¹ The Committee's final recommendations, including a partial return to indefinite sentencing, originally constituted "central parts" of the RTL.⁸² However, the decarceral goals announced by the reform coalition and discussed by the Recodification Committee were not reflected in the final version of the legislation.⁸³ As a result, the RTL's criminal sentencing scheme, as enacted, fails to promote a consistent or coherent theory of public safety and rehabilitation.⁸⁴

III. ADMINISTRATIVE PRISON TERM SCHEMES FAIL CONSTITUTIONAL REVIEW AND EXACERBATE MASS INCARCERATION

The RTL's sentencing scheme offends separation of powers principles, violates the procedural due process rights of incarcerated individuals, and counteracts the RTL's goal of promoting public safety and rehabilitation.⁸⁵ In Part III.A, this Note argues that Ohio courts should hold the law unconstitutional because the administrative prison term extension system at the heart of the RTL resurrects the unconstitutional "bad time" system invalidated by the Supreme Court of Ohio in 2000.⁸⁶ Part III.B transitions from legal analysis to policy analysis, arguing that the RTL, or any similar system of administrative prison sentencing, will tend to increase lengths of stay in prison and fail to address mass incarceration. Overall, Part III builds a legal and policy case not only for throwing out the RTL as unjust sentencing policy, but also for reducing reliance on long prison sentences to advance public safety goals.

⁸⁰ OHIO CRIM. SENT'G COMM'N, *supra* note 1, at 5.

⁸¹ Alan Johnson, *Statehouse Leaders Push for Shorter Prison Sentences, Reducing Prison Population*, COLUMBUS DISPATCH (Sept. 10, 2015), <https://www.dispatch.com/story/news/politics/2015/09/10/statehouse-leaders-push-for-shorter/23919508007/> [<https://perma.cc/3UKX-BATT>].

⁸² SEAN C. GALLAGHER, BACK TO THE FUTURE: THE REAGAN TOKES LAW (SB 201) AND OHIO'S RETURN TO INDEFINITE SENTENCING 3 (Apr. 2019), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/backToFutureSCG.pdf> [<https://perma.cc/2JDJ-NSCL>].

⁸³ Young, *supra* note 19, at 160; *see supra* Part II.A.

⁸⁴ *See supra* Part II.A (noting how administrative officials make the final call on extending a prison sentence while judges make the final decision on reducing an RTL prison sentence).

⁸⁵ *See infra* Parts III.A, III.B.

⁸⁶ *See State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000).

A. New Law, Same Old Mistakes: The RTL Revives Unconstitutional “Bad Time” Administrative Prison Terms

Based on the procedural issues identified in Part II.A, among other constitutional concerns, people sentenced under the RTL started challenging the constitutionality of the law’s new sentencing scheme almost immediately after it took effect.⁸⁷ Several courts have already ruled directly and split on the RTL’s substantive constitutionality issues.⁸⁸ In early 2022, the Supreme Court of Ohio held that constitutional challenges to the RTL’s indefinite sentencing scheme are ripe for judicial review immediately after sentencing⁸⁹ and requested briefing in two cases to consider the RTL’s constitutionality.⁹⁰ The following two subparts break down the separation of powers and due process issues at play, arguing that Ohio courts should hold the RTL unconstitutional and laying

⁸⁷ See generally Memorandum from Scott Shumaker, Crim. Just. Couns., Ohio Crim. Sent’g Comm’n, to Ohio Crim. Sent’g Comm’n & Advisory Comm. (Jan. 13, 2021), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/appealTracking.pdf> [<https://perma.cc/U288-PC24>] (listing Ohio appellate court decisions involving the RTL and summarizing their holdings).

⁸⁸ See, e.g., Kevin Grasha, *Hamilton County Judge: Reagan Tokes Act Is Unconstitutional, Disregards ‘A Judge’s Power,’* CINCINNATI.COM (Nov. 27, 2019), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2019/11/27/judge-reagan-tokes-act-unconstitutional-disregards-a-judges-power/4318868002/> [<https://perma.cc/Q7KP-XMVT>]; Steve Kilburn, *Ohio’s Shift Back to Indefinite Sentencing: Reagan Tokes Law and Current Local Controversy*, RITTGERS & RITTGERS (Dec. 20, 2019), <https://www.rittgers.com/blog/2019/12/ohios-shift-back-to-indefinite-sentencing-reagan-tokes-law-and-current-local-controversy/> [<https://perma.cc/8XWJ-GZKG>]. At the trial level, multiple courts have held the entirety of the RTL unconstitutional based on separation of powers and due process violations. *State v. Oneal*, No. B 1903562, slip op. at 8–9 (Ohio Ct. Com. Pl. Nov. 20, 2019), *rev’d*, No. C-190736 (Ohio Ct. App. Aug. 31, 2022); *State v. Hursey*, No. 20 CR 004459, slip op. at 12–13 (Ohio Ct. Com. Pl. Aug. 6, 2021); *State v. Tupper*, No. CR-19-645523-A, slip op. at 1 (Ohio Ct. Com. Pl. Jan. 28, 2020). At the appellate level, three panels in Ohio’s Eighth District, which encompasses Cleveland and the rest of Cuyahoga County, struck down the law on constitutional grounds before being reversed en banc. *State v. Delvallie*, 173 N.E.3d 544, 566 (Ohio Ct. App. 2021), *rev’d en banc*, 185 N.E.3d 536 (Ohio Ct. App. 2022); *State v. Sealey*, 173 N.E.3d 894, 907 (Ohio Ct. App. 2021), *rev’d en banc*, No. 109670 (Ohio Ct. App. Apr. 7, 2022); *State v. Daniel*, 173 N.E.3d 184, 197 (Ohio Ct. App. 2021), *rev’d en banc*, No. 109583 (Ohio Ct. App. Apr. 7, 2022). Appellate courts in several other districts have also decided to uphold the RTL as constitutional, rejecting the separation of powers and due process concerns cited elsewhere. E.g., *State v. Leet*, No. 28870, slip op. at 6, 8 (Ohio Ct. App. Apr. 16, 2021); *State v. Hacker*, 161 N.E.3d 112, 121 (Ohio Ct. App. 2020); *State v. Guyton*, No. CA2019-12-203, slip op. at 9 (Ohio Ct. App. July 27, 2020).

⁸⁹ *State v. Maddox*, No. 2020-1266, slip op. at 12–13 (Ohio Mar. 16, 2022).

⁹⁰ SUPREME COURT OF OHIO, CASE ANNOUNCEMENTS 1 (Apr. 2022), <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-ohio-1104.pdf> [<https://perma.cc/VAH7-5YGD>] (ordering briefing in *State v. Hacker*, 161 N.E.3d 112 (Ohio Ct. App. 2020) and *State v. Simmons*, 169 N.E.3d 728 (Ohio Ct. App. 2021)).

argumentative groundwork for any challenges to any similar sentencing systems in other states.

1. *The RTL Violates Separation of Powers Principles*

Rather than a traditional indefinite sentencing scheme, the RTL more closely resembles a modified definite sentencing scheme in which only administrative officials, not judges, are empowered to impose additional prison time beyond the minimum term.⁹¹ Although courts generally approve of administrative decision-making power in determining parole release under traditional indefinite sentencing, definite schemes that allow prison administrators to impose additional prison time as a punishment for misconduct in prisons have drawn scrutiny under separation of powers principles.⁹² The RTL's pseudo-definite scheme raises separation of powers concerns closely resembling those invoked in the Supreme Court of Ohio's decision striking down Ohio's "bad time" statute in 2000.⁹³

Ohio courts upholding the constitutionality of the RTL viewed additional term hearings under the RTL as functioning similarly to parole hearings under Ohio's traditional indefinite sentencing scheme.⁹⁴ However, under the RTL, an incarcerated person is vested with a presumption of release at the expiration of their minimum term, rebuttable only by administrative officials.⁹⁵ This presumption undercuts the "indefinite" nature of RTL sentences and means the

⁹¹ See *supra* notes 34–45 and accompanying text.

⁹² See CAMPBELL, *supra* note 26, § 15:6; *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (1997) ("The division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule.").

⁹³ See *Bray*, 729 N.E.2d at 361. Although the concept of separation of powers is not explicitly mentioned in the Ohio constitution, the Supreme Court of Ohio has recognized that the "doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *City of S. Euclid v. Jemison*, 503 N.E.2d 136, 138 (1986).

⁹⁴ See, e.g., *Simmons*, 169 N.E.3d at 735. Under Ohio's traditional indefinite sentencing system, upon the expiration of a person's minimum term, the Ohio Parole Board holds an initial or "First Hearing" at which members of the Board will determine whether the person is suited for release. OHIO ADMIN. CODE 5120:1-1-10(A) (2022). The Board may decide to release or "continue" the person, denying release and setting a future parole hearing date up to ten years after the first hearing. See OHIO PAROLE BOARD, OHIO PAROLE BOARD HANDBOOK 19–25 (2019), <https://www.drc.ohio.gov/Portals/0/Parole%20Board%20Handbook%20January%202019-FINAL.pdf> [<https://perma.cc/EAH6-XWUT>] (describing parole hearing procedures and potential outcomes). In the event of an objection (from either a Board member, a hearing officer, or the Office of Victim Services) to an initial decision to release the incarcerated person on parole, a full board hearing is held at which more parties may testify, including the victim and other designated parties. OHIO REV. CODE § 5149.101 (2022); OHIO PAROLE BOARD, *supra*, at 19–25.

⁹⁵ OHIO REV. CODE § 2967.271(B) (2022); see *supra* notes 34–36 and accompanying text.

RTL functions like a definite sentence where a person presumably must be released at the term's expiration.⁹⁶ The maximum term merely represents an upper limit on the total additional prison time ODRC can add to a person's sentence based on the person's prison disciplinary record.⁹⁷ Rather than a traditional indefinite sentencing system with Parole Board discretion regarding the release date, RTL sentences represent a "definite plus" additional time system, granting administrative officials unilateral power to impose, in ODRC's own words, "additional term[s]" of imprisonment.⁹⁸

The RTL's shift of adjudication authority from the judicial branch to the executive branch closely resembles Ohio's unconstitutional "bad time" statute in several ways. Most importantly, a defendant sentenced under the RTL has the same notice of a potential extension as did a defendant sentenced under the "bad time" law.⁹⁹ Under "bad time," a trial court was statutorily required to advise a defendant that "the parole board may extend the stated prison term," that such extensions "will be done administratively *as part of [a defendant's] sentence*" and that the sentence imposed by the trial court "automatically includes any extension."¹⁰⁰ In *Bray*, the Supreme Court of Ohio was not convinced that this required judicial advisement cured the separation of powers issues plaguing "bad time" because executive officials, not judges, ultimately made the extension decision.¹⁰¹ The court held "bad time" unconstitutional on separation of powers grounds over the objections of dissenters citing to these notice provisions as evidence that the full sentence (including any extension) was part of the original sentence "imposed by the judicial branch."¹⁰²

Similarly, under the RTL, judges advise defendants at sentencing that ODRC "may maintain the offender's incarceration" beyond the minimum term and up to the maximum term if ODRC officials rebut the presumption of release.¹⁰³ As an example of how trial courts are currently advising defendants of the potential for administrative extension under the RTL, consider the following excerpt from a recent criminal sentencing in Jackson County, Ohio. While preparing to accept a negotiated plea of ten years for an RTL-eligible offense (meaning the maximum term would be fifteen years), the judge advised the defendant:

⁹⁶ See Ball, *supra* note 28, at 906–07.

⁹⁷ OHIO REV. CODE § 2967.271(D) (2022).

⁹⁸ ODRC 105-PBD-15, *supra* note 39, at 1.

⁹⁹ See *infra* notes 100–03 and accompanying text.

¹⁰⁰ OHIO REV. CODE ANN. § 2929.19(B)(3)(b) (West 1997) (emphasis added); see also OHIO REV. CODE § 2943.032 (2022).

¹⁰¹ See *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 362 (Ohio 2000).

¹⁰² See *id.* at 364 (Cook, J., dissenting).

¹⁰³ OHIO REV. CODE § 2929.19(B)(2)(c) (2022). Judges must similarly advise a defendant of their potential for administrative extension prior to their entering a guilty plea to an RTL-eligible offense. *Id.* § 2943.032(A).

[I]t's presumed that you would do whatever number that I assign to you so . . . ten years. And then there is an additional . . . five years that . . . would be[,] for lack of a better term[,] is bad time credit. You're in prison and you misbehave. You break the rules. They can give you that additional five years. I don't control that at all. That's completely up to the prison. I have no role in that.¹⁰⁴

Although this judge did not describe any specific conditions under which ODRC could extend the defendant's prison term beyond "misbehaving," the judge emphasized that the court had "no role" in making that additional term determination.¹⁰⁵

Second, the RTL scheme allows for administrative prison term extensions for up to one-half of the minimum term, exactly matching the maximum additional prison time that could be imposed beyond the "stated term" for conduct violations under the "bad time" statute.¹⁰⁶ Third, both schemes involve automatic calculation of this "maximum term." For judges sentencing a defendant under the RTL, the maximum term is automatically calculated by a mathematical formula.¹⁰⁷ Similarly, under "bad time," the maximum administrative term was capped at "one-half of the stated prison term's duration."¹⁰⁸ In both systems, judges impose sentences with an *awareness* of the maximum term implied by the minimum or "stated" term they assign, but with no *flexibility* to set a higher or lower maximum.¹⁰⁹ This contrasts with traditional indefinite sentencing where judges independently set a minimum and maximum term with discretion at both ends.¹¹⁰ Fourth, ODRC's procedures for

¹⁰⁴ Transcript of the Arraignment, Pre-Trial's, Final Pre-Trial, Motions Hearing, Plea and Sentencing at 123–24, *State v. Sheets*, No. 20 CR 0077 (Ohio Ct. Com. Pl. sentenced Dec. 13, 2021) (on file with the *Ohio State Law Journal*).

¹⁰⁵ *Id.*

¹⁰⁶ OHIO REV. CODE § 2967.271(D) (2022) (allowing for ODRC to impose additional terms); *supra* notes 22–25 and accompanying text (explaining the RTL's basic sentencing math); OHIO REV. CODE ANN. § 2967.11 (West 2000) (repealed 2009) (allowing for "bad time" prison terms as a punishment for disciplinary infractions not to exceed a total "period longer than one-half of the [definite] stated prison term's duration"), *invalidated by State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000).

¹⁰⁷ *See generally* OHIO REV. CODE § 2929.144 (2019).

¹⁰⁸ OHIO REV. CODE ANN. § 2967.11(B) (West 2000) (repealed 2009), *invalidated by State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000).

¹⁰⁹ For instance, a judge sentencing under the RTL has no discretion to set a minimum term of five years and a maximum term of six years. The maximum term would be automatically set at seven and one-half years. *See* OHIO REV. CODE § 2929.144 (2022); *see also supra* notes 22–25 and accompanying text.

¹¹⁰ CAMPBELL, *supra* note 26, § 4:2.

administering additional term hearings under the RTL echo ODRC's defunct statutory process for imposing unconstitutional "bad time" sentences.¹¹¹

Proponents of the RTL's constitutionality would argue that one key difference remains: Under "bad time," additional prison time could only be added when incarcerated people committed a "criminal offense," while under the RTL, time may be added when any of the rebuttal conditions are met, not all of which necessarily constitute criminalized behavior.¹¹² However, this reveals a fifth key similarity between "bad time" and the RTL. One of the three rebuttal conditions under the RTL allows for ODRC to impose an administrative prison term when the incarcerated person "committed institutional rule infractions . . . or committed a violation of law that was not prosecuted . . ."¹¹³ Just as the "bad time" statute violated the constitution by giving administrative officials the power to prosecute new crimes, the RTL grants administrative officials the power to prosecute, adjudicate, and punish new crimes occurring after conviction, sentencing, and imprisonment.¹¹⁴

Therefore, for separation of powers considerations, the only difference between the RTL and "bad time" scheme is mere semantics—at RTL sentencing, ODRC's highest potential administrative prison term is explicitly labeled as a "maximum prison term,"¹¹⁵ whereas at "bad time" sentencing, ODRC's maximum additional term was described to the defendant as an

¹¹¹ Under the "bad time" law, ODRC prison administrators could impose additional time in prison beyond the incarcerated person's originally stated prison sentence in increments of up to ninety days for each conduct violation, defined as "an act that is a criminal offense under the law of this state or the United States." Weaver, *supra* note 64, at 345 n.43; OHIO REV. CODE ANN. § 2967.11 (West 2000) (repealed 2009), *invalidated by State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000). In total, administrative extensions could not exceed one-half of the incarcerated person's stated prison term. *Id.* § 2967.11(B). The incarcerated person's conduct was reviewed by ODRC officials (including the Rules Infraction Board, the head of the relevant prison, and the Parole Board) in a three-tier process in which the person had statutory rights to testify, cross-examine witnesses, present a defense, and appeal. Weaver, *supra* note 64, at 345–49.

¹¹² OHIO REV. CODE ANN. § 2967.11 (West 1997) (repealed 2009), *invalidated by State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000); OHIO REV. CODE § 2967.271(C) (2022).

¹¹³ OHIO REV. CODE § 2967.271(C)(1)(a) (2022) (emphasis added).

¹¹⁴ *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 362 (Ohio 2000). Even if this provision were stricken from the RTL, the remaining rebuttal conditions would still leave ODRC with de facto prosecuting powers in addition to the adjudication and sentencing power of a judge. The list of behaviors that count as institutional infractions is long and varied, many of which could be interpreted as involving "compromising the security of a state correctional institution." OHIO REV. CODE § 2967.271(C)(1)(a) (2022); *accord* OHIO ADMIN. CODE 5120-9-06(C) (2022). Many of the listed violations, including causing physical harm to another, hostage taking, and extortion, resemble behaviors banned under the Ohio criminal code. *See* OHIO ADMIN. CODE 5120-9-06(C) (2022).

¹¹⁵ OHIO REV. CODE § 2929.19(B)(2)(c)(v) (2022).

extension up to “one-half of the [prison] term’s duration.”¹¹⁶ Functionally, and for the defendant facing an administrative prison term under either scheme, this is a distinction without a difference. Following *Bray*’s precedent, the RTL’s administrative sentencing extension scheme must fall as a violation of separation of powers principles.

2. *The RTL Undermines Procedural Due Process Rights of Incarcerated Individuals*

The U.S. Constitution affords those facing a deprivation of liberty or property certain procedural due process rights embodied primarily by the Fifth and Fourteenth Amendments.¹¹⁷ Although incarcerated people are afforded only “the most basic” due process rights,¹¹⁸ they do “not forfeit all constitutional protections by reason of . . . conviction and confinement in prison.”¹¹⁹ For those facing an extension or reinstatement of prison time, a varied set of procedural due process rights attach depending on the nature of the liberty interest at stake. Because the liberty interest present for those facing extension under the RTL closely resembles the interest of those facing parole revocation, or at least the interest of those facing a loss of “good time” credits, the Constitution affords them procedural rights not currently guaranteed under the RTL.

The basic test for assessing whether a due process violation exists proceeds in two steps: (1) whether a person holds a liberty interest that has been deprived, and (2) whether the state’s procedures for that deprivation are constitutionally sufficient.¹²⁰ In carrying out this test, courts assess the nature of the personal liberty interest at play, the risk that the state’s procedures will lead to an erroneous deprivation of that interest, and the fiscal and administrative burdens that additional procedural requirements would impose on the government.¹²¹ Generally, the higher liberty interest at stake in a given administrative hearing setting, the more procedural due process rights attach.¹²²

People incarcerated under the RTL are vested with a liberty interest sufficient to require more substantial rights than are currently afforded to them

¹¹⁶ OHIO REV. CODE ANN. § 2929.19(B)(3)(b) (West 1997) (amended 2019).

¹¹⁷ See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”). Due process represents two central concerns: the utilitarian goal of depriving liberty only when a correct determination of facts and law allows the state to do so, and the more normative goal of respecting an individual’s right to be heard before a neutral decisionmaker. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

¹¹⁸ *Hewitt v. Helms*, 459 U.S. 460, 467 (1983).

¹¹⁹ *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

¹²⁰ *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

¹²¹ *Mathews*, 424 U.S. at 334–35.

¹²² See *id.*

by the legislature and by ODRC's release rebuttal process.¹²³ When a person is sentenced to a prison term under the RTL, they are told "[t]hat it is rebuttably presumed that [they] will be released . . . on the expiration of the minimum prison term imposed as part of the sentence or on [their] presumptive earned early release date, . . . whichever is earlier[.]"¹²⁴ Indeed, the RTL commands that ODRC "shall" release the incarcerated person from imprisonment at the expiration of the minimum term unless ODRC itself makes certain additional findings.¹²⁵ Thus, the state has created a statutory right to release conditional only upon findings of fact regarding conduct (criminal and noncriminal) in prison.¹²⁶ This strong liberty interest in release from prison creates due process rights that the state must guarantee.

In rebuttal, courts upholding the constitutionality of the RTL minimized the liberty interest created by presumptive release by comparing RTL sentences to parole.¹²⁷ At parole release hearings, the U.S. Constitution only guarantees eligible offenders the opportunity to be heard and to receive a statement of the reasons for denial.¹²⁸ People incarcerated on indefinite sentences facing traditional parole board hearings do not have a liberty interest in their release at stake during those proceedings because they have no statutory expectation of release—the parole board "may" release people on parole at that stage, but no single factor "create[s] a presumption of release[.]"¹²⁹

Under the RTL, the exact opposite is true. A single factor—being sentenced to a minimum term under the RTL's sentencing scheme—creates a presumption

¹²³ This liberty interest is primarily embodied by the presumption of release under OHIO REV. CODE § 2967.271(B) (2022).

¹²⁴ *Id.* § 2929.19(B)(2)(c)(i).

¹²⁵ *Id.* § 2967.271(C).

¹²⁶ *See id.*

¹²⁷ *See, e.g.,* *State v. Wilburn*, 168 N.E.3d 873, 880–81 (Ohio Ct. App. 2021); *State v. Simmons*, 169 N.E.3d 728, 734 (Ohio Ct. App. 2021).

¹²⁸ *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (describing the Court's holding in *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979)). These are the minimum requirements, and states may add their own due process guarantees. *See id.* at 219–21. Although "[t]he Ohio Constitution is a document of independent force," the Supreme Court of Ohio has been reluctant to interpret the Ohio constitution's Due Course of Law Clause as granting higher due process rights than those afforded under the U.S. Constitution. OHIO CONST. art I, § 16; *Simpkins v. Grace Brethren Church of Del.*, 75 N.E.3d 122, 138 (Ohio 2016) (Lanzinger, J., concurring) (quoting *Arnold v. Cleveland*, 616 N.E.2d 163, 164 (Ohio 1993) (paragraph one of the syllabus)); *see State v. Aalim*, 83 N.E.3d 883, 887, 894 (Ohio 2017) (overturning, on reconsideration, the court's prior decision in the same case which acknowledged a due process right under the Ohio constitution not afforded by the U.S. Constitution).

¹²⁹ OHIO ADMIN. CODE 5120:1-1-07(A) (2022); *id.* at 5120:1-1-07(C); *see also* *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (emphasizing that courts must determine whether a presumption of release on parole exists on a case-by-case basis depending on the structure of the state's parole system).

of release.¹³⁰ Therefore, a person subject to an RTL administrative extension hearing is more similarly situated to those facing revocation of their liberty rather than a discretionary grant of freedom.¹³¹ Whereas an incarcerated person subject to parole release consideration waits to hear whether the state will open the doors to release, a person subject to an RTL extension hearing waits to hear whether the state will slam shut the release door already open to them.

In analogous settings where a revocation of liberty is at stake, a higher level of procedural due process protections apply than does in discretionary parole release settings.¹³² For instance, people released from prison on parole or post-release control (PRC) are guaranteed certain rights before they can be re-incarcerated because of their liberty interest in maintaining their freedom from incarceration.¹³³ People subject to such hearings are due, at a minimum, written notice of claimed violations, the disclosure of evidence presented against them, the opportunity to be heard and present their own evidence, the confrontation and cross-examination of adverse witnesses, and a “neutral and detached” hearing body, among other rights.¹³⁴ Ohio provides these and other due process rights to people facing release revocation hearings by administrative regulation and by statute.¹³⁵ Although none of these rights are statutorily guaranteed under the RTL, some (but not all) of these rights are provided under ODRC’s policy document for additional term hearings.¹³⁶

Despite the similarities between those facing parole or PRC revocation and those subject to RTL extension hearings, some courts may resist the comparison because the former are outside of prison facing re-incarceration and the latter are currently incarcerated facing extension.¹³⁷ For a tighter fit, those courts might look to administrative discipline proceedings for currently incarcerated people facing a potential revocation of “good time” or “earned” credit.¹³⁸ The interest created in such administrative disciplinary hearings is stronger than the

¹³⁰ OHIO REV. CODE § 2967.271(B) (2022).

¹³¹ See *State v. Sealey*, 173 N.E.3d 894, 901–02 (Ohio Ct. App. 2021) (holding that a person sentenced under the RTL has a liberty interest in their release from prison similar to the liberty interest of those facing release revocation proceedings).

¹³² See *infra* notes 133–34 and accompanying text.

¹³³ See *Morrissey v. Brewer*, 408 U.S. 471, 481–82 (1972). Similar liberty interests have been extended to the context of probation violation proceedings, *Gagnon v. Scarpelli*, 411 U.S. 778, 785–86 (1973), and post-release control violation hearings, *Woods v. Telb*, 733 N.E.2d 1103, 1110–11 (Ohio 2000).

¹³⁴ *Morrissey*, 408 U.S. at 488–89.

¹³⁵ OHIO ADMIN. CODE 5120:1-1-18(A)(5) (2022); OHIO REV. CODE § 120.06 (2022) (establishing a duty to provide legal representation to indigent adults and juveniles in certain settings).

¹³⁶ See generally OHIO REV. CODE § 2967.271 (2022) (failing to provide these procedural guarantees); ODRC 105-PBD-15, *supra* note 39 (providing some, but not all due process guarantees provided by statute to those facing release revocation hearings).

¹³⁷ See, e.g., *supra* notes 46–48 and accompanying text.

¹³⁸ See *supra* notes 46–48 and accompanying text.

interest at stake in parole eligibility settings but weaker than the interest present in parole or post-release control revocation settings.¹³⁹ When facing a loss of good time credits towards their release based on misconduct in prison, the U.S. Constitution affords incarcerated people the right to advance written notice, the right to disclosure of evidence presented against them, and the right to call witnesses and to present documentary evidence in defense (when not “unduly hazardous to institutional safety or correctional goals”).¹⁴⁰

Because those facing administrative extension hearings under the RTL are similarly situated at least to those facing loss of good time credits, if not to those facing parole revocation, Ohio courts should require the state to provide revocation hearing-level procedural guarantees for those facing an additional term under the RTL. Therefore, in addition to the separation of powers issues explored above, Ohio courts should hold the RTL unconstitutional on due process grounds.

B. Administrative Prison Terms Increase Lengths of Stay and Exacerbate Mass Incarceration

In addition to the RTL’s questionable constitutional bona fides, the law is also bad policy because it threatens to increase the state’s prison population and to reverse Ohio’s recent progress toward decarceration.¹⁴¹ This Part first assesses the likelihood that the RTL will lead to increased lengths of stay and then examines the criminogenic effects of the prison environment and the public safety consequences of long-term imprisonment.

1. The RTL Will Lead to Increased Lengths of Stay in Prison

The RTL’s administrative prison term system is likely to increase the average length of time eligible offenders spend in prison because of two punitive sentencing choices made by the legislature. First, the RTL’s new sentencing framework allows for maximum terms higher than existing felony sentencing ranges.¹⁴² For example, under the RTL, a judge can sentence someone to a minimum term of up to eleven years for a first-degree, non-life-eligible felony

¹³⁹ *Wolff v. McDonnell*, 418 U.S. 539, 560–61 (1974) (“For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee.”).

¹⁴⁰ *Id.* at 564–67.

¹⁴¹ See *supra* notes 74–76 and accompanying text.

¹⁴² See OHIO REV. CODE § 2929.14 (2022). Although the RTL eliminated definite sentencing in favor of nominally indefinite sentencing for non-life first- and second-degree felony offenses, the range of years that a judge can sentence someone to under the felony sentencing statute did not change. See generally OHIO CRIM. SENT’G COMM’N, *supra* note 21.

offense.¹⁴³ The maximum term would be automatically calculated as sixteen and one-half years (the minimum term plus one-half of that minimum term).¹⁴⁴ Before the RTL, that same person could not serve more than an eleven-year sentence.¹⁴⁵ Now, ODRC can impose up to five and a half more years of prison time on top of the eleven-year minimum term without another appearance in court.¹⁴⁶

Second, when a person is sentenced to serve multiple sentences consecutively (rather than concurrently), their maximum term is calculated as an aggregate of all the minimum terms rather than just the longest minimum term.¹⁴⁷ For example, if a judge imposes a ten-year minimum term for one count of aggravated robbery and another ten-year minimum term for one count of kidnapping (both first-degree felonies) to be served consecutively, the maximum term is calculated as the total of the two minimum terms plus 50% of that total.¹⁴⁸ Here, the minimums would add up to twenty years, so the maximum term would be thirty years.¹⁴⁹ In imposing this punitive math, the legislature defied the Recodification Committee's recommendation that only the longest minimum term should serve as the basis for calculating the maximum term.¹⁵⁰ If that math applied in this example, the maximum term would be twenty-five years, not thirty years.¹⁵¹

Additionally, the legislature failed to incorporate other recommendations of the Recodification Committee that might have offset the lengthening effects of the RTL's scheme. First, the legislature failed to simplify and expand access to judicial release for those sentenced to indefinite terms.¹⁵² Second, the RTL

¹⁴³ OHIO REV. CODE § 2929.14(A)(1)(a) (2022); OHIO CRIM. SENT'G COMM'N, *supra* note 21, at 1.

¹⁴⁴ OHIO REV. CODE § 2929.144(B)(1) (2022); *see supra* notes 22–25 and accompanying text.

¹⁴⁵ Under Ohio's definite sentencing system (still in effect for third-, fourth-, and fifth-degree felonies), people convicted of felonies are sentenced to a "definite term" of months or years. *See, e.g.*, OHIO REV. CODE § 2929.14(A)(3)(a) (2022).

¹⁴⁶ *See id.* § 2967.271(D); *supra* notes 34–38 and accompanying text.

¹⁴⁷ OHIO REV. CODE § 2929.144(B)(2) (2022).

¹⁴⁸ OHIO REV. CODE ANN. § 2911.01(C) (West 1997) (aggravated robbery is a first-degree felony); OHIO REV. CODE § 2905.01(C) (2022) (kidnapping is a first-degree felony); *Id.* § 2929.144(B)(2) (maximum term is calculated by combining the minimum terms when imposed to be served consecutively).

¹⁴⁹ $10 + 10 = 20$; $20 + (20 \times 0.5) = 30$; or $20 \times 1.5 = 30$.

¹⁵⁰ *See Testimony in Opposition of SB201 Reagan Tokes Law: Hearing on S.B. 201 Before the S. Gov't Oversight & Reform Comm.*, 132nd. Gen. Assemb., Reg. Sess. 1–2 (Ohio 2018) [hereinafter *Testimony in Opposition of SB201*] (statement of Niki Clum, Legislative Liaison, Ohio Public Defender).

¹⁵¹ $((10 + 10) + (10 \times 0.5) = 25)$ instead of $((10 + 10) + ((10 + 10) \times 0.5) = 30)$.

¹⁵² *Testimony in Opposition of SB201*, *supra* note 150, at 3–4. Judicial release is a discretionary form of court-adjudicated sentence commutation eligible to certain offenders in Ohio after completing an applicable portion of their prison term. *See* OHIO REV. CODE § 2929.20(C)–(D) (2022).

retains a form of post-release supervision that allows for people who completed an RTL sentence to be sent back to prison for violating the terms of their post-release supervision, even when that violation does not constitute a new felony offense.¹⁵³

State public defenders,¹⁵⁴ ACLU Ohio,¹⁵⁵ and the nonpartisan Ohio Legislative Service Commission (LSC)¹⁵⁶ all agree that the RTL's sentencing system will lead to an increase in the state's prison population. Even "if the courts approve most" of ODRC's recommendations to reduce prison time for exceptional conduct, the LSC notes that ODRC still "expects the effect may be a slight increase in the overall size of the prison population."¹⁵⁷ Thus, under the RTL, the cycle of carceral legislating in Ohio continues, leaving people languishing in prison for longer before returning to the community.

2. Long-Term Incarceration Needlessly Perpetuates Mass Incarceration

By increasing lengths of stay in prison instead of advancing creative solutions to public safety challenges, the RTL will perpetuate mass incarceration. In resorting to incarceration instead of shifting focus to meeting social and economic needs, lawmakers ignored the negative effects of mass imprisonment and the futility of long-term sentences.¹⁵⁸

Four primary drivers of violence are also four key features of prison: "shame, isolation, exposure to [previous] violence, and diminished ability to meet one's economic needs."¹⁵⁹ As Shon Hopwood describes prison from his personal experience, "if you were to design a system to perpetuate intergenerational cycles of violence and imprisonment in communities already overburdened by criminal justice involvement, then the American prison system

¹⁵³ See *Testimony in Opposition of Am. SB201 Reagan Tokes Law: Hearing on S.B. 201 Before the H. Crim. Just. Comm.*, 132nd Gen. Assemb., Reg. Sess. 1–2 (Ohio 2018) (statement of Timothy Young, Ohio Public Defender).

¹⁵⁴ See *id.* at 1; *Testimony in Opposition of SB 201*, *supra* note 150, at 1.

¹⁵⁵ *Senate Bill 201—Interested Party Testimony: Hearing on S.B. 201 Before the S. Gov't Oversight & Reform Comm.*, 132nd Gen. Assemb., Reg. Sess. 1–2 (Ohio 2018) (statement of Gary Daniels, Chief Lobbyist, ACLU of Ohio).

¹⁵⁶ JOSEPH ROGERS, OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, Gen. Assemb. 132, Reg. Sess. 1 (2019).

¹⁵⁷ See *id.* at 1; see also *supra* notes 46–48 and accompanying text (explaining ODRC's power under the RTL to reduce sentences based on "exceptional conduct"). Conversely, if the courts deny most of ODRC's recommendations, the RTL could lead to a \$20 million to \$40 million annual increase in ODRC spending. JOSEPH ROGERS, OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, Gen. Assemb. 132, Reg. Sess. 1 (2019). This projected increase accords with the historical tendency of indefinite sentencing schemes to lead to an "increase of the average criminal's incarceration term." CAMPBELL, *supra* note 26, § 3:8 n.13.

¹⁵⁸ See *infra* notes 157–63 and accompanying text.

¹⁵⁹ DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 67 (2019).

is what you would create.”¹⁶⁰ Unsurprisingly, then, “[m]ost criminologists would predict that, on balance, offenders become more, rather than less, criminally oriented due to their prison experience,”¹⁶¹ and prison overcrowding tends to exacerbate these criminogenic¹⁶² conditions.¹⁶³ The unforgiving nature of prison life pose risks for everyone, not just those incarcerated, because among those who experience the perils of incarceration, about 95% will eventually be released back into society.¹⁶⁴ For those focused on making sure the tragedy of Reagan Tokes’s murder “never happens again,”¹⁶⁵ or at least happens less often, increased reliance on imprisonment is a futile solution.

In addition to its failure to address the size and scope of mass incarceration, the RTL also fails by relying on long-term incarceration as a public safety tool. Sentencing policy expert Marc Mauer¹⁶⁶ identifies three key reasons why lengthy prison terms are unsupported by traditional criminal sentencing rationales.¹⁶⁷ First, criminology literature has established that people “age out” of criminal behavior starting by their mid-twenties and dropping off throughout their thirties and forties.¹⁶⁸ Thus, keeping people in prison beyond middle age when they entered prison in their teens or early twenties undermines the incapacitation rationale for imprisonment.¹⁶⁹ Second, the deterrent effect of imprisonment is “primarily a function of the *certainty* of punishment, not its

¹⁶⁰ Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> [https://perma.cc/KUT8-X5P9]. Professor Hopwood served more than ten years in federal prison before becoming a lawyer and joining the faculty at Georgetown University Law Center. *Id.*

¹⁶¹ Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 53S (2011), <https://journals.sagepub.com/doi/abs/10.1177/0032885511415224> (on file with the *Ohio State Law Journal*).

¹⁶² Defined as “producing or leading to crime.” *Criminogenic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/criminogenic> [https://perma.cc/25GV-SLDX].

¹⁶³ See *Brown v. Plata*, 563 U.S. 493, 501–02 (2011).

¹⁶⁴ RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES & NICHOLAS TURNER, VERA INST. OF JUST., REIMAGINING PRISON 25 (Oct. 2018), https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf [https://perma.cc/C7QZ-7GWC].

¹⁶⁵ *Press Conference - Reagan Tokes Act*, *supra* note 3, at 04:14–04:18.

¹⁶⁶ Marc Mauer, SENTENCING PROJECT, <https://www.sentencingproject.org/staff/marc-mauer/> [https://perma.cc/JHK6-NDEZ].

¹⁶⁷ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 121 (2018).

¹⁶⁸ *Id.* at 122; Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 585 (2003) (finding that the prominence of all criminal offenses they tracked “decline systemically in the middle adult years”).

¹⁶⁹ Mauer, *supra* note 167, at 122.

severity.”¹⁷⁰ Thus, clearer expectations around enforcement and sentencing, rather than harsher sentences, would more effectively dissuade instances of violence.¹⁷¹ Third, excessive incarceration places significant fiscal constraint on governments, lowering their capacity to invest in social interventions and economic support programs associated with more, proven public safety benefits.¹⁷²

Therefore, because the RTL increases the state’s fiscal burden and rests on a faulty public safety rationale, the law cuts against ODRC’s mission to reduce crime and recidivism in Ohio.¹⁷³ Even criminologists who express reservations about the likelihood that prisons’ criminogenic features lead to increased recidivism after release conclude that prisons do not have a specific deterrent effect and that low-risk offenders are likely the most prone to recidivism due to incarceration.¹⁷⁴ In fact, following significant decreases in the prison populations of states like California, New York, and New Jersey, crime rates in those states continued to decline at a faster pace than national averages.¹⁷⁵ This suggests Ohio’s move toward increasing lengths of stay under the RTL is backed by little to no public safety rationale.

In short, by contributing to the stagnation in the state’s prison population,¹⁷⁶ Ohio risks the health and safety not only of those it incarcerates, but also of the communities with whom those formerly incarcerated persons will eventually reintegrate. Even so, despite a growing consensus in Ohio and the rest of the country around the failure of mass incarceration to produce sustainable public safety and harm accountability,¹⁷⁷ retributivists might not see a problem with

¹⁷⁰ *Id.* at 123; see also DAVID ROODMAN, THE IMPACTS OF INCARCERATION ON CRIME, 48 (Sept. 2017), https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf [<https://perma.cc/6K39-5DEQ>] (finding “little convincing evidence that at today’s margins in the US, increasing the frequency or length of sentences deters aggregate crime”); Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 98–99 (2019) (explaining how the deterrence rationale also fails as an argument against second look resentencing laws).

¹⁷¹ See Mauer, *supra* note 167, at 123; see also NAT’L INST. OF JUST., U.S. DEP’T OF JUST., NCJ 247350, FIVE THINGS ABOUT DETERRENCE (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/S96T-WFJB>].

¹⁷² See Mauer, *supra* note 167, at 124.

¹⁷³ *About the ODRC*, OHIO DEP’T OF REHAB. & CORR., <https://drc.ohio.gov/About> [<https://perma.cc/8N9D-VZSW>].

¹⁷⁴ Cullen, Jonson & Nagin, *supra* note 161, at 59S–60S.

¹⁷⁵ Mauer, *supra* note 167, at 116.

¹⁷⁶ OHIO LEGIS. SERV. COMM’N, *supra* note 71, at 85.

¹⁷⁷ See, e.g., Laura A. Bischoff, *A Massive Criminal Justice Reform Bill 5 Years in the Making Is Now Up for Debate in Ohio*, CINCINNATI.COM (Feb. 3, 2022), <https://www.cincinnati.com/story/news/politics/2022/02/03/ohio-looks-reform-criminal-justice-laws-improve-outcomes/6637520001/> [<https://perma.cc/PU5P-3HPC>]; John Pfaff, *Decarceration’s Blindspots*, 16 OHIO ST. J. CRIM. L. 253, 255–56 (2018) (“Scaling back our reliance on prisons is one of the few genuinely bipartisan issues in these polarized times, at the local,

the RTL's likely effects of increasing lengths of stay and the state's prison population.¹⁷⁸ But the likelihood that a law like the RTL could lead to worse public safety outcomes should give pause even to those seeking to increase carceral punishment in response to public tragedies.¹⁷⁹

IV. LEGISLATIVE AND POLICY SOLUTIONS FOR THE RTL

Although this Note has argued that the administrative prison terms established under the RTL are unconstitutional¹⁸⁰ and unwise as a matter of public safety policy,¹⁸¹ several legislative and policy changes to the RTL could alleviate some of the law's worst effects if the law is ultimately upheld. First, the legislature and ODRC should adjust the RTL to address separation of powers and due process issues with three key changes. Second, the legislature should alter the math for how the maximum term is calculated in consecutive sentencing scenarios. Finally, the legislature should keep the RTL's presumption of release because eliminating it would undercut decarceration efforts and perpetuate the cycle of carceral legislating.

A. Remedy Separation of Powers and Due Process Issues

To address the constitutional issues highlighted in Part III.A, the legislature and ODRC should modify the RTL in three ways: (1) establishing external appealability through mandatory judicial review of administrative prison terms, (2) creating meaningful internal appealability of additional term hearings and clarifying the conditions required to rebut the presumption of release, and (3) aligning due process rights under the RTL with those afforded to people facing parole revocation hearings.

state, and even federal levels.”). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262–63 (2018) (distinguishing between a “mass incarceration” framing and “overcriminalization” framing of criminal justice system critiques).

¹⁷⁸ See David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 447 (1996); The Blade Editorial Board, *Editorial: Strengthen, Uphold Reagan Tokes Law*, BLADE (Apr. 3, 2022), <https://www.toledoblade.com/opinion/editorials/2022/04/03/editorial-strengthen-uphold-reagan-tokes-law/stories/20220402059> [<https://perma.cc/8SBN-5URK>] (“If the rights of crime victims mean anything in the Ohio justice system, the Ohio Supreme Court must uphold the Reagan Tokes Law.”).

¹⁷⁹ Like Ohio Representative Kristin Boggs, this author also admires the desire of Reagan Tokes' parents to advocate for change rather than seek retribution. Statement of Ohio Representative Kristin Boggs during *Press Conference - Reagan Tokes Act*, *supra* note 3, at 12:40–13:44.

¹⁸⁰ See *supra* Part III.A.

¹⁸¹ See *supra* Part III.B.

1. *Judicial Review of Additional Terms*

A sentencing judge bound by felony sentencing ranges and mandatory minimums prescribed by the legislature should have a role in determining whether a person they sentenced to prison should receive an additional term of imprisonment under the RTL's sentencing scheme. At the sentencing phase, judges are required to weigh the seriousness of the convicted person's offenses, their likelihood of future recidivism, and mitigating circumstances.¹⁸² This statutorily mandated review process, combined with the adversarial and public nature of the courtroom setting, aims to protect the due process rights and dignity of a person subject to a traditional sentencing decision.¹⁸³ By contrast, the private, secluded, nonadversarial, and unreviewable process for imposing administrative prison terms under the RTL allows executive branch officials to exercise unchecked judicial and prosecutorial powers and quashes the due process rights of incarcerated people.¹⁸⁴

To repair this central fault of the RTL, the Ohio legislature should mandate judicial review of any additional prison term that ODRC seeks to impose. If ODRC rebuts the presumption of release and decides to impose an additional prison term under the RTL, the incarcerated person should have the right to appeal this decision through an adversarial hearing process before the sentencing court. Detractors may claim this would be procedurally burdensome for courts. But the statutory and procedural structure for this process already exists—as discussed in Part II.A, ODRC must secure judicial approval whenever they seek to award an incarcerated person an “earned time” reduction of their sentence.¹⁸⁵ This Note simply calls on the Ohio legislature, or any legislature considering administrative prison terms, to provide the same procedural guarantees for someone facing an extension of their prison term as those provided to someone facing a potential reduction of their sentence.

¹⁸² See OHIO CRIM. SENT'G COMM'N, FELONY SENTENCING QUICK REFERENCE GUIDE 3 (Nov. 2021), [https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/jud Practitioner/felonyQuickRef.pdf](https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/jud%20Practitioner/felonyQuickRef.pdf) [<https://perma.cc/8LRV-2B9J>]. Even so, the wide range of sentencing discretion granted to judges can lead to highly disparate and potentially discriminatory sentencing across chambers or geographic regions. See also Donnelly, *supra* note 16, at 228, 230, 234.

¹⁸³ See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 19 (2006) (“Modern due process doctrine recognizes that adversary procedural rights are needed at [the sentencing] stage, just as at the criminal trial, because the length and terms of the sentence implicate the defendant's liberty interests no less than conviction itself. The judge's determination of the length of the sentence, or her choice between a prison term, home confinement, or probation, may affect the defendant's interests as keenly as the fact of conviction.”).

¹⁸⁴ See *supra* Part II.A, III.A.

¹⁸⁵ See *supra* notes 46–48 and accompanying text.

2. Meaningful Internal Appealability of Infraction and Extension Decisions

To overcome the presumption of release under the RTL, ODRC must find that one of three conditions are met.¹⁸⁶ Each of these conditions involve ODRC's internal, unchecked decisions and judgment regarding an incarcerated person's behavior and potential for violence while in prison.¹⁸⁷ But the punishment for violating certain kinds of ODRC rules under the RTL—the imposition of an additional prison term—is the type of consequence our criminal legal system imposes for violations of law committed outside of prison, not for violations of prison disciplinary rules.¹⁸⁸ Under the RTL, an incarcerated person is punished with a penalty meant to remove them from society based on a finding that they violated rules designed by ODRC for managing ODRC's own prison environment.¹⁸⁹

Further, ODRC's unchecked power to add prison time based on a lack of compliance with the written rules of prison is inherently incompatible with the unwritten rules of surviving in the prison environment. American prisons are uniquely oppressive, characterized by ever-present fears of violence, distance from the outside community, and other dehumanizing conditions and treatment.¹⁹⁰ A person who tries their hardest to follow the written rules of prison by avoiding fights, showing respect for correctional officers, and not participating in underground markets may find themselves more vulnerable to

¹⁸⁶ See *supra* notes 35–38 and accompanying text.

¹⁸⁷ *Id.* For instance, ODRC may impose an additional prison term if the incarcerated person is classified as a security level three or above at the time of the additional term hearing. OHIO REV. CODE § 2967.271(C)(3) (2022). Security level one is the lowest security level, affording individuals the highest number of privileges and degree of autonomy. OHIO DEP'T OF REHAB. & CORR., 53-CLS-01, SECURITY CLASSIFICATION FOR INCARCERATED PERSONS LEVELS 1 THROUGH 4, at 3 (2020), [https://www.drc.ohio.gov/Portals/0/Policies/DRC%20Policies/53-CLS-01%20\(Feb%202020\).pdf?ver=2020-02-04-104618-103](https://www.drc.ohio.gov/Portals/0/Policies/DRC%20Policies/53-CLS-01%20(Feb%202020).pdf?ver=2020-02-04-104618-103) [<https://perma.cc/8MRN-DE8R>]. ODRC's security classification process categorizes incarcerated people “according to their security risk,” considering a list of factors including the person's age, behavioral history, criminal history, notoriety of offenses, mental instability, prison programming and education history, and release eligibility. *Id.* at 5. ODRC conducts an annual review process and may grant additional special security reviews to consider adjustments to an incarcerated person's security classification. *Id.* at 6–10.

¹⁸⁸ See *State v. Oneal*, No. B. 1903562, slip. op. at 8 (Ohio Ct. Com. Pl. Nov. 20, 2019) (“It is fair to believe that many of the institutional violations may simply relate to the many hardships of prison life, as their purpose is to provide punishment of incarcerated prisoners under a disciplinary regime imposed by prison officials. Indeed, prison discipline falls within the realm of the DRC. Nevertheless, it becomes rather problematic when the consideration of a modest sanction may inevitably affect the duration of an offender's sentence without the necessary due process protections, like a fair and impartial hearing before the sentencing judge.”).

¹⁸⁹ See *id.* at 4, 8.

¹⁹⁰ Hopwood, *supra* note 160.

physical abuse, sexual assault, exploitation, nutritional deprivation, and other traumatic experiences of prison than someone who asserts themselves for their own protection.¹⁹¹ The conditions of the RTL's additional term sentencing system, then, are at odds with the realities of surviving in prison.

Although these complications alone call for an elimination of the administrative prison term process altogether, this Part assumes the RTL remains mostly intact. In that event, the legislature should require ODRC implement a robust system for internally appealing ODRC's decision to impose an additional prison term. Additionally, the legislature should clarify what violations of the Ohio Administrative Code¹⁹² an incarcerated person can commit that satisfy the conditions for rebuttal of the presumption of release under the RTL's rebuttal section.¹⁹³ By clarifying this process and implementing an internal appeal procedure, incarcerated people would have greater notice of what specific conduct could lead ODRC to impose additional time in prison.

3. Align Due Process Rights Under the RTL with Parole Revocation Hearings

As described in Part II.A, ODRC's policy for additional term hearings under the RTL provide for no assistance of counsel, no right to confront witnesses, and no right to an administrative appeal.¹⁹⁴ Based on this Note's argument in Part III.A.2, this fails to meet the due process requirements that arise out of the liberty interest created by the RTL's presumption of release.¹⁹⁵ Because the liberty interest created under the RTL is similar to that of those facing parole revocation, people facing additional term hearings should be afforded those same rights.¹⁹⁶ If Ohio courts disagree, and if the legislature does not address these due process concerns by statute, ODRC should establish them as a matter of policy. Affording these rights to incarcerated people subject to additional term hearings under the RTL is important not only as a matter of human dignity, but also as a way of ensuring that prison administrators cannot impose backdoor prison sentences without the procedural protections and transparency required by the U.S. Constitution.¹⁹⁷

¹⁹¹ *See id.*

¹⁹² OHIO ADMIN. CODE 5120-9-06 (2022) ("Inmate rules of conduct").

¹⁹³ OHIO REV. CODE § 2967.271(C) (2022).

¹⁹⁴ ODRC 105-PBD-15, *supra* note 39, at 1, 5, 7; *see also supra* notes 39–40 and accompanying text.

¹⁹⁵ *See supra* Part III.A.2.

¹⁹⁶ *See supra* notes 123–26, 133–36 and accompanying text.

¹⁹⁷ *See supra* Part III.A.

B. Reduce Maximum Terms in Consecutive Sentencing

As described in Part III.B.1, the legislature defied the recommendations of the bipartisan Recodification Committee by establishing that, for those sentenced to consecutive prison terms, the maximum term under the RTL would be calculated based on the aggregate of their minimum terms, not just their lone longest minimum term.¹⁹⁸ To prevent the upward pressure that this will place on the state's prison population,¹⁹⁹ the legislature should adopt the Committee's recommendation to calculate the maximum term based only on the longest minimum term, not the total of all the minimum terms.

C. Preserve the Presumption of Release

Finally, the Ohio legislature must keep the RTL's presumption of release in place. To address the RTL's separation of powers and due process issues, the legislature might be tempted to eliminate the presumption that people incarcerated under the RTL are to be released at the end of their minimum prison term. Doing so would be a mistake. To preserve the punishment theory ostensibly underlying the RTL (that administrators are better positioned to know whether an incarcerated person is prepared for release), the legislature would likely replace the presumption with a process preserving ODRC's control over the additional term decision.²⁰⁰ Assuming this process makes it easier for ODRC to impose additional prison terms than they can under the current process, eliminating the presumption would be deeply misguided because it would lead to increased lengths of stay in prison.²⁰¹ This would worsen the criminogenic conditions of the prison environment and again counteract the state's progress in achieving a long-term, sustainable reduction in the state's prison population.²⁰² Therefore, if the RTL must remain, the legislature should at least retain the presumption of release as a meaningful check on ODRC's power to impose additional prison terms under the RTL.

¹⁹⁸ See *supra* notes 147–50, 153–56 and accompanying text.

¹⁹⁹ See *supra* Part III.B.1.

²⁰⁰ See *supra* Part III.A.

²⁰¹ Under the RTL's presumption of release, ODRC must meet at least one of several rebuttal conditions. See *supra* Part II.A. Without the presumption of release, the legislature might defer entirely to ODRC's reasoned judgment without a set of constraining factors.

²⁰² See *supra* Part III.B.

V. AFTER THE RTL: DECARCERATION AND JUDICIAL DISCRETION,
WITHIN LIMITS

Ohio, like the rest of the country, cannot incarcerate its way out of the systemic social, economic, and cultural forces that produce violence.²⁰³ In the context of Ohio's continually overcrowded prisons, the RTL and the rest of Ohio's history of carceral legislating shows the futility of alternatively easing up on the gas pedal of punishment and flooring it.²⁰⁴ Creative solutions acknowledging the ineffectiveness of long-term incarceration as a violence reduction tool are necessary if Ohio is to break its self-destructive cycle of ineffective criminal sentencing reform. Regardless of whether the Supreme Court of Ohio upholds the RTL's sentencing scheme, the political conversation around the court's decision can serve as an impetus for a political reckoning with Ohio's overcrowded prisons and its failed history of cyclical criminal sentencing reform.²⁰⁵

Fundamentally, any state's prison population is a function of how many people enter the system (new commitments) and how long they stay incarcerated.²⁰⁶ As discussed in Part II.B, recent decarceral criminal sentencing reforms in Ohio have focused on reducing new commitments to prison by diverting people into rehabilitation programs and community-based control in lieu of conviction.²⁰⁷ These programs tend to benefit people charged with "low-level, non-violent drug offenses."²⁰⁸ But, as shown by the Ohio's stalled and steady prison population over the last three decades, achieving sustainable

²⁰³ SERED, *supra* note 8, at 4–5; *see also supra* Part III.B (arguing that increasing lengths of stay in prison undercut the state's public safety goals and perpetuate mass incarceration); SERED, *supra* note 159, at 67 (explaining that four key drivers of violence are also four central features of prison).

²⁰⁴ *See supra* Part II.B (reviewing Ohio's recent criminal sentencing reform history and emphasizing the sustained prison population growth over the past thirty years).

²⁰⁵ Despite Ohio's recent trend toward Republican political domination on both the state and federal level, an inter-ideological coalition of lawmakers and advocates has shown a willingness to consider and enact criminal legal system reforms that reduce the state's reliance on incarceration. *See Young, supra* note 19, at 154–56; *see also supra* notes 17, 76, 78 and accompanying text (discussing bipartisan, diversion-based criminal legal system reforms aimed at reducing reliance on incarceration); Andrew J. Geisler, *Time to Expand Ohio's T-CAP Program Statewide*, BUCKEYE INST. (Apr. 7, 2021), <https://www.buckeyeinstitute.org/blog/detail/time-to-expand-ohios-t-cap-program-statewide> [<https://perma.cc/2HCK-BN6H>] (discussing conservative or libertarian support for saving Ohio money and reducing prison overcrowding by expanding an alternative to prison program).

²⁰⁶ *See infra* note 208 and accompanying text.

²⁰⁷ *See supra* Part II.B; David M. Reutter, *Ohio Enacts Criminal Justice Reform in 2020*, PRISON LEGAL NEWS (Aug. 1, 2021), <https://www.prisonlegalnews.org/news/2021/aug/1/ohio-enacts-criminal-justice-reform-2020/#:~:text=The%20changes%20were%20the%20result,drug%20or%20alcohol%20treatment%20programs> [<https://perma.cc/6446-Z2RN>].

²⁰⁸ Chow, *supra* note 76.

decarceration also requires reducing lengths of stay for those incarcerated on offenses categorized as violent.²⁰⁹

Accordingly, this Part advances a vision of criminal sentencing reform at the state level featuring automatic, “second look” sentencing review, presumptive parole release, and cabined judicial discretion within lower sentencing ranges. These reforms would counteract the cycle of carceral legislating by sidestepping the political and public safety buck-passing problems highlighted by Ohio’s criminal sentencing history and the RTL. By reducing the overall state prison population, these reforms also reduce prison overcrowding and its negative effects and decrease the fiscal and human burden of mass incarceration.²¹⁰

A. Enact a Second Look Sentencing Law

States can reduce lengths of stay in prison by enacting a second look sentencing law automatically providing incarcerated people with a right to judicial review and potential sentence modification after ten years of imprisonment. The tradition of sentencing flexibility and clemency has deep roots in the United States, such as in systems for resentencing, compassionate release, parole, and pardons.²¹¹ Like aspects of these existing systems, second look laws are premised on criminological research showing that long-term sentences lack a sufficient punishment rationale, the tendency for people to become less impulsive and less violent as they grow older, and a concern for human dignity and the capacity for change.²¹²

Second look laws are already catching on across the United States. In 2017, the American Law Institute (ALI) approved a proposed final draft of a Model Penal Code for sentencing that includes a second look law.²¹³ Under the Model Penal Code version, a judicial panel reviews applications for sentence

²⁰⁹ See *supra* Part II.B; Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL’Y INITIATIVE (Apr. 2020), <https://www.prisonpolicy.org/reports/violence.html> [<https://perma.cc/42ZG-FF68>].

²¹⁰ Hopwood, *supra* note 160; Mauer, *supra* note 167, at 124.

²¹¹ Hopwood, *supra* note 170, at 90–92. The First Step Act, signed into law by President Donald Trump in 2018, introduces a mechanism for resentencing for prisoners sentenced for crack cocaine offenses and represents a modern iteration of this tradition. *Id.* at 87.

²¹² See *supra* notes 166–72 and accompanying text. See generally *A Second Look at Injustice*, SENT’G PROJECT (May 2021), <https://www.sentencingproject.org/app/uploads/2022/10/A-Second-Look-at-Injustice.pdf> [<https://perma.cc/45GC-QFGT>].

²¹³ Am. L. Inst., *Modification of Long Term Prison Sentences*, ALI ADVISOR (Mar. 27, 2019), <http://thealiadviser.org/sentencing/modification-of-long-term-prison-sentences/> [<https://perma.cc/DS9G-9D8Q>] (stating that the ALI approved a new “second-look” process for sentence modification and describing the newly approved section, entitled *Modification of Long-Term Prison Sentences; Principles for Legislation*); see also *Model Penal Code: Sentencing Approved*, AM. L. INST. (May 24, 2017), <https://www.ali.org/news/articles/model-penal-code-sentencing-approved/> [<https://perma.cc/J4XW-DT5N>].

modification from people who have been incarcerated for at least fifteen years.²¹⁴ Several states have also already enacted versions of a second look law.²¹⁵ Variations enacted include a prosecutorial initiation of resentencing, petitioning for resentencing for those who committed their crimes under age twenty-five, and petitioning for a parole hearing for those age fifty-five or older.²¹⁶

Second look laws that automatically provide for a sentence review and potential sentence reduction or release after a certain number of years in prison (usually ten or fifteen) embrace studies showing that people tend to mature out of criminalized behaviors before reaching middle age.²¹⁷ In addition to showing that “young adults are more likely to engage in risk-seeking behavior, have difficulty moderating their responses in emotionally charged situations, or have not fully developed a future-oriented method of decision-making,”²¹⁸ criminology research shows that rates of arrest for violent offenses fall sharply throughout the thirties and forties.²¹⁹ Additionally, eighteen-year-olds arrested for crimes like robbery, burglary, and aggravated assault are no more likely than the general population to commit those same offenses by the time they are in their early to mid-twenties.²²⁰ Under a second look sentencing law, people sentenced to lengthy prison terms could appear before a judge for resentencing based on their demonstrated rehabilitation, institutional behavior, and effective planning for post-incarceration life. This would afford incarcerated people, young and old, the opportunity and incentive to demonstrate that they would pose no public safety threat upon release.

Additionally, a second look law would also more effectively implement the public safety logic that Ohio lawmakers claimed as a justification for the RTL’s administrative prison term system. Second look laws acknowledge that the reasons for imposing long sentences at the time of the offense may no longer apply for the person after ten years or more of incarceration.²²¹ At the initial sentencing stage, our current system asks prosecutors, judges, and other legal system actors to predict how a person will adjust to incarceration and estimate

²¹⁴ MODEL PENAL CODE § 305.6 (AM. L. INST., Proposed Final Draft 2017).

²¹⁵ *A Second Look at Injustice*, *supra* note 212, at 4–5.

²¹⁶ *Id.*

²¹⁷ *Id.* at 4; 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/P7B9-E8ZA>].

²¹⁸ VINCENT SCHIRALDI, BRUCE WESTERN & KENDRA BRADNER, U.S. DEP’T OF JUST., COMMUNITY-BASED RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 3–4 (Sept. 2015), <https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/ESCC-CommunityBasedResponsesJusticeInvolvedYA.pdf> [<https://perma.cc/3RKH-5Q3B>].

²¹⁹ *See* Jones, *supra* note 209.

²²⁰ Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 338–39 (2009).

²²¹ *See A Second Look at Injustice*, *supra* note 212, at 6–8.

when the person will be sufficiently rehabilitated to reenter society.²²² This is an extraordinarily difficult task that tends to result in over-punishment due to political pressures and system actors playing it “safe,” especially in systems with elected judges and prosecutors.²²³ Second look laws help remedy this tendency by providing for automatic sentencing review once a person is closer to their planned release date, reducing the political and public safety buck-passing problems rampant across criminal sentencing systems.²²⁴

Under an Ohio second look law, ODRC would notify an incarcerated person of their right to apply for judicial modification of their sentence after ten years of imprisonment. Upon the incarcerated person’s application for judicial modification of their sentence, the sentencing court would consider whether the applicant’s current sentence is still justified based on their rehabilitative progress and behavior while incarcerated.²²⁵ Any such law should include a right to counsel for all stages of the judicial review and sentence modification process to ensure the incarcerated person can make the strongest argument possible for a reduction of their sentence.

B. *Expand the Presumption of Release to Parole*

With the introduction of RTL sentences, state lawmakers added yet another sentencing track to the state’s existing “morass of inconsistencies.”²²⁶ One glaring mismatch created by the state’s various parallel sentencing schemes is the difference in how people sentenced under the RTL are released from prison as compared to those who face a discretionary parole release system under traditional indefinite sentencing in Ohio. Currently, unlike those sentenced

²²² Hopwood, *supra* note 170, at 88–90.

²²³ See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287 (2008) (“Given the political unpopularity of criminal defendants as a group and the unique salience of crime in the public perception of judicial behavior, incumbent judges may be most vulnerable when their opponents are able to characterize them as soft on crime Criminal defendants who face an elected judge concerned to look “tough” will generally find little succor in the Federal Constitution.”); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O’Conner, J., concurring) (“Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”).

²²⁴ See German Lopez, *A Massive Review of the Evidence Shows Letting People Out of Prison Doesn’t Increase Crime*, VOX (Sept. 25, 2017), <https://www.vox.com/policy-and-politics/2017/9/25/16340782/study-mass-incarceration> [<https://perma.cc/RB6Y-V253>] (quoting empirical evidence researcher David Roodman, who reviewed the empirical quality of thirty-five studies related to criminal justice reform and concluded that “at least as much evidence suggests that decarceration *reduces* crime as increases it.”).

²²⁵ This process could involve a reconsideration of the incarcerated person’s sentence based on Ohio’s statutory sentencing factors. See OHIO REV. CODE § 2929.12 (2022). See generally OHIO CRIM. SENT’G COMM’N, *supra* note 182.

²²⁶ Young, *supra* note 19, at 154.

under the RTL, incarcerated people facing parole release consideration in Ohio have no presumption of release.²²⁷

To remedy this mismatch, a presumption of release should be extended to those facing parole. Such a presumption could be rebutted by clear and convincing evidence that the person poses a specific public safety threat. Because the full Parole Board would rebut the presumption of release rather than a single prison administrator in a private, isolated administrative hearing room as in the RTL, this presumptive release system would avoid the constitutional issues present under the RTL's administrative prison term system.²²⁸

In 2021, the Ohio Parole Board held 953 release consideration hearings, resulting in only 151 releases—just 15.8% of those considered for release.²²⁹ With such low odds of release, many sentenced under traditional indefinite sentencing might feel hopeless and have little incentive to invest their time and energy in rehabilitation and post-release planning.²³⁰ Granting those facing parole consideration a rebuttable presumption of release would empower those incarcerated people with a more significant hope of life outside of prison and incentivize rehabilitation. Increasing the likelihood of parole would also help reduce the population of prisoners in Ohio who are deep into or past their middle age (Ohio's prisons currently incarcerate 9,337 people who are fifty or older),²³¹ for whom traditional rationales for imprisonment lack support.²³²

Extending the presumption of release to parole would help reduce the inconsistencies present in the state's sentencing system and would lead to a sustained reduction in the state's prison population. Extending the RTL's presumption of release to those facing discretionary parole release would more closely align the incentives and expectations of those incarcerated under "old law" indefinite sentences with those newly sentenced under the RTL.²³³

²²⁷ See *supra* note 129 and accompanying text.

²²⁸ See *supra* Part III.A.

²²⁹ ODRC ANNUAL REPORT 2021, *supra* note 57, at 41. The Ohio Parole Board has also faced criticism and lawsuits for their release policies and practices. See, e.g., Laura A. Bischoff, *Ohio Parole Board Facing Lawsuit Over 'Unwritten' Policies to Deny Release*, COLUMBUS DISPATCH (July 28, 2021), <https://www.dispatch.com/story/news/2021/07/28/ohio-parole-board-faces-new-lawsuit-over-its-practices/5398880001/> [<https://perma.cc/47JS-LKYD>].

²³⁰ See generally Kelly E. Moore, Shania Siebert, Garrett Brown, Julia Felton & Jennifer E. Johnson, *Stressful Life Events Among Incarcerated Women and Men: Association with Depression, Loneliness, Hopelessness, and Suicidality*, 9 HEALTH & JUST. 1 (2021), <https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-021-00140-y> [<https://perma.cc/ZV6C-QFL5>].

²³¹ ODRC ANNUAL REPORT 2021, *supra* note 57, at 17.

²³² See *supra* notes 217–19 and accompanying text.

²³³ See *supra* note 57 and accompanying text (referencing Ohio's "old law" indefinite sentencing system for those sentenced before S.B. 2's definite sentencing system took effect).

C. Lower and Level Felony Sentencing Ranges

Reducing felony sentencing ranges and establishing transparency in criminal sentencing through a robust sentencing database would also help reduce lengths of stay in prison and would address systemic sentencing disparities across demographics, geographical regions, and courtrooms.²³⁴ In Ohio, felony sentencing laws allow judges to select a prison term from a range of three to eleven years for a first-degree felony and two to eight years for a second-degree felony.²³⁵ Judges also can order people convicted of multiple crimes to serve their sentences concurrently or consecutively, significantly widening potential disparities.²³⁶ These laws result in a system where similarly situated defendants might receive wildly differing sentences depending on their county or the specific judge setting their sentence.²³⁷ The RTL made this problem worse by expanding the high end of felony sentencing ranges through administrative prison terms that can be added on beyond the eleven- or eight-year maximum.²³⁸

The legislature could address these disparities by reducing the statutory range of felony sentences. For example, if the felony sentencing range for a second-degree felony (currently two to eight years) was halved down to one to four years, the maximum sentencing disparity for similarly situated defendants would be three years instead of six years. Any such reductions would residually reduce disparities resulting from concurrent versus consecutive sentencing determinations and would reduce the prison population overall by reducing average lengths of stay in prison. By cabining judicial discretion within more reasonably bounded sentencing limits, the state could reduce sentencing

in 1996 and still existing for some convictions today); DAVID DIROLL, OHIO CRIM. SENT'G COMM'N, THOUGHTS ON APPLYING S.B. 2 TO "OLD LAW" INMATES 8 (2022), [https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/SB2.pdf_\[https://perma.cc/HGG3-T6X2\]](https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/SB2.pdf_[https://perma.cc/HGG3-T6X2]).

²³⁴ See *infra* note 241 and accompanying text.

²³⁵ OHIO REV. CODE § 2929.14(A)(1)(a)–(2)(b) (2022).

²³⁶ See, e.g., *id.* § 2929.14(C)(7).

²³⁷ See Donnelly, *supra* note 16, at 228, 230–33 (recounting the stories of two criminal defendants in Ohio who pleaded guilty to offenses for which they could be sentenced anywhere from three to thirty-nine years (receiving a twenty-two-year sentence) and probation to sixty-five years (receiving the sixty-five year maximum sentence), respectively).

²³⁸ See *supra* notes 147–51 and accompanying text. For example, under the RTL, a person sentenced to an eleven-year sentence for a first-degree felony is eligible for an administrative prison term lasting up to five and one-half additional years. While that person's total sentence could add up to sixteen and one-half years, a person sentenced to the statutory minimum of three years for the same felony could not serve more than four and one-half years under the RTL.

discrimination and injustices levied due to the punitive instincts or implicit biases of certain judges.²³⁹

Although reducing felony sentencing ranges by statute is the most simple and elegant way to reduce sentencing disparities and the state prison population, such a change would face significant political resistance, especially in a state like Ohio riddled by carceral legislating tendencies.²⁴⁰ Whether or not these reductions could be achieved, a robust sentencing database tracking convictions, sentences, demographics, and outcomes across all trial courts in the state would bring transparency to sentencing and help hold accountable judges imposing outlier sentences.²⁴¹ Ohio has already taken steps toward creating such a system, with outgoing Chief Justice Maureen O'Connor and Justice Michael Donnelly leading the effort.²⁴² The legislature can support this effort by codifying requirements for trial court participation and providing the necessary funding and tools for implementation.

Reducing felony sentencing ranges and implementing a sentencing database with universal buy-in would help reduce the state's prison population and increase trust in the state's criminal legal system by increasing transparency and clarifying sentencing expectations.²⁴³

VI. CONCLUSION

Ohio lawmakers are stuck in a cycle of carceral legislating. Beset by parallel criminal sentencing systems with no unifying theory of public safety, Ohio's criminal legal code now resembles a "morass of inconsistencies."²⁴⁴ As the latest entry into this quagmire, Ohio's Reagan Tokes Law brings no clarity nor unifying logic of punishment—in fact, it creates an unconstitutional administrative prison term scheme,²⁴⁵ exacerbates the policy failures of long-

²³⁹ See Kathleen Maloney, *Striving Toward Justice with Data*, COURT NEWS OHIO (Aug. 2020), <https://www.courtnewsoriohio.gov/inDepth/2020/August/default.asp#.Yq9dHXbMJJaQ> [https://perma.cc/3F2S-SWUB].

²⁴⁰ See *supra* notes 1, 8 and accompanying text.

²⁴¹ See Donnelly, *supra* note 16, at 235 (calling for Ohio to implement a statewide sentencing database); Maloney, *supra* note 239.

²⁴² Laura Hancock, *Ohio Supreme Court, University of Cincinnati Ink Agreement to Build Criminal Sentencing Database*, CLEVELAND.COM (Oct. 4, 2021), <https://www.cleveland.com/court-justice/2021/10/ohio-supreme-court-university-of-cincinnati-ink-agreement-to-build-criminal-sentencing-database.html> [https://perma.cc/G6SK-4AJL]; see also *Ohio Sentencing Data Platform*, OHIO CRIM. SENT'G COMM'N, <https://www.ohiosentencingdata.info/> [https://perma.cc/82EL-5JVU].

²⁴³ See OHIO CRIM. SENT'G COMM'N, SENTENCING DATABASE: BACKGROUND & PATH FORWARD 1 (2021), <https://www.supremecourt.ohio.gov/docs/Boards/Sentencing/Materials/2021/March/sentencingDatabaseFactsheet.pdf> [https://perma.cc/9XWT-76RA].

²⁴⁴ Young, *supra* note 19, at 154.

²⁴⁵ See *supra* Part III.A.

term incarceration,²⁴⁶ and worsens disparities among Ohio's manifold criminal sentencing schemes.²⁴⁷ Throughout this decades-long criminal sentencing mess, Ohio's state prison population has hovered at or above 40,000 for nearly thirty years, even as lawmakers and state officials bemoan the unacceptably overcrowded conditions of the state's prisons.²⁴⁸ While acknowledging the problem of mass incarceration and tweaking Ohio's criminal legal system with limited diversionary reforms, Ohio legislators continue to enact punitive measures that drive up the prison population and offset any decarceral progress.²⁴⁹

This Note has proposed a path forward for breaking cycles of carceral legislating, wherever they may exist. Accounting for the possibility that Ohio courts uphold the constitutionality of the RTL, this Note also proposed feasible legislative and policy changes to alleviate the problems of the RTL's administrative sentencing scheme.²⁵⁰ But breaking this cycle requires Ohio lawmakers to take seriously the failures of long-term incarceration in generating public safety by enacting serious reforms aimed at reducing lengths of stay in prison. This Note proposed a set of felony sentencing reforms, including a second look law, a presumption of release at parole hearings, lowering felony sentencing ranges, and establishing a statewide sentencing database.²⁵¹ Taken together, these reforms, wherever implemented, would drive down state prison populations and reduce systemic injustices throughout the criminal legal system.

²⁴⁶ See *supra* Part III.B.

²⁴⁷ See *supra* Part II.B.

²⁴⁸ See *supra* notes 68–73 and accompanying text.

²⁴⁹ See *supra* Part II.B.

²⁵⁰ See *supra* Part IV.

²⁵¹ See *supra* Part V.