

Federal Judicial Center
Off Paper Episode 15
Bank Robber Turned Law Professor
Discusses Prison, Reentry, and Supervision

Mark Sherman: From the FJC in Washington, D.C., I am Mark Sherman and this is *Off Paper*.

Today a conversation with Shon Hopwood, associate professor of law at Georgetown University. Hopwood's background isn't the typical law professor story making it one we can learn from. And that's what makes him a perfect guest for this podcast. Through his story, we will explore how an individual's capacity for change can be nurtured and supported and how to create a system that does it better.

Shon Hopwood's unusual legal journey began not in law school but by chance in federal prison during a twelve-year stint for robbing banks. There he was offered a job in the law library and took it because, even though he thought it would be boring, it seemed better than working in the kitchen. He was smart and began writing briefs for other prisoners, good ones, resulting in two of his petitions being granted review by the U.S. Supreme Court.

To understand just how remarkable that is, you should know that the Supreme Court receives thousands of petitions each year but it grants only a few. Around a hundred. And very rarely does the court grant review of petitions submitted by prisoners.

So to have one petition granted is special enough, but two by a prisoner is really unheard of. But Shon Hopwood did it.

After his release from prison in 2008, while on supervised release Hopwood was able to land a job in Omaha, Nebraska working for a printer of Supreme Court briefs. With a lot of help and support he was able to overcome many of the obstacles that stand in the way of most individuals reentering society from prison; obstacles, that often contribute to reoffending and the revolving door of the system, like the inability to find a well-paying job or a safe, decent, and affordable place to live.

He applied to law school and was accepted to the University of Washington where he was awarded a Gates' public interest scholarship. While in law school, Hopwood worked in the chambers of U.S. District Judge John Coughenour in Seattle. After graduating, he secured a prestigious clerkship with Judge Janice Rogers Brown of the U.S. Court of Appeals for the District of Columbia Circuit. Now he is a member of the bar, teaching constitutional law and criminal law at Georgetown, and representing prison inmates before the federal courts.

He is also on the board of directors of FAMM, also known as Families Against Mandatory Minimums, a criminal justice advocacy organization based in Washington, D.C. FAMM, in coalition with a bipartisan group of organizations, lobbied successfully in 2018 for passage of the First Step Act which is perhaps the most

significant federal criminal justice reform to be enacted in at least a generation.

Professor Hopwood's memoir published in 2012 is called *Law Man* which seems like a fitting title for a story about a guy who has been on both sides of the law. So, folks, we've got the law man in the house. He is going to talk with us about becoming a part of the system in order to survive it and how luck - something we can't provide - as well as available resources, something we can, help them reenter society in position to climb to the top. Professor Shon Hopwood, welcome to *Off Paper*.

Shon Hopwood: Thanks for having me, Mark. That is quite an introduction. I hope I can live up to it.

Mark Sherman: Shon, for folks in the audience who may not know about you - or even if they do, if they haven't had an opportunity to read your book - could you describe what was happening in your life that led you to rob five banks in Nebraska? In the late 1990s, what made robbing banks seemed like such a good idea to someone like yourself? A smart kid who was also a high school and college athlete with a bright future and a supportive family.

Shon Hopwood: Yeah. It's kind of hard to explain. It's hard for me to think about it now, why I did such foolish and reckless things given I knew better. Part of it was depression. Part of it was immature or reckless foolishness. I had a

problem with impulse control. Part of it was hanging out with other people that were similarly situated. We kind of egged each other on. But I think the biggest reason, and you know everyone wants to have some reason for why I did the things I did, the biggest reason was I just had no purpose in life. I woke up every day and had no idea what I wanted to do with my life.

You mix some other young men to the mix really similarly situated, drugs and alcohol and depression, and what you get is -- you know. When my friend came to me and said, hey, what do you think about robbing this bank, there should have been several responses and appropriate responses to that question. None of which were, yes, that sounds like a great idea.

Mark Sherman: As in, are you crazy?

Shon Hopwood: Yes. Are you crazy? No. What are you talking about? I need to leave. We need to order another beer. This was at the bar in my small rural hometown of 2,500 people. There were lots of answers to that question. The law professor in me is like: What were you thinking? You had many options here, none of them should have included the word yes.

Mark Sherman: It's interesting to hear your answer because we know just from years of criminal justice research that all of the things or many of the things that you just articulated are things that contribute to the drivers of criminal behavior.

Right? The being with the wrong peer group. Lack of impulse control especially when somebody is still an adolescent. Those types of things. So it's interesting to hear you describe that not as a researcher. Though you are a researcher, not as a researcher but as somebody who it actually happened to.

Shon Hopwood: I read a lot of research papers on neuroscience and brain science and particularly in the age group of young men 18 to 25 given that that's such a large driver of crime in this country. Every time I read one of those papers I just think, oh, that was you. You know we like to think that people that commit crimes have to be evil. They have to be psychopaths. But so many of the crimes that are committed in this country is young men 18 to 25 whose brains haven't matured, who don't have impulse control; who, like me, it was hard to imagine spending four years working for a college degree at the end of it.

The good news is the brain science says eventually that will go away. People will grow out of their foolishness and stupidity. That was certainly the case for me. But it is interesting to read those findings now and realize so many of the things I struggled with were common amongst a lot of young men. Every time I go give a talk, I never have to convince all of the women in the audience that men's brains mature slower than women's do. I don't have to cite the social science. All

I ask them is: You know criminal law is set up so that people will act reasonably in response to criminal law, but are young men 18 to 25 rational actors? Do they think and reason rationally? And the answer is a lot of times no.

Mark Sherman: So you were sentenced to 12 years and sent off to the Federal Correctional Institution at Pekin, Illinois. One of the things that I found so intriguing in reading your book was your description of life inside prison. From your telling, a person needs to be very savvy and streetwise just to keep from being physically hurt or even killed by other inmates especially if they have cooperated with the government. You described drug use, fighting, gang activity and corruption amongst staff as an everyday part of prison life. Even though you had never spent time in prison before, you were able to figure out how to survive. How did you do that?

Shon Hopwood: Well, like most of the things I've had success in, I had a lot of help. I had people that realized that I was not the guy who had been in and out of jail, let alone in and out of prison often. They realized that they needed to give me some guidance on how to get through this because having some intelligence helps but, when you are in a new environment that you've never experienced before and you have this overwhelming impulse of fear, it's not always easy to

make great decisions. And I'd tell you in the first couple of years of my time in prison I didn't make great decisions.

We think that when people get caught for doing something wrong, contrition automatically follows. But anyone who has a child, who corners a child and says you just lied to me, a lot of times that leads to defensiveness and even more rebelliousness. I saw a lot of that with people who had gone through the criminal justice system particularly if they were a young man who had received a really long sentence. They didn't go to prison and just take from that I need to change. They went to prison and they took from that the system is out to get me, I'm bitter and I'm going to act out. And I saw that play out in federal prison the entire time I was there.

Mark Sherman: I am still so curious to know more about it. So you were coming in to the situation. You were full of fear, right? You weren't sure what you were going to be confronting when you were there. It wasn't as if you had a rap sheet a mile long and kind of knew how to maneuver in this kind of a dangerous situation. You said that you had some help. Obviously you were able to take advantage of that. I just wonder if you could elaborate on sort of what that help looked like and how you were able to, again, navigate what was really a dangerous situation for somebody like yourself.

Shon Hopwood: Yeah. Well, I had some people that I became friends with that were older and wiser and who had been through this experience maybe once or twice. I had not and I listened to them. Also I'm perceptive. I saw pretty quickly what got people into trouble - getting involved in gangs, getting involved in drugs and gambling, racking up large debts with people that you can't pay off, running your mouth. I mean everything is a quick study there.

I remember the second day I went to the chow hall. We had trays of food. You have a glass that you can fill up with water or whatever they have to drink. I reached my arm across a guy who was about three times my size over his food tray. Needless to say he had a very visceral and quick reaction that led me to never ever do that the entire rest of the ten-plus years I was there. So some of it was trial and error but a lot of it, you know, I had some people that for whatever reason realized that I needed some guidance and helped me out.

Mark Sherman: So your educational background before you went to prison included a high school diploma and a very brief and unsuccessful experience in college. Yet you became a very successful jailhouse lawyer. Again my question is how did that happen?

Shon Hopwood: I don't really know. I don't think I could have named a right in the Bill of Rights when I got the job in

the prison law library. Not only did I not know the law, but I didn't really know how to write. So to this day, even now as a law professor at one of the most prestigious law schools in the country, if you would go back to Nebraska and ask people that knew me prior to going to prison that Shon would become a lawyer and a law professor and litigate cases and any of those things, they would say you are crazy. I was a solid C student in high school because I didn't try. I didn't put any effort in.

But the one thing about prison that helped me learn the law was I quickly realized I did not like it. I saw way too many people who would come in to the system for a few years, get back out, come back in. We had a term for that. It was doing life on the installment plan. And the one thing I knew was I didn't want to do that.

So I saw the law as maybe something that I could do as a paralegal after prison, but I wasn't convinced of that when I started. For about the first six months I was in the law library I didn't want anything to do with the law. Those books were big. They were thick. They were intimidating. It felt like they were written in another language.

But then in June 26th of 2000 the Supreme Court decided a case called *Apprendi v. New Jersey*. I, along with everyone in federal prison, wanted *Apprendi* to applied to the sentencing guidelines not because we knew why they should apply but we knew

maybe if that happened we could get a sentence reduction. So I had a lot of motivation to start learning the law and I did.

This is a story I don't tend to tell my students that often, which is the first brief I prepared was for myself. I sent it off to the Eighth Circuit Court of Appeals and a few weeks later I got a letter back from the clerk saying: Mr. Hopwood, it would really behoove you to file this brief in the correct court. This needs to go back to your sentencing judge. So my legal career started by me researching the law for myself, pecking out a brief on a prison typewriter, and then promptly filling it in the wrong court. Luckily things went up from there.

Mark Sherman: Rookie mistake.

Shon Hopwood: Yeah.

Mark Sherman: So it sounds like you had the internal motivation. You didn't like obviously your living circumstances, your living arrangement. So that was part of your internal motivation. You wanted to change your situation. Then *Apprendi* comes out. That's sort of another contributing factor to your motivation. Then you wrote the brief or the motion on behalf of yourself and filed it in the Eighth Circuit. Not exactly the right court. A rookie mistake, as we said. So it sounds like you would characterize that moment as the moment

really where you sort of decided that this was the kind of work that you wanted to do while you were serving out your sentence.

Shon Hopwood: I was fascinated by the law. The process of solving the legal puzzle, researching it, writing out the solution I thought was fascinating. But I didn't know a great deal of what I was doing. Trying to figure this all out, trying to figure out the law through the mechanism of federal habeas law, there is a reason why we don't teach that generally in law schools. We certainly would never teach that in the first year. It's one of the most difficult areas of law to understand and yet that was how I found the law and how I started to figure it out. But I think those first couple of years, particularly after Judge Kopf quickly shot down my brief, I don't know that I would have kept to it had the *Fellers* case not happened.

Mark Sherman: Talk a little about that.

Shon Hopwood: Well, so after Judge Kopf rejects my own filing, I started writing memos for other people who are on direct appeal to their lawyers. Then I wrote one or two habeas petitions for people. It was around that time that John Fellers, another man from Nebraska, we were both in the same unit in a federal prison in Illinois. We became friends. One day he came and said: Hey, Shon, I just lost my appeal in the Eighth Circuit. My lawyer says we have little to no chance of

review by the Supreme Court. Would you help me and would you write a petition for writ of certiorari to the Supreme Court?

My response was 'absolutely not.' I knew just enough about the Supreme Court to be dangerous, but I also knew filing a brief in the Supreme Court is not the same as filing a habeas petition. A court receives, as you noted, thousands of these a year. They grant about 1 percent of them. But that 1 percent is for lawyers filing briefs to the Supreme Court. Not indigent federal prisoners. To get a case like that heard is about 1 percent of 1 percent.

But John was pretty persuasive and I ultimately agreed to it. For two months this was all I did, prepare and work on this petition. We sent it off to the court. John Fellers transferred to another prison and I largely forgot about the case until one morning I was headed out to the recreation yard at 6:30 and a friend of mine came running and screaming out of the housing unit Shon, Shon. I'll tell you it's federal prison. So the first thing I think is one of my friends is running and screaming at me, why would he want to come fight me at 6:30 in the morning?

Mark Sherman: Right.

Shon Hopwood: But what he had was a copy of the *USA Today* saying that the Supreme Court of the United States had granted John Fellers' case. It said how unlikely that was given that he

had filed without a lawyer. Then it quoted a couple of sentences from that petition that I had pecked out on the prison typewriter. I knew it was a big deal at the time. Did I know that it would lead to me going to law school or becoming a lawyer, clerking or becoming a law -- heck, no. But I knew it was a big deal for one pretty immediate reason. I became very, very popular in federal prison. There were not many days after the *Fellers* case was granted where I could walk across the compound without someone stopping me and saying, Shon, you got five minutes, let me just tell you about my case. And if you saw my mailbox at Georgetown and the amount of letters I get, in some respects that hasn't changed.

Mark Sherman: My guest is the criminal justice reform advocate Professor Shon Hopwood of Georgetown University Law School. Before becoming a lawyer and law professor, he spent ten years in federal prison for bank robbery. In 2018 he, along with a coalition of reformers, successfully lobbied for passage for the First Step Act. The law makes several important changes to the operation of the Bureau of Prisons and the federal sentencing process with the goal of transforming the system into one that helps reduce repeat offending.

After a short break we will talk more with Professor Hopwood about his reentry after prison, specifically his halfway

house and supervised release experience in Nebraska and in the Western District of Washington.

Shon Hopwood: I remember getting stuck in an aisle at Walmart trying to pick out toothpaste and my now wife saying, are you okay? I'm just like I've not had this amount of choice in ten years.

Mark Sherman: You're listening to *Off Paper*.

Lori Murphy: Hi. This is Lori Murphy, head of the Executive Education Group at the FJC. We've got another podcast we think you'll like called *Executive Edge* that focuses on leadership in the federal courts. Each episode brings leadership guidance, research, and insight to court executives and highlights cutting-edge thinking about public and private sector leadership. We do this by talking with critical thinkers whose research and expertise are directly related to the work of federal court executives. We've already interviewed thought leaders on a variety of leadership topics such as courage, inspiration, and civility. Our guests have helped us explore how to make better decisions, find common ground, and be more forward thinking.

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Mark Sherman: Shon, you were released from prison in 2008. You had been in for about ten years. You'd accomplished some extraordinary things, as you had earlier described, in terms of your legal work while you were in prison. But the reality was that you had to reenter society just like every other inmate does and you were facing many of the same uncertainties. After you were released, you had to report to the halfway house in Omaha and figure out how you were going to live. You had to reconnect with your family and the woman who at the time was your girlfriend. You needed a job. You needed a driver's license. You had to stay out of trouble. What was the reentry experience like for you?

Shon Hopwood: Frightening all the way across the board.

Mark Sherman: Talk about that.

Shon Hopwood: I'm not one that has a great deal of anxiety. I actually don't get that nervous about public speaking. I don't even get that nervous when I have to argue before really smart judges. But I had a tremendous amount of anxiety at the halfway house so much that I was every night eating right before bed a pastry that I would buy from a vending machine. That was a thousand calories. I was eating about 5,500 calories a day when I first got to the halfway house and I was losing weight. Part of it was I was just anxious about every --

I'd never been on the Internet. Never seen an iPhone, an iPad, an iPod. Things that just normal people can do with a few clicks on the phone were insurmountable for me. I remember getting stuck in the aisle at Walmart trying to pick out toothpaste and my now wife saying are you okay. I'm just like I've not had this amount of choice in ten years. Just the little things like that.

I was a nervous wreck when I had to take the driver's test. Just the world had passed me by. Everything was so new and so changing. I was used to the same things day after day after day, that was a lot to overcome. But you know, again, I had some resources. My now wife drove me around to lots of job interviews. Finding a job was not great. Everybody remembers what the economy was like in 2008. It's hard for anyone to find work let alone --

Mark Sherman: That was after the Great Recession.

Shon Hopwood: Yes. Let alone the guy that robbed five banks and just got out of federal prison.

Mark Sherman: Right. Not at the top of anybody's lists.

Shon Hopwood: That's right. In fact, there was one interview - used car salesman - where the owner said, well, Shon, you have a ten-year résumé gap here, what's going on? You know as soon I got the word prison out of my mouth he said let's go outside. So we walked through the showroom, past the

customers, and we get just out the door. And he says, Mr. Hopwood, please don't come back here ever again. It was at that point that I thought, you know, the ethical bar for used car salesmen is not high. I might not find work. It might be difficult.

I probably did 30 job interviews and everyone said no. Eventually I did find a job telemarketing. I had to make political phone calls to people in Oregon around dinnertime. What happened was they would oftentimes scream, and yell, and cuss me out. And because I had been in federal prison for 11 years, my response was to do it back. That job lasted one day. The second job was washing cars outside of a used car dealership. But this was October, November in Nebraska. I knew once it started freezing I was out of a job.

One of the things I quickly realized was people don't advertise jobs in the classified section of a newspaper anymore. It was just all of these things, all these little hurdles that a normal person could get over quite easily were really difficult for me to overcome.

Mark Sherman: There were a couple things that you just mentioned that I would like to drill down on. One was you were talking about sort of your life in prison and how generally in prison life is controlled. You don't have choices. Or if you do, it's not a very broad choice. That's one thing because

you're coming out into an environment when you're reentering where you have many choices and it sounds like that can be very paralyzing.

So I wanted to ask about your observations about prerelease preparation from the Bureau of Prisons, what you went through, how you think it could be improved. And then also once you were released, how that transition was for you to the residential reentry, sent to the halfway house, and how that might also be improved based on your experience and even what you're observing now with people who you represent.

Shon Hopwood: Yeah. I talk about this a lot when I talk with federal probation officers. What I say is, you know, I have a lot of empathy for your situation because honestly you're being penalized for the Bureau of Prisons' failings. I do not believe that you can have someone incarcerated for more than months, let alone years, and have successful reentry in most circumstances if you're not focused on that while they're in prison. Not just the last six months, which is what the BOP did at the time. I wasn't involved in any programs to help me prepare for reentry until six months before I was about to be released, but by then it was too late. By then your job skills have deteriorated, your social skills.

I'll give you a couple of examples of that. In prison, when you have conflict and somebody gets up in your face and

yells and screams, there's only one thing you can do - escalate the situation. Yell louder. You scream louder. Sometimes you have to fight. Because if you don't, you will be raped, robbed, and stolen from. And nobody wants to do that. Well, that sort of way of dealing with confrontation doesn't work very well when it's a wife, or a boss, or customer service. Which is why, when I got the job at Cockle Legal Briefs helping lawyers all over the country, when there's confrontation, that's the exact opposite of what you'd want to do. And so it was just difficult.

I was fortunate that my wife and the people I worked at Cockle saw value in me despite the fact that my social skills were not great and took the time to help sand down those rough edges in those first two years out of prison. Because I had spent ten-and-a-half years around nothing but guys, nothing but dudes in prison, and then I'm in this office at Cockle where 85 percent of the people that work there are women. I'm at home every day and navigating that was not easy.

Also there are things the BOP could do. I think the First Step Act is going to solve a lot of these problems if it's implemented correctly. But, for me, reentry should be focused on the day someone enters prison. There should be a plan set up then. If I had waited until the last six months and hadn't

studied the law and hadn't been on my own form of rehabilitation, I may very well be back there.

Mark Sherman: Sure. I mean you at least had some skills to lean on. You also had some family support when you came out.

Shon Hopwood: I did. I had the Montgomery GI that I took college classes through. I had a lot of resources.

Mark Sherman: That's right. Because you had spent some time in the Navy earlier in your life.

Shon Hopwood: I had. So I had some resources that other people did not. I would tell the staff at the prison all the time I'm on my own personal rehabilitation and reentry plan. It was doing that and doing things on my own and keeping tethered to the outside world while I was in prison. Whether through family, lawyers and friends, it was really helpful in having some sort of community when I got out. I'll tell you most of the best and most successful reentry stories I see involve community. Someone gets out and feels like there are family and friends there that care about them.

It operates on many different planes. One is I had two incredible lawyers and my now wife who had believed in me and supported me along with my family. That acts as a natural deterrent. The last thing I want to do is get out and commit a new offense and let them down. But if someone is living on knife's edge when they get out, living paycheck to paycheck. If

something happens with their job and they have no community or family to fall back on, that's usually when people are put to the choice of homelessness or crime.

Mark Sherman: What was happening in your life at that point, as you were finishing up at the halfway house and needing to transition on to supervision? Can you talk about what that was like and what your relationship was like with your probation officer in the District of Nebraska?

Shon Hopwood: I could not wait to get out of the halfway house. The halfway house I was in, the conditions were worse than prison. We had two bathrooms for 75 men. You would be in big dormitories with people that were not nearly as motivated to do the right things as maybe you are. So that caused conflict, when guys that don't have jobs want to stay up all night and I'm trying to sleep because I do have to get up in the morning.

It also caused a lot of friction because my job at Cockle at that time paid \$12 an hour, which doesn't seem like much. But the people that were working at the halfway house were being paid \$9 an hour. They were not very happy about the fact that I had this job coming right out of prison and they did not. They voiced their displeasure and exhibited their displeasure in multiple ways.

Mark Sherman: Well, that's such an interesting point right there because this is a residential reentry center where they're supposed to help you find a living wage type of a job.

Shon Hopwood: Yes. But that was not really how it worked out. So by the time my time was done with the halfway house, I was very excited to be gone. I had a much better relationship with my probation officer than I ever did with anyone at the halfway house in part because he wasn't jealous of me having success and was trying to encourage success. In fact, he across the board was just very encouraging of me. I'm Facebook friends with him now. I'm also Facebook friends with the counselor I had in prison and with a lot of people that you would not think I am. But he always tried to help.

When you come from an environment where the message implicitly and explicitly every day is you are worthless, you're a piece of garbage, when you get out you're going to commit a new offense and come back. To have someone in law enforcement and an authority figure act like they believe in you is just huge. In the same way the lawyer that took over the Supreme Court case named Seth Waxman, the former Solicitor General of the United States, both he and my wife telling me you should go to law school made me believe. It made me start to drink the Kool-Aid. It's amazing what a little bit of encouragement can do especially for someone that's coming out, that's dealing with

all of the challenges that people coming out of prison have to deal with. I had a really good relationship with him. He went out of his way to try and help me.

Mark Sherman: While you were on supervision you had been encouraged, as you just said, by a lot of people including Mr. Waxman and the Supreme Court lawyers that you'd partnered with on your legal work to apply to law school. Something you thought you'd never be able to do and was probably still something you could not even imagine at that point.

You were accepted to the University of Washington and offered the Gates scholarship, but what that meant was that you had to leave Omaha and move to Seattle for school. It also meant that, because you were on supervised release, you had to have your supervision transferred from the District of Nebraska to the Western District of Washington and to a new probation officer. These are the kinds of things that certainly the general public does not think about or know about. Perhaps to some degree they shouldn't have to think about it or know about it. But these are important things that can really trip somebody up when they are trying even in the best of circumstances, which in many respects yours were, to try to turn their lives around. So what was that transition, the transfer of supervision like for you from the District of Nebraska to the Western District of Washington where you had never lived and was

having to set up a new life and, no pressure, you were just starting law school on a full scholarship?

Shon Hopwood: Yeah. That was after I had asked Judge Kopf to cut me loose six months earlier on supervision and he said no.

Mark Sherman: Right. So no early termination for you.

Shon Hopwood: Judge Kopf and I are now pretty close friends. He later wrote that what Shon had shown me was - these are his words, not mine - my sentencing instincts suck. We just went back to Nebraska in August. Judge Kopf took pictures of me and my wife and my two kids sitting up on a bench in the courtroom in which he sentenced me in. But I could never get him to give me anything in court. He denied me. So I had to go to law school, the first six months of law school while on federal supervised release.

When I got up to Seattle I had a wife, a son, another baby on the way, a full-ride scholarship to law school, a book deal. I had not gotten into any problems on supervision. You would have thought that my probation officer in Seattle would have looked at that and said, you know, this is not going to be a big deal. And yet she very much acted as if it was only a matter of time before I was going to commit a new offense. That really bothered me. It didn't impact me in the way that I think maybe it could for someone else, but it angered me.

Mark Sherman: What were the kinds of things? Were there behaviors that she engaged in? I mean how was it communicated to you that it's only a matter of time before you're going to recidivate or do something wrong and there have to be some kind of violation hearing or something along those lines?

Shon Hopwood: Just body language. The number of times she came to my house versus the number of times that my probation officer in Nebraska came to my house in two-and-a-half years versus the six months I was with her. Just every time I was around her, that was the feeling I got. I mean, again, I did not let that impact me. But I had a fun time seeing her about two months after I was off federal supervision. I was in the elevator of the courthouse.

Mark Sherman: What were you doing there?

Shon Hopwood: Well, I'll get to that. She gets on the elevator and says, "Shon, what are you doing here? You're off supervision. What are you doing at the courthouse?" I said, well, I work here. "What? Who do you work for?" I said Judge Coughenour. "How did that happen?" I said I applied and he said yes. She was baffled by it and was even more baffled when she had to come to chambers to bring pre-sentence investigation reports and rings the bell. Guess who answers? Judge Coughenour's new intern, her former supervisee.

I don't think probation officers realize how much power they have by just encouraging people and making it feel like I'm not the gotcha person that's waiting to catch you to send you back and instead we're both swimming in the same direction. We're both going towards you having success and what do I need to help you with that. Just that attitude is not going to fix all of the problems, but it certainly helps. I know people who I watched have success coming out. Part of the things I will say is, you know, I had a probation officer that supported me and how surprised they were when that happened and how much of an impact that had on their own reentry.

Mark Sherman: Even among those who have the best POs, the most supportive officers, there's so much failure that one can also sort of empathize with officers. Sometimes just as a matter of self-protection they have to enter into the relationship thinking, all right, this is likely not going to work. Therefore, it's going to color their attitude during the period of supervision. How do you respond to that?

Shon Hopwood: I get that. I get people become jaded. I've seen defense lawyers that become the same way. So I understand that. But show or deal with that outside of your interactions with the person you're supervising. I just also think of some of the things you can do as a probation officer to just let people know you're trying to encourage. I tell

probation officers all the time don't always meet the people you're supervising at your office if you want to have a real conversation with the people you're supervising. The second they walk in a federal building the walls go up because they've not had any good experiences in the federal courthouse. Nothing there has ever been good or fun for them. Go meet them at a coffee shop. You may get to have a more real meaningful conversation with them about what's to come ahead by meeting them on neutral territory.

Mark Sherman: That's so interesting, that you would suggest that. Because we are sort of observing a turn in terms of the practice in U.S. Probation and Pretrial Services among officers who are being encouraged by policy to get out into the field, visit folks where they are, and have more of those frank conversations. It's good to see people in their own environments. It gives you so much intelligence information and all kinds of information that you can then use as an officer to plug into your supervision strategy.

Shon Hopwood: I would love to see more people who are federal probation officers working in the Bureau of Prisons. But people ask me all the time, if you have a magic wand, what could you do with the BOP? My answer is always the same. I would replace every correctional officer with a social worker. Then I would encourage them and reward them based on the

recidivism rate of people coming out of their prison. Get everyone swimming in the right direction, towards rehabilitation and redemption and restoration. Then I think we would have a lot more success with people coming out.

Mark Sherman: This is *Off Paper*. I'm Mark Sherman. I'm talking with law professor and criminal justice reform advocate Shon Hopwood of the Georgetown Law School.

We're going to take another break. When we return, I'll ask Professor Hopwood for his assessment of the First Step Act which has been enforced for a little over a year now.

Shon Hopwood: The irony of the American criminal justice system is oftentimes the longer someone spends in incarceration, the least likely they are to get out and be a law-abiding and successful citizen.

Mark Sherman: Back in a moment.

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Mark Sherman: Shon, I want to ask you about how your experience on the inside, in prison I mean, informs your work now on the outside as a criminal law and policy expert and as a scholar and teacher. Recently you wrote an article for the *Cardozo Law Review* entitled *Second Looks and Second Chances* where you explained how the compassionate release sentencing provisions of the First Step Act can be used by courts to take a second look at long sentences in some cases.

In the article you said something really intriguing. You said, quote: Our system asks too much of prosecutors, probation officers, and federal judges to determine at the frontend during charging and sentencing decisions which defendants will remain a danger and are unredeemable. What decision makers can't measure at sentencing, however, is the capacity for people to change.

What do you mean by that?

Shon Hopwood: Well, the example I give in the article is my former client and good friend Matthew Charles. I think his

case pretty typifies what I see which is Matthew had a very ugly criminal history - violent crimes, kidnapping, shot someone in the head. By the time he gets sentenced at the age of 28 for his federal drug offense, the judge looks at everything he's done and says I must incapacitate you for a long time, you are dangerous, and gives him a 30-year sentence.

Mark Sherman: And he was dangerous.

Shon Hopwood: He was dangerous and it's hard to say, oh, you judge, you were too harsh.

Mark Sherman: Right.

Shon Hopwood: But what no one could understand is that Matthew would go to prison, he would have an awakening of sorts faith-wise, and then he would go on to have 21 straight years in the BOP without a minor incident report.

Mark Sherman: Wow.

Shon Hopwood: I cannot tell you how unusual that is.

Mark Sherman: Sure.

Shon Hopwood: I'm often held up as the model of rehabilitation and I got two incident reports in ten years. And that's only because I got caught twice.

Mark Sherman: Right.

Shon Hopwood: If a guard is not having a great day, they can write you up for almost anything. So 21 years was pretty remarkable. Matthew files a motion to get out on resentencing.

The judge grants it. He gets out for two years. He does everything we want of someone coming out of prison. He gets out. He gets a job. He gets stability. He has a serious girlfriend. He gets a place to work. He volunteers in the community in Nashville through his church.

Even though the first two years are really difficult for people coming out of prison, Matthew takes every Saturday morning to go volunteer at a soup kitchen for the homeless called The Little Pantry That Could. He takes his time to do that. Well, the DOJ had appealed the sentence. He loses in the Court of Appeals and the judge has to bring him back in and resented him to nine years. Ultimately that happened. He went back into prison, but he was the first person that was ultimately released under the First Step Act. Not only was he released but he gets released and then two weeks later he is a guest of the President at the State of the Union. A few days after that he's sitting on my couch with my kids jumping up and down on him.

It was no wonder that they sentenced him the way they did, but it was not possible for them to foresee the character change that Matthew would go through. The same way that Judge Kopf said -- when Shon stood up at sentencing and said I'm going to change my life around, you'll never see me again, his quote was: I bet all the farm and all the animals that Shon would not have

made a productive citizen and what he showed is that my sentencing instincts suck.

I don't blame judges and prosecutors for thinking the way that they do about people who have committed serious offenses, but there needs to be some sort of mechanism on the backend that says if you do the right things while you're in prison, if you do become rehabilitated, if you do gain some wisdom, we're going to get you out of prison sooner in part because it's good public policy. The irony of the American criminal justice system is oftentimes the longer someone spends in incarceration, the least likely they are to get out and be a law-abiding and successful citizen.

So we should be trying to identify the Matthew Charles and Alice Marie Johnson who the President commuted her life without parole sentence and now who is a role model for all sorts of different things. We should be trying to find those people. They are not the only ones in the system who are no longer a danger and who probably were sentenced too harshly. We should be trying to find ways to identify them and get them out of prison.

Mark Sherman: I have a two-part question for you. First, over the past year or so district courts have begun deciding cases involving compassionate release. These are petitions submitted by federal prison inmates pursuant to the First Step

Act. What are you seeing in terms of how the district courts are interpreting that part of the act? And the second question is what you think the Justice Department and BOP have to do to change.

Shon Hopwood: Well, there's no question compassionate release is functioning much better now that the BOP is no longer the triggering authority. But what I am seeing is largely federal judges, in part because this is so new, being quite skittish about who to cut loose and who not to. My view is there will be room for even looking at things beyond medical age and elderly cases where district judges can grant a sentence reduction. Several, up to I think 10 to 15 federal district courts, have said this - it's going to be litigated all over.

I think compassionate release is one of these places and opportunity for federal judges to look back at someone who they may have had a certain viewpoint about when they sentenced but realized now I oversentenced that person. That person has a pretty remarkable record of rehabilitation in prison, maybe I should reconsider. And I think we should want that. I would think the Bureau of Prisons would want that because, if we started seeing this happen, I think you would see a sea change in how people in prison behave.

Right now, with 15 percent good time and the length of sentences, there's not a lot of incentive to do the right thing.

And if you're a 20-year-old kid with a 20-year mandatory minimum sentence, it's kind of hard to wake up every day and seize the day and think about rehabilitation. They're just bitter. But if there was an opportunity to get a second look after demonstrating you've been rehabilitated, I think you would see a large change in how people respond. Not everyone of course, but I think there would be. The bureau would be far less dangerous and violent than it is now.

Mark Sherman: Do you think though in sort of thinking about how sentencing has worked - at least since the Sentencing Reform Act and the importance of things like truth in sentencing - that if I, the judge, I'm going to sentence you the 12 years or 13 years in your case and you're going to do most of that time, do you think that the approach that you are advising or recommending might throw a wrench into sort of the truth in sentencing and then we end up back where we were with federal parole before it was abolished where truth in sentencing was really an issue or perceived to be an issue?

Shon Hopwood: I agree, but I don't believe in truth in sentencing. The whole premise for that is general deterrence. We're going to give someone a 20-year sentence. We're going to make them serve all of that and that's going to deter everyone else from thinking about committing this crime. But again that assumes that the person is responding rationally. Young men 18

to 25 don't always act rationally. And that also assumes that people actually know. You can't be deterred by something you don't know.

I have lots of speaking events with rooms full of lawyers. I will ask them things like do you know how many statutes, federal statutes, there are that carry criminal penalties and do you know any of the penalties for any of those statutes. Outside of federal prosecutors and federal defenders, no one knows there are over 5,000 federal crimes and no one knows the punishments for any of these. And no one is certainly paying attention to anything as far as individual judges' sentencing practices. So to think that the would-be criminal is going to go to the statute, the United States Code, and then to a 500-page guideline manual and that somehow they're going to figure out what the potential sentence is and that's going to deter them, I just don't believe that happens.

Mark Sherman: So in other words, you're questioning the assumptions underlying --

Shon Hopwood: Yes.

Mark Sherman: -- the concept of truth in sentencing generally?

Shon Hopwood: Most of the data out there says that general deterrence does not work. That if you want to deter someone, it's the threat of whether or not they'll get caught. No one is

thinking about the consequences. So I often say if we would quit being in the business of sending people to prison for so long, we could take some of that money, hire more federal law enforcement, solve more crimes and actually deter more people. But we're not going to get a great amount of deterrence from just increasing sentences. So fundamentally, and it's not just me, I would say almost every expert scholar that studies deterrence theory would say we're not getting much deterrence bang for our buck with truth in sentencing.

Mark Sherman: It also raises I think another issue that's been of concern for many, many years. Unwarranted disparity, right? So if the courts begin taking a second look as a matter of course at sentences that had been imposed, then inevitably we're going to be seeing disparity among what are perceived to be similarly situated individuals. Perhaps they're not so similarly situated which, again, I think the concern is that it will discourage respect for the law. People will view the law as arbitrary and subjective. It really just sort of depends on the judge you get which is what I think the guidelines were really, in the Sentencing Reform Act, that was something the system was trying to get away from. Thoughts about that?

Shon Hopwood: I think they're unwarranted sentencing. Disparity is all over the system even when we had mandatory guidelines. Whether someone is charged federally versus state

leads to the biggest sentence disparity. If you're charged federally for the same crime you would in a state, chances are you're going to serve a longer time in prison because many states do have parole, and clemency, and backend issues. You know, how the prosecutor charges the case and whether or not the defense lawyer is good and objects.

I've had cases with two people on a drug conspiracy. One defense lawyer objected to guideline calculations, the other one didn't. They got different sentences because of the quality of the defense counsel, the quality of the probation officer preparing the presentence. By the time it gets to the judge, there are so many disparities baked into the system. I just don't believe that it will cause disrespect for the law to say to a guy like Matthew Charles: We're going to give you 30 years. But if you do all the right things and rehabilitate yourself, we're going to cut you lose six or seven years early.

Anyone looking at that, what they're not going to take away from that is, oh, I can go commit the same offense as Matthew Charles. Somehow we're going to lose deterrence if we let him out a few years early because he is rehabilitated. I mean some of the things that our system is based on, I just question the premises underlying them because I don't think they're empirically based.

Mark Sherman: Most certainly. And this is anecdotal obviously. But in your own case, we were talking at the beginning of the program about what was going on in your life at the time you were a young person, an adolescent, all of the right answers that you should have given to the proposition. Do you want to go rob banks? You didn't give the right answer. You gave the wrong answer. Sure, let's give that a shot. You weren't thinking about deterrence or you weren't thinking you'd get caught I imagine.

Shon Hopwood: No. No, I wasn't thinking I would get caught. I was just incapable of thinking about the consequence. I couldn't contemplate the consequences of my actions on myself, so it was kind of easy to not think about the consequences of my actions on anyone else.

Going back to your point about disparities, if you have two people who received a 30-year sentence and one of them is Matthew Charles who goes 21 years doing everything right and the other person does 21 years and does everything wrong, it's then not an unwarranted sentencing disparity to say we're going to reward Matthew Charles by getting him out of prison because those two people are no longer similarly situated. One's still dangerous and one's not.

So I know we worry about disparities, but so many of those things are baked into the system long before the judge gets

them. What we need to be worried about is how do we incentivize people to be rehabilitated knowing that 90-some percent of people who are sent into federal prison are going to come home someday.

Mark Sherman: That's a great segue to that second part of the question which is really about some of this. So the First Step Act is really encouraging a paradigm shift in the Justice Department and the Bureau of Prisons specifically to a much more rehabilitative paradigm, but you've got an organization. As with any organization that is oriented toward a different paradigm, having to make that transition is extraordinarily difficult in a complex organization.

Shon Hopwood: Yes.

Mark Sherman: So what's it going to take, do you think, for the DOJ and BOP to turn the corner?

Shon Hopwood: I say this to members of Congress all the time. You can pass all the laws you want, but I have serious concerns of whether what you want to do will get implemented properly. I think there would have to be some sort of cultural change and it would have to be led from the top down. I think there are ways to get people pushing on the -- you know what I used to tell the correctional officers when I was in prison? I used to say you think it's us versus them, but really we should have the same goal.

Mark Sherman: Right.

Shon Hopwood: Which is to do the time as easy as possible and go home. You're doing it at eight-hour shifts, I'm doing it in years. But the goal should be the same.

Mark Sherman: And there were certainly BOP staff members while you were in prison who stood by you, encouraged you, provided space for you to file those briefs and went out of their way.

Shon Hopwood: Yeah, went out of their way.

Mark Sherman: So really good people trying to do the right thing.

Shon Hopwood: That's right. There are some and I don't pretend otherwise, but it would take a pretty big sea change in how BOP views its job and how BOP's realm is defined by the larger DOJ apparatus before I would be confident that they are able to do this even with the changes by First Step. I am encouraged by First Step and I am encouraged with some of the things I see coming from BOP and DOJ. It's just having been in the culture and seeing it first hand, it's hard for me to think that the BOP is going to be able to do this in a way that Congress wants it to.

Mark Sherman: Well, Shon Hopwood, your story is just extraordinarily inspiring but also very real. Something that certainly our audience both small and large within the federal

courts, and beyond, is a story that they need to hear. And I just want to thank you so much for talking with us.

Shon Hopwood: Oh, I'm happy to do it. You know I have had the opportunity in the last two years to give lots of talks for federal probation offices and U.S. district courts. I'm always fascinated by it. I will tell you I have seen a sea change in probation in the last five years that's been quite remarkable. I do think if they were supported better by the things we do with people who are in prison, we would have more successful people coming out of prison. That's not the fault of the U.S. Probation Office. I really do think that they have turned a corner and that they are making a positive difference in people's lives, and that's really what it takes.

Mark Sherman: *Off Paper* is produced by Shelly Easter. The program is directed by Craig Bowden. Our program coordinator is Anna Glouchkova and our intern is Cameron Regalado. Don't forget you can subscribe to *Off Paper* wherever you get your podcast. I'm Mark Sherman. Thanks for listening. See you next time.

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