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Implementing Change in Sentencing and Corrections: The Need for Broad-Based Research

NORA V. DEMLEITNER

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Insight must precede application.
—Max Planck

This Issue of the *Federal Sentencing Reporter* testifies to the multitude of developments in sentencing. It focuses on policy actions and scholarly activity that help inform and develop the discourse, further research agendas, and prepare next steps on reform fronts.

This introductory article begins with a look at the Presidential clemency process and the restoration of rights in the states. It then discusses recent efforts at illuminating further the underlying causes for the large prison and corrections build-up in the United States, especially through comparative research. Only with a deeper background understanding of the current situation can approaches similar to those pursued in the past be avoided and the overall philosophy of the current regime be addressed. Despite many prescriptive studies and much advocacy, Congress still has not passed major sentencing reform legislation. Fundamental change remains elusive, even though many smaller projects, despite yet undetermined results, seem to be flourishing in the federal system and the states.

I. Executive Clemency and Restoration of Rights: What Stands Behind Them?

President Obama's grants of executive clemency have captured the public's attention. In early May 2016, the President commuted the sentences of another 58 federal prisoners.¹ Almost at the same time, the American Bar Association's Criminal Justice Section announced that Clemency Project 2014 had by then submitted over 1,000 petitions to the Office of the Pardon Attorney, out of a total of 36,000 federal prisoners who had approached the Project for assistance. This fiscal year alone, the President has commuted over 200 sentences. Still, he is far from matching Woodrow Wilson's 341 commutations in 1920, at a time when the federal prison population was well below 5,000—compared with today's, at almost 196,000.² The President's overall record on clemency still falls short of that of any president elected in the twentieth and twenty-first centuries, with the exception of George H.W. Bush and George Bush.³ Even though he deserves credit for a substantial clemency effort focused on prison commutations, at this point his pardon grants are the lowest since Theodore Roosevelt. Commutations figures as of May 11, 2016, are surpassed by those of the first seven presidents elected in the 20th century but run well ahead of those of all other post-World War II presidents, yet pardons seem to have fallen by the wayside entirely, with President Obama having granted only 70 so far, four less than President George H.W. Bush gave out in his four years in office.⁴

Pardons and commutations are distinct elements of clemency, which serve different functions. The former restores someone whose criminal justice record lies in the past to all the rights of citizenship, at least under federal law. A sentence commutation allows an offender to leave prison sooner. Since the latter often constitutes a greater political risk for a president (or governor), the screening process may not only center on the past offense but also on the future likelihood of re-offending. Still, in recent years presidents have given out only a few pardons, largely to minor offenders whose crimes were decades in the past. With President Obama's focus on and understanding of the debilitating consequences of a criminal record, it remains curious that he has not used his pardon power more generously.⁵



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In her January resignation letter, which is reprinted in this Issue, U.S. Pardon Attorney Deborah Leff indicated that the low number of grants of executive clemency in recent presidencies differs substantially from a time when presidents pardoned relatively generously. Even though she commends the President on his clemency initiative, she bemoans the lack of resources to deal with the onslaught of petitions, making it difficult to “make timely and thoughtful recommendations on clemency to the President.” In her letter she also indicates that she was “instructed to set aside thousands of petitions for pardon and traditional commutation,” which explains the dramatic decrease in pardons. She reserves her harshest criticism for the process that includes denial of access by the Pardon Attorney “to the Office of White House Counsel, even to share the reasons for our determinations in the increasing number of cases where [top leaders in the Department of Justice] have reversed our recommendations.” With the Department of Justice leadership as a countervailing force to the Pardon Attorney, perhaps exercising veto power, it may not be surprising that clemency is applied meagerly. Leff notes that she is encouraged by “the commitment now to share the Pardon Attorney’s recommendations and rationale with White House Counsel.”

Mark Osler’s article details the particularly cautious nature of the process that has led to the current commutations. Thirteen levels of review have made it difficult for applicants to get favorable results. Six of these layers are outside the formal process, applied by the groups that have come together under the Clemency Project 2014 umbrella to screen applicants. Then three different government offices—the Office of the U.S. Pardon Attorney, top officials within the Department of Justice, and the Office of White House Counsel—apply their distinct filters to the process. It bears mentioning that technically, the Pardon Attorney is within DOJ.

Osler is also troubled that the groups that would traditionally be critical of the process have been coopted into participating actively in the clemency effort. This removes their watchdog function, in his view.

Osler provides two structured proposals for procedural change, which would likely lead to a less restrained exercise of clemency. He advocates for the Pardon Attorney to be imbedded in the White House. Alternatively, he favors a bipartisan commission to make clemency recommendations to the President, though he considers that possibility unlikely, especially with the President’s term ending in seven months. That model, applied during the Ford presidency, nevertheless shows the potential of such a tool, which likely would result in a more generous number of grants and could do so in a structured and transparent way.⁶

It is unlikely that the President will implement substantial structural reforms in the waning days of his presidency, though he will likely issue many more commutations. Building on current initiatives, the next president will have the opportunity to bring structural change to reinvigorate the pardon process and continue to provide regular commutations. Regular and considerable clemency was a norm during many past presidencies, when the federal prison population and the percentage of Americans with a criminal record was a fraction of today’s numbers.

Although presidential pardons may remove select collateral sanctions and diminish the stigma arising from a criminal conviction, they do not restore all rights. State law, for example, governs the right to vote.⁷ In April, Governor Terry McAuliffe made headlines when he used his powers under the Virginia Constitution to restore the right to vote to all those with a felony record. Virginia has had one of the broadest disenfranchisement laws in the country, which had resulted in more than 200,000 state residents being permanently disenfranchised even though they had served their prison time and been released from supervision. The Governor, a Democrat, also indicated in his initial clemency order that he would issue monthly orders to restore voting rights to those who had completed probation or parole. He was immediately accused of using re-enfranchisement for political purposes, implying that those seeking the right to vote would cast their ballot for the Democratic nominee in November’s presidential election.⁸

Even though suit has been filed over the Governor’s order,⁹ the Governor has called the restoration his “greatest day as governor.”¹⁰ In his order he indicated that the restoration of rights was designed to eliminate vestiges of a discriminatory history of disenfranchisement directed at African Americans, which is reflected in the fact that 20 percent of African Americans of voting age are denied the franchise in Virginia. In addition, the Governor noted the socio-economic disparity between those allowed to vote and those denied that right. A month after the restoration of rights, almost 5,000 of those re-enfranchised had registered to vote.¹¹

The Secretary of the Commonwealth issued a detailed study of the make-up of the population whose franchise had been restored.¹² Among other findings, it indicated that almost 80 percent of those whose had regained the right to vote had been convicted of nonviolent offenses. As criticism mounted that the

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Governor had restored the voting rights of violent offenders, he stated his belief that once an offender served her time, she deserves to be eligible to vote—and serve on a jury—independent of the underlying crime. The discussion is again a reminder that the ongoing debate about criminal justice, imprisonment, and sentencing increasingly deems those with a conviction for a nonviolent offense worthy of reintegration and full membership in society, but not those with a conviction for a violent crime in their past.¹³ That new line-drawing is troubling as it creates a class of people who are considered too unworthy to reenter society fully, based on the label that has been attached to their underlying offense.

II. A Comparative View of our Correction's Population

So far, the President's commutations have barely made a dent in the federal prison population. Nevertheless the number of federal inmates has decreased by almost 25,000 since 2013, when it reached an all-time high of over 219,000.¹⁴ The overall correctional population has also been declining.¹⁵ Nevertheless the United States retains the label of being the largest jailer. Some of the contributions in this Issue are attempting to explain this phenomenon.

Bill Pizzi considers what he labels the “vanishing trial” to be largely responsible for the high incarceration rate. In his view, it is not case pressures but rather the Supreme Court's jury trial requirement that has led to prosecutors charging more aggressively to arrive at favorable pleas. With the expensive trial system no longer functioning as an effective check on the quality and quantity of cases filed, now 96 to 97 percent of all convictions result from a plea bargain. With 80 percent of convictions following plea bargains in 1974 and a total nationwide prison and jail population of slightly below 230,000 then,¹⁶ one can wonder if the increase in pleas is solely or at least largely responsible for the dramatic rise in the number of prisoners.

To support his argument, Pizzi uses Canada and England as examples as they allow for both non-jury and jury trials. His description of a bifurcated criminal system that keeps charges low raises the question whether the existence of non-jury trials or other elements of the system, including resource allocation, allows for lower sentences. Pizzi compares these countries to New York City's countless misdemeanor convictions, which stem from plea bargains, and concludes that a weak trial system “avoids hard questions about the best way to handle less serious antisocial behaviors.”

The tendency to resolve social problems through the criminal justice system, however, may not only be procedurally driven. Rather, it may result from the U.S. conception of the role of the state as limited, focused on punishing rather than supporting those who have committed or are at risk of committing minor offenses. That may also explain, perhaps as much as Pizzi's theory, why poor and less sophisticated individuals often get prosecuted while, in the United States, white-collar offenders get less attention. Pizzi does concede that other elements may play a role in keeping sentences in check in other countries, including proportionality in sentencing, espoused by the European Court of Human Rights and Canada's highest court. Here the existence of the death penalty infuses a different—and very limited—notion of proportionality. Ultimately, Pizzi argues that the “weak trial system puts pressure on other structural weaknesses in the criminal justice system to the point that they break.”

Although a single causal explanation of U.S. punitiveness may be attractive, it is more likely a multifaceted set of causes that propelled the United States into the role of the largest jailer. That, however, presents a greater challenge in permanently reducing mass incarceration. The interdisciplinary roundtable report *Why is America So Punitive?* notes that “incarceration has become a common form of punishment in America, even for many first-time and nonviolent offenders, and prison sentences are much longer.”

The report includes a comparative perspective and provides multiple angles on the question posed. Among the potential causes discussed were the roles of racism and religion, including forgiveness and compassion, the function of culpability and blame, embedded in views of free will and societal circumstances as determinants of crime, and the psychology of punishment. The report also mentions that in the United States criminal justice has become a populist issue, and imprisonment itself is much less humane than in Europe.¹⁷ Like Pizzi, the report notes the role European judges play in exercising restraint, though it does not provide a nuanced analysis.

One hopes this roundtable is the beginning of a conversation about how European countries and U.S. states differ with respect to incarceration, probation, and parole rates. The Robina Institute's Data Brief confirms both the diversity of European countries and the differences between the Council of Europe as a whole and the United States.

In the last Issue of the *Federal Sentencing Reporter*, we reprinted the Robina Institute's Brief on probation rates. The Institute has followed up with a brief on parole supervision, concluding that on average the United States has at least four times as many parolees as the 33 European countries that

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submitted data, with the data likely overestimating the number of Europeans on parole. Without Turkey, which has struggled with prison overcrowding for at least the last fifteen years, the European parole rate would be cut by almost a third to 48 per 100,000, in contrast to a U.S. average of 304. Compared to all the European countries in the study, the United States has about 150 percent more parolees with a population that is close to 40 percent smaller. Even though the quantitative data alone demonstrates the exceptionalism of the United States, the quality of parole tends to differ as well, with U.S. conditions being more burdensome. The authors ascribe the distinctions to a stark philosophical difference between the U.S. emphasis on public safety and decreased risk and the European focus on human dignity and procedural justice. In addition, they note the differences between types of decision makers who politicize the U.S. process more leading to later parole release and frequent negative outcomes in the form of a return to prison.

The data and attempts at explanation presented by these three different works whet one's appetite for more descriptive and analytical work, focused also on more differentiated data sets and details on differences in procedure and staffing.

Compared to the Council of Europe countries, American use of the death penalty continues to be unique. With the number of executions and of death sentences imposed declining considerably,¹⁸ recent U.S. Supreme Court decisions on the death penalty have largely focused on execution methods. In *Hurst v. Florida* the Court struck down Florida's death penalty statute in violation of the Sixth Amendment,¹⁹ fourteen years after it had declared Arizona's similar death penalty regime unconstitutional in *Ring*.²⁰ Gray Proctor notes the speed and ease with which the Court decided *Hurst*, but questions why it took well over a decade to reach that result.

Proctor predicts that *Hurst* will not empty Florida's death row because only those whose sentences are not yet final will be entitled to resentencing. Federal courts can intervene on behalf of only those who currently have a federal habeas petition with a *Ring* claim pending. He predicts that state courts will be unlikely to provide a remedy as "neither case law nor political expediency weighs in favor of resentencing in Florida's courts." Therefore, he views *Hurst* as a right without a remedy unless the state legislature acts.

With *Hurst v. Florida* now pending in the Florida Supreme Court, an impressive array of amici suggests, however, that an easy judicial remedy does exist. A group of former justices and chief justices of Florida's Supreme Court, an 11th Circuit judge, presidents of Florida's State Bar and the American Bar Association, the president of Florida State University, chairs of various Florida commissions, the chief prosecutor of Miami-Dade State Attorney's Homicide and Capital Crimes division, and others came together to argue that once the U.S. Supreme Court declared Florida's capital sentence unconstitutional, Florida law mandates that all of those on death row be resentenced to life without parole. They deem the statute's plain language supported by legislative history and the rule of lenity. We will soon find out what the Florida Supreme Court decides. The unseemly spectacle of executions based on a statute held unconstitutional may continue beyond that decision.

III. Long on Prescription, Short on Implementation?

The decline of capital punishment has increased the focus on another unique phenomenon of the U.S. criminal justice system, mass incarceration. The White House report on *Economic Perspectives on Incarceration and the Criminal Justice System* provides a look at U.S. practices that starts with economics but then goes well beyond the economic perspective. It concludes with a broad range of recommendations for change that extend from greater fairness and less stigma for those with a criminal conviction to a refocus of resource allocation from corrections to law enforcement and education. How such a fundamental change is to be accomplished and how success is to be measured remain open questions. The long-term ramifications of greater investment in law enforcement may certainly be difficult to gauge at this point.

On the other hand, the Colson Task Force report sets out a detailed set of recommendations for change in the federal system, which proceeds from the assumption that "doing nothing is not a sustainable option." Not only do costs far outweigh the benefits of the existing criminal justice system, the present regime does not meet the goals of a well-functioning justice system. The executive summary, reprinted in this Issue, lays out a roadmap for reforming the federal prison system and protecting public safety. That, however, requires an upfront investment.

With the Task Force finding multiple reasons for the federal prison population increase, change also demands a multiprong approach. It recommends changes in sentencing but also in the culture of federal prisons. Many of these changes hinge on evidence-based practices to reduce risk and provide for more successful reintegration. The Task Force also calls for greater transparency and performance-focused

collaboration among the Bureau of Prisons, Probation and Pretrial Services, and the federal judiciary. A number of articles in the April Issue of the *Federal Sentencing Reporter* indicated some ways in which the federal judiciary and Probation and Pretrial Services are already collaborating and have developed ways to improve reentry.²¹

IV. Conclusion

The articles and reports in this Issue make it obvious that we must continue to work on two fronts: On the one hand, there are still basic open questions about how we arrived at the largest correctional population per capita in the world. Basic empirical research and cross-disciplinary scholarship, including research focusing on comparisons among different U.S. jurisdictions and foreign jurisdictions, will provide multiple answers to the puzzle. On the other hand, the toll the size of the criminal justice system is taking continues unabated. For that reason it is important to start implementing promising reforms, as pilot projects and more broadly. In the end, it will require a fundamental rethinking of the tenets of punishment and of our correctional practices to change the system substantially and arrive at the size of a correctional population that makes the United States less “exceptional.”

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Notes

- ¹ See Sari Horwitz, *President Obama just commuted the sentences of 58 people. Here are their names*, Wash. Post, May 5, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/05/05/here-are-the-58-people-whose-sentences-president-obama-just-commuted/>.
- ² See Department of Justice, Office of the Pardon Attorney, *Clemency Statistics* [hereinafter *Clemency Statistics*], <https://www.justice.gov/pardon/clemency-statistics> and <https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics>; Federal Bureau of Prisons, *Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp (population count of 195,722 as of May 26, 2016); Margaret Werner Cahalan, *Historical Corrections Statistics in the United States, 1850–1984*, Table 3-2, 29, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 102529, (Dec. 1986), <http://www.bjs.gov/content/pub/pdf/hcsus5084.pdf> (on day of survey in 1923, 4,664 persons were present in federal institutions; in 1910, the number was 1,904).
- ³ See *Clemency Statistics*, *supra* note 2; Meredith Booker, *President Obama’s Record on Clemency: A Premature Celebration* (May 17, 2016), <http://www.prisonpolicy.org/blog/2016/05/17/clemency/>.
- ⁴ See *Clemency Statistics*, *supra* note 2.
- ⁵ See, e.g., The White House, Office of the Press Secretary, *Fact Sheet: President Obama Announces new Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated*, Nov. 2, 2015, <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.
- ⁶ See, e.g., Nkechi Taifa, *Clemency Board— a Promising Option for Consideration of Old Crack Cocaine Cases* (May 8, 2012), <http://www.acslaw.org/acsblog/clemency-board-a-promising-option-for-consideration-of-old-crack-cocaine-cases>; Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 Fed. Sent’g Rep. 228 (2011).
- ⁷ See U.S. Department of Justice, Office of the U.S. Pardon Attorney, *Pardon Information and Instructions*, <https://www.justice.gov/pardon/pardon-information-and-instructions>.
- ⁸ At least one study indicates that this concern may not be entirely unfounded. See Christopher Uggen & Jeff Manza, *Democratic Contraction: Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777 (2002).
- ⁹ Alanna Durkin Richer, *Virginia GOP filing law suit to block felons from voting*, Seattle Times, May 23, 2016, <http://www.seattletimes.com/nation-world/virginia-gop-filing-lawsuit-to-block-felons-from-voting/>. The constitutional issue is whether the Governor has the right to grant clemency categorically as opposed to in individual cases.
- ¹⁰ See Michael Martz, *McAuliffe says blanket rights restoration was his “greatest day as governor,”* Richmond Times-dispatch, May 12, 2016, http://www.richmond.com/news/virginia/government-politics/article_f2987aa9-acad-5c37-913d-7a93b6c62ef6.html.
- ¹¹ Michael Martz, *Almost 5,000 felons registered to vote after rights restoration*, Richmond Times-dispatch, May 24, 2016, http://www.richmond.com/news/virginia/government-politics/article_caaf2adc-8850-5894-8416-29f72b74865b.html.
- ¹² Kelly Thomasson, Secretary of the Commonwealth, *Analysis: Virginians Whose Voting Rights Have Been Restored Overwhelmingly Nonviolent, Completed Sentences More Than A Decade Ago*, May 11, 2016, <https://commonwealth.virginia.gov/news/newsarticle?articleId=15207>.
- ¹³ See, e.g., Nora V. Demleitner, *Alternative Visions for the Federal Criminal Justice and Corrections System: Is True Change Possible?*, 28 Fed. Sent’g Rep. 121, 124 (2015).
- ¹⁴ Federal Bureau of Prisons, *Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited May 24, 2016).
- ¹⁵ E. Ann Carson, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2014*, Sept. 2015, NCJ 248955.
- ¹⁶ U.S. Department of Justice, Bureau of Justice Statistics, *Bulletin: Prisoners 1925–81*, <http://www.bjs.gov/content/pub/pdf/p2581.pdf>.
- ¹⁷ See, e.g., John Henley, *Anders Breivik’s Human Rights Violated in Prison, Norway Court Rules*, The Guardian, Apr. 20, 2016, <http://www.theguardian.com/world/2016/apr/20/anders-behring-breiviks-human-rights-violated-in-prison-norway-court-rules> (court rules solitary confinement of man convicted of most fatal killing in

Norway's history, in violation of European Convention on Human Rights' provision against inhuman and degrading treatment).

¹⁸ See Death Penalty Information Center, *The Death Penalty in 2015: Year End Report*, <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

¹⁹ *Hurst*, 577 U.S. ____ (2016).

²⁰ *Ring v. Arizona*, 536 U.S. 584 (2002).

²¹ See M. Casey Rodgers, *Evidence-Based Supervision in the Northern District of Florida: Risk Assessment, Behavior Modification, and Prosocial Support—Promising Ingredients for Lowering Recidivism of Federal Offenders*, 28 Fed Sent'g Rep. 239 (2016); Benji McMurray, *Conceptualizing Change through Utah's Federal Mental Health Court*, 28 Fed. Sent'g Rep. 245 (2016); Rodney Villazor, *Reentry Courts: An Examination of the "Provocative Proposal" in Practice*, 28 Fed Sent'g Rep. 253 (2016); Matthew G. Rowland, *Projecting Recidivism Rates for Federal Drug Offenders Released Early from Prison*, 28 Fed. Sent'g Rep. 259 (2016).