

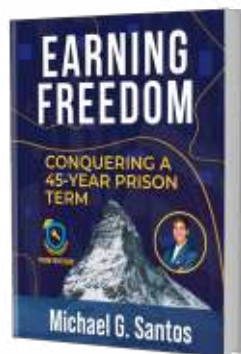
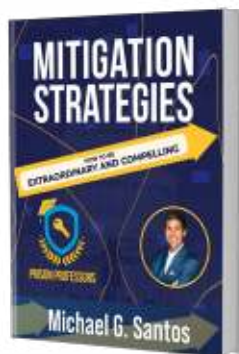
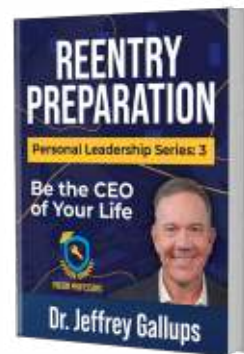
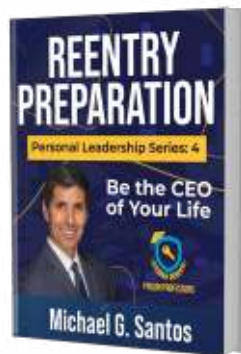
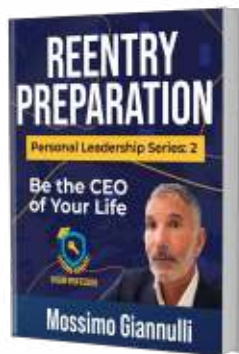
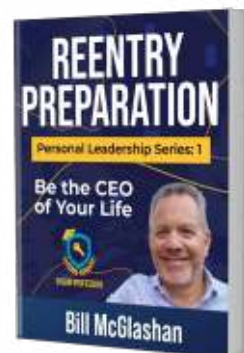
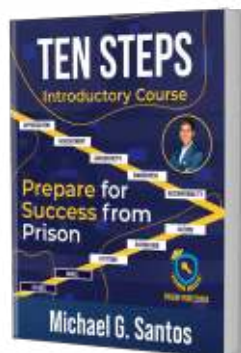
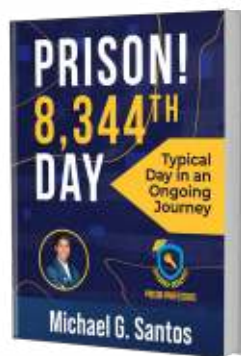
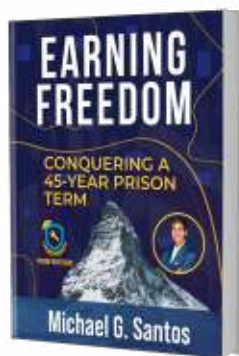
RELEASE

PLAN



PRISON
PROFESSORS

An Earning Freedom Company



While lying inside a solitary prison cell, I needed hope. Biblical passages frequently inspired me, especially the following:

I took another walk around the neighborhood and realized that on this earth as it is—The race is not always to the swift, nor the battle to the strong, nor satisfaction to the wise, nor riches to the smart, nor grace to the learned. Sooner or later, bad luck hits us all. No one can predict misfortune. Like fish caught in a cruel net or birds in a trap, men and women are captured by accidents, evil and sudden.

Ecclesiastes Chapter 9, Verses 11-12

This Biblical message offers excellent takeaways for anyone, especially for justice-impacted people.

My name is Michael Santos, and I founded Prison Professors with the hopes of helping people in jail and prison learn how to self-advocate. Too many people in custody give up hope. They may not belong in prison, but they should never stop working to advocate for liberty.

Sometimes, people going through the system may find it helpful to learn from others who had walked the journey before—and emerged successfully.

To strive for liberty at the soonest possible time, people may consider a path I learned from leaders. They adhere to a disciplined, deliberate plan when they seek to resolve a challenge. They take the following steps:

- » Define success as the best possible outcome,
- » Build a plan to go from where you are today to where you want to go,
- » Put priorities in place,
- » Create an accountability metric to measure progress, and
- » Execute the plan every day.

With the message from Ecclesiastes, we have evidence that people have been dealing with unexpected challenges since the beginning of time. No one anticipates spending time in prison. But if a person knows how to prepare a solid release plan, a person may work toward a better outcome.

Every justice-impacted person wants the best possible outcome. To get that outcome, however, a person should prepare and understand how stakeholders view success from the system.

What will our adversaries expect of us?

That question should guide our preparations. It always helped me make better, more deliberate decisions.

In one of his influential books on personal leadership, Malcolm Gladwell wrote that a person could become an expert at any task by devoting 10,000 hours of practice. Over 9,500 days, I spent 228,000 hours living as federal prisoner number 16377-004. Throughout that journey, I prepared for the challenges I expected to face.

From the loneliness of a jail cell, I would stare at the wall and anticipate the people I would meet in the future. If they had discretion over my future, I contemplated how I could influence how they perceived me. Like every other justice-impacted person should do, I thought about future case managers, wardens, probation officers, judges, employers, and prospective business partners.

- » What could I do during my imprisonment to help others see how I responded to problems I created with my criminal behavior rather than the problems that led me to prison?
- » What tools, tactics, and resources could I create to advocate more effectively through the storms ahead?
- » In what ways would the tools I developed convert my adversaries into my advocates?

During this era of prison reform, it's more important than ever for justice-impacted people to contemplate such questions. The more thought they give to how they're preparing to overcome challenges, the more effective they will become at advancing prospects for liberty at the soonest possible time.

When I write about this "era of prison reform," I'm talking about several developments:

- » The Second Chance Act of 2008: President Bush signed this law, which authorized the BOP to allow people to serve up to 12 months of their sentence in a Residential Reentry Center (halfway house). If a person had a sentence of 60 months or longer, the person could serve the final six months in home confinement; if a person had a sentence of fewer than 60 months, the person could serve the last 10% of the sentence in home confinement.
- » The First Step Act: President Trump signed the First Step Act in December of 2018. It's the most significant piece of reform legislation since the Sentence Reform Act of 1987, which introduced the Federal Sentencing Guidelines. As with all reform movements, we can anticipate many rounds of litigation and advocacy. Each ruling will bring clarity to the way that the BOP trains staff members to implement the First Step Act in a uniform way across the country.

- » The CARES Act: With the pandemic, President Trump signed an executive order that influenced how the government operated. The attorney general wrote a series of memorandums that mandated the Bureau of Prisons to reduce its prison population by sending appropriate people to serve their sentences in home confinement. The CARES Act is not a law but an executive order. President Biden extended the executive order. But with the stroke of a pen, the president can discontinue the CARES Act.

Each of the reform movements I mentioned influenced people in federal prison. In common, each reform movement mandated that administrators in the Bureau of Prisons put more emphasis on preparing people for successful, law-abiding lives upon release. They require staff members to pay close attention to release plans.

Justice-impacted people should understand how administrators measure excellence in a release plan. The National Institute of Justice, the Vera Institute, the Urban Institute, and others publish extensive documentation on release plans. Our team at Prison Professors relies upon that evidence-based documentation, but we also defer to the subject-matter experts we retain.

Those who have access to our subject-matter expert page on Prison Professors may have watched interviews I've done with people who built careers in law enforcement. I've interviewed people who built careers as:

- » Leaders of US probation,
- » The Federal Bureau of Prisons,
- » US District Court Judges, and
- » Prosecuting attorneys.

Each subject-matter expert I interviewed expressed the importance of a release plan. They want to see a record that shows positive on-going efforts for change, showing a person's commitment to preparing for success upon release. They want to see evidence that a person has been thoughtful about risk factors—or triggers—that can lead to recidivism.

To prepare a template and model for others to follow, I relied upon the information I received from Jon Gustin. Jon retired from the Bureau of Prisons in 2022 after 24 years of service. When he retired, Jon held the position of Administrator over Residential Reentry Centers (RRCs) that the Bureau of Prisons relied upon across America. We wanted to use the same reliable information that administrators use to create a template justice-impacted people could follow.

During the 26 years that I served in prison (between 1987 and 2013), administrators frequently told me, “We don’t care anything about your life after you finish your sentence. We only care about the security of the institution.” Administrators locked me in segregation or transferred me to prisons across state lines for doing the same things that the First Step Act now encourages people to do.

A release plan guided my adjustment. By documenting the journey and memorializing the accomplishments I made, I succeeded in overcoming many of the obstacles I faced.

Since completing my obligation to the Bureau of Prisons on August 12, 2013, the arc of justice has bent toward reform, as evidenced by the First Step Act. I would expect to see more reforms, but I would also expect the need for litigation and legislative changes. Many organizations will play a role in pushing for policy change.

At Prison Professors, our team strives to show people how to succeed despite the challenges that they will face. They should expect obstacles and difficulties. They should persevere, always focusing on steps they can take to convert adversaries into advocates. You should act as your own advocate. Staff members in the BOP do not respond favorably to people who say they’re “entitled” to receive benefits or privileges. People help themselves when they can show a sustained record of participating in positive programs. A good record becomes a tool for self-advocacy.

Staff members in the Bureau of Prisons have enormous discretion. Each person should document efforts toward personal development. They should communicate in a positive and respectful manner. Each person must persevere through the challenges ahead.

I never ask anyone to do anything that I didn’t do.

The lessons I learned from prison, and my release plan helped me launch several ventures upon my release. The practice of documenting my journey opened many opportunities. Those who’ve read *Earning Freedom: Conquering a 45-Year Prison Term* know that I prepared my “release plan” while awaiting my sentence from a solitary cell of the Pierce County Jail.

After reading *The Crito*, a short book describing Socrates’ time in jail, I learned how to stop thinking about my current problems and begin thinking about the broader community.

- » What steps could I take to reconcile with society?
- » How could I influence the way that others perceived me?
- » What plans could I make to advance possibilities for a second chance at life?

Those kinds of open-ended questions influenced my release plan. The sooner a person begins preparing a release plan, the more robust that plan will become.

Although I am confident that the following lessons will help any justice-impacted person, my area of expertise and experience lies with the federal system. Regardless of where

a person serves time, a release plan will influence a person's ability to navigate the pathway toward the soonest possible release date. Indeed, many prison reform movements emphasize the importance of a release plan.

Please consider the following as a self-directed template. We encourage participants in our course to use what they deem appropriate and to craft their release plan.

With hopes of proving worthy of your trust, we offer this plan as a starting point. It's not perfect because it needs your input. Following the template, I offer an example of how I would have used it to influence stakeholders that had discretion over my life.

With best wishes for the success of all participants, I speak for every member of our team at Prison Professors in wishing you success.

Sincerely,

Michael Santos, PrisonProfessors.com

RELEASE PLAN TEMPLATE

Identifying Information:

- » Name
- » Date of Birth:
- » Today's Date:
 - » Previous versions
- » Sentence length:
- » Begin in prison:
- » Projected release date:
- » Projected days in prison:

Identification:

- » Driver's license image:
- » Social security card image:
- » Birth certificate image
- » Insurance Card: Image attached

Support Information:

- » Letter from primary support:
- » Letter from employer:

Transportation:

- » Vehicle:
- » Insert Make
 - » Insert Model and Year
 - » Insert License
 - » Insert Registered Owner
 - » Insert letter from Registered Owner providing approval to use
- » Insurance:
 - » Proof of insurance that includes right to use vehicle/coverage for you to drive (May be combined with letter of primary support and letter from registered owner)

Housing:

- » Describe housing situation:
- » Who will live in the house:
- » Confirm that you've installed a landline:
- » Confirm that the house is in a low-crime area:

- » How will you meet household expenses?
- » How will living in the house contribute to your successful reentry?
- » How can unit team and RRM have assurance that you're welcome to live there?
- » Include letter of support from owner/lease holder.
- » Copy of lease that allows for additional residents to reside at location.
- » If the lease lists the names of approved residents, get a letter to show that the lease holder can add your name to the list of approved residents.

Medical/Mental Health/Dental:

- » What plan do you have in place to cover medical needs?

Substance Abuse Counseling / Treatment:

- » If you participated in RDAP, describe how you anticipate participation with the aftercare component.

Family Situation:

- » Describe your family situation, including:
 - » Do you have custody or visitation established with children?
 - » Is family counseling necessary?
 - » How have family responded to the sentence?

Education:

- » Describe your educational credentials

Employment:

- » Job skills and training you have:
- » Job skills and training you need:
- » Job placement status:
- » Special skills you've developed or have:
- » If you have employment, provide letter of support from current employer if the employer is willing to offer.

Financial Obligations:

- » Detail your financial status
- » Detail your contribution to financial responsibility:
- » Provide comprehensive financial plan which specifies income amounts, on-going expenditures (bills) and any projected expenses. Your budget should include an allowance to pay restitution or court-imposed fines.

Course participation during imprisonment:

- » Detail projects you've participated in and the way that they relate to your risk assessment survey.

Post release Support System:

- » Describe services you can access for support, if appropriate.
- » We encourage individuals to include any religious support, including letters from spiritual leaders or clergy.

Reentry Accountability Plan:

- » Describe ways that you've introspected on risk factors:
 - » My self-defeating behavior that blocks my success include:
 - » My behavior goal to address my issue is:
 - » My action plan to meet the above goal is: Target completion date / completion date
 - » Accountability metrics:

Completion of Plan:

- » Discuss board of advisors with whom you've gone over the plan.

Case Manager / Counselor Information:

- » Facility name:
- » Housing Area:
- » Case Manager Name:
- » Counselor Name:
- » Work Detail:
- » Work Detail Supervisor:

Future Plans/Goals:

- » Discuss your plans and goals for the future
- » Immediate plans/goals
- » Intermediate plans/goals for 1-5 years
- » Long Term plans/goals for 5+ years

SAMPLE RELEASE PLAN

Identifying Information:

- » Name: Michael Santos
- » Registration: 16377-004
- » Date of Birth: January 15, 1964
- » Today's Date: July 31, 2022 / Age: 58
- » Sentence length: 45 years
- » Begin time in prison: August 11, 1987
- » Halfway House: August 13, 2012
- » Days in Prison: 9,135
- » Release Date: August 12, 2013
- » Days in BOP: 9,500

Snapshot Showing Incarceration History:

- » (NOTE: The example that follows is how I would have documented my history through the Bureau of Prisons. Few people will serve the length of time that I served. I offer this information as a sample.)
- » When memorializing your journey, please show as much as possible. Do not hide any incident reports or infractions. Instead take the positive program participation, educational opportunities and show how negative incidents did not define your incarceration. Show how you learned from the experiences you've had, good and bad experiences.
- » Transparency and honesty go a long ways. If staff members positively influenced your incarceration, I encourage you to document their influences. The BOP is a tight-knit community of employees. If staff members see you giving credit to other staff members, they may support your efforts for higher levels of liberty.



Date	Location	PATTERN / Description / Accomplishments
	MCC Miami	<p>My initial arrest led me to MCC Miami as a pre-trial detainee. The judge did not authorize a bond and I remained in custody. At that time, I only wanted to get out of custody and didn't understand the gravity of offense that I had committed.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a "low."</p>
1987 to 1988	Transitory jails and holding centers.	<p>While proceeding through trial, I deferred to my defense attorney and failed to accept responsibility for the crimes that I committed. I remained in pretrial custody, locked in jails and detention centers. After a jury convicted me on all counts, I made a commitment to work toward reconciling with society and preparing for a law-abiding life upon release.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a "low."</p>

<p>1988 to 1994</p>	<p>USP Atlanta</p>	<p>After a jury trial, a federal judge sentenced me to serve 45 years in prison. Based on the sentence length and conviction, the BOP sent me to a high-security penitentiary in Atlanta. While in transit, I crafted a plan to begin preparing for a law-abiding life upon release. That plan would require that I work on three prongs over 10 years: 1) earn a university degree; 2) contribute society by becoming a published author; 3) build an influential support network.</p> <p>While in Atlanta, I worked as a clerk for the UNICOR factory. I also began studying toward my university degrees and building an influential support network. I journaled to memorialize efforts to prepare for a law-abiding, contributing life upon release.</p> <p>Notable accomplishments: Earn university degree from Mercer University in 1992; build network of mentors; publish articles.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a “minimum” after I turned 30, in 1994.</p>
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1994 to 1995	FCI McKean	<p>Relying upon assistance from the influential support network I built, and working together with my unit team, I transferred from USP Atlanta to FCI McKean.</p> <p>While at McKean, I continued efforts to prepare for a law-abiding, contributing life upon release. I worked in the education department as a tutor. Simultaneously, I completed a Master of Arts program at Hofstra University. Hofstra awarded my master's degree in 1995. I began studying at the University of Connecticut toward a Ph.D. program.</p> <p>Highlight of time in McKean bringing a class from Princeton University for a class I taught in warden's conference room, along with warden and Professor John DiIulio.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a "minimum."</p>
1995 to 1996	FCI Fairton	<p>Authorities transferred me from FCI McKean to FCI Fairton for population reasons. While in Fairton, I held a job in education and looked for opportunities to broaden my support network.</p> <p>The warden at FCI Fairton blocked my pursuit of a Ph.D.</p> <p>In the spring of 1996, my security level dropped from medium to low. The BOP transferred me to the low-security prison in Fort Dix.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a "minimum."</p>

1996 to 2003	FCI Fort Dix	<p>While in Fort Dix, I held a job in the education department. After receiving permission from the captain, I began building an investment portfolio to assist my transition upon release.</p> <p>I continued working to build my support network, receiving visits and mentoring from some of America's leading penologists. Those relationships led to publishing opportunities. I sought and received permission to publish from the BOP's regional counsel. While in Fort Dix, received publishing contracts for About Prison and Profiles from Prison.</p> <p>Through publishing, I continued to build a support network. The network had a vested interest in my release plan. On June 24, 2003, I married Carole in the Fort Dix visiting room.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a "minimum."</p>
2003 to 2005	Satellite Camp, Florence	<p>Once I advanced to within 10 years of my release date, my unit team recommended me for camp placement. The team waived my management variable for great-severity offense, and I transferred from the low-security prison to a minimum-security camp in Florence, Colorado.</p> <p>While in Florence, I worked in the laundry of the ADX. In my spare time I continued to publish. I received a publishing contract from St. Martin's Press to bring Inside: Life Behind Bars to market. The New York Times Sunday Book Review and the Los Angeles Times Sunday Book Review covered this nonfiction book.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a "minimum."</p>

2005 to 2007	Satellite Camp, Lompoc	<p>Following the publication of Inside, administrators at Florence transferred me to Lompoc. While in the Lompoc Camp, I continued efforts to publish. Those efforts helped preparations for my release.</p> <p>Sensing that a contract-facility would be a better fit for me, given my prolific writing plans, administrators transferred me to the camp in Taft, California.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a “minimum.”</p>
2007 to 2011	Satellite Camp, Taft	<p>While in Taft, I taught courses and continued my publishing career, always striving to prepare for success upon release.</p> <p>I continued to build a strong support network, visiting with academic mentors and opening relationships with prospective employers.</p> <p>Secure residence and job opportunity that will await me upon release.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a “minimum.”</p>
2011 to 2012	Satellite Camp, Atwater	<p>While completing final months in prison before my transition to an RRC, I solidify income opportunities and housing arrangements. Provide unit team with offer letters from employer, and provide confirmation of housing.</p> <p>Coordinate transition from prison to halfway house on August 11, 2012, after 9,135 days of imprisonment.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a “minimum.”</p>

2012 to 2013	RRC San Francisco / Home Confinement	<p>Serve six months in San Francisco halfway house, and six months on home confinement, concluding obligation to Bureau of Prisons on August 12, 2013.</p> <p>Secure job at San Francisco State University, where I teach course that I designed called Architecture of Incarceration.</p> <p>The PATTERN Score did not exist. Using the form that exists today, I would have scored a “minimum.”</p>
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Identification:

» Driver’s license image:



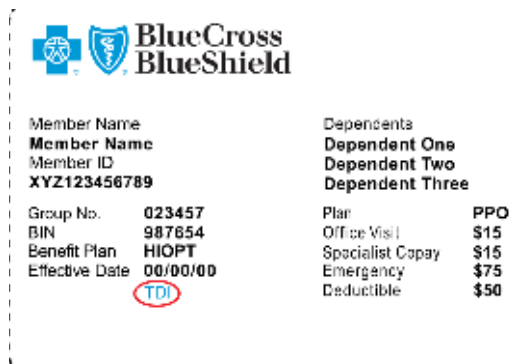
Social security card image:



Birth certificate image



Insurance Card: Image attached



Support Information:

» Letter from wife:

Sample Response:

Date: August 2, 2011
 From: Carole Santos
 To: Warden, Atwater Prison Camp
 Re: Michael Santos, Registration # 16377-004

Dear Warden,

My name is Carole Santos. I am writing to express my wholehearted and unconditional support for my husband, Michael Santos. I am an integral part of his release plan, and I want to assure your staff of the many ways that I commit to supporting Michael through his term on home confinement, Supervised Release, and his recalibration with society.

Michael began working on his release plan in 1987 while still locked in county jail and awaiting sentence. To memorialize his commitment to preparing for a law-abiding life, he wrote to a journalist covering his trial for the Seattle Times.

Michael's unsolicited letter led to a front-page story that documented Michael's commitment to reconciling with society. While incarcerated, Michael pledged to follow a three-part plan. He would work to 1) earn academic credentials, 2) grow a positive support network of mentors, and 3) create meaningful social contributions.

During the 25 years that Michael has served, he adhered to his plan. He earned a bachelor's and master's degrees, and he published several books that university professors use to teach courses on corrections.

Based on Michael's extraordinary and compelling adjustment in prison, he built a massive support network that includes thousands of people. He has income opportunities awaiting him, including an offer to teach at San Francisco State University, and he has my wholehearted support.

Michael and I married inside the visiting room at the federal prison in Fort Dix on June 24, 2003. With support from Michael's work, I returned to school and became a registered nurse with a master's degree in clinical nurse leadership. I earn more than \$100,000 per year and will support Michael financially while he transitions to society. I will cover our household living expenses; I will ensure that Michael has medical and dental insurance; I will provide Michael with transportation to ensure that he complies requires with all appointments and responsibilities.

We have a stable home, and we have registered and insured our vehicles. If allowed to drive, Michael will provide proof of full insurance coverage. If Michael is not permitted to drive, I will transport him from the prison to the Residential Reentry Center and all appointments as directed.

Thank you for considering me integral to my husband's release plan. It's my hope that you will use your discretion and authorize Michael's transition to home confinement at the soonest possible time.

Sincerely,
Carole Santos

» Letter from employer:

August 2, 2022

Dear Michael:

Our Prison Professors Charitable Corporation team is pleased to offer you a full-time position with our nonprofit. Should you accept, we would like you to take the role of advocacy specialist.

With the role of advocacy specialist, we will expect you to work toward helping justice-impacted people prepare for law-abiding, contributing lives, regardless of what stage they're in the journey. Your duties will include writing, editing, filming, recording audio files, and overseeing publications on our website at PrisonProfessors.com.

In this role, you will work remotely, collaborating with our director of operations through regular video calls. You will set your hours, but we expect to see daily publications that will likely require 40 hours each week.

We will start you at a salary of \$1,000 per week if you accept. We will pay you through digital checks each Friday. We would like you to begin this assignment on July 1, 2022.

Your employment with the Prison Professors Charitable Corporation will be on an at-will basis, which means you and the company are free to terminate employment at any time, with or without cause or advance notice. This letter is not a contract indicating employment terms or duration.

Please confirm your acceptance of this offer by signing and returning this letter.

Sincerely,

Bill McGlashan,
Board Member

Transportation:

» Vehicle:



- » Make: Tesla
- » Model S, 2022
- » Registered Owner: Michael Santos
- » Proof of Insurance:



Housing:

- » Describe housing situation:
- » Who will live in the house:
- » Confirm that you've installed a landline:
- » Confirm that the house is in a low-crime area:
- » How will you meet household expenses?
- » How will living in the house contribute to your successful reentry?
- » How can unit team and RRM have assurance that you're welcome to live there?

Sample Response:

My wife and I are the lawful owners of our home at 81313 Earning Freedom Lane in Laguna Niguel, California. We will live in our home together, and we've installed a landline to comply with any monitoring requirements. Our home is in a gated community in one of the lowest crime areas in the country.

My wife and I have credit scores that exceed 700, and we have a history of paying our household expenses on time. We have sufficient savings to cover all our costs for over three years.

By living together, we will avoid altercations with law enforcement and work toward building a career around lessons that I learned while growing up through 25 years in federal prison. With approval from authorities, I intend to work from home to minimize exposure to risks that complicate an adjustment for other formerly incarcerated people.

To assure the Residential Reentry Manager and my future probation officer that I have full support from my wife, I have attached a letter from her and my prospective employer, the Prison Professors Charitable Corporation.

Medical/Mental Health/Dental:

- » What plan do you have in place to cover medical needs?

Sample Response:

As stated in the support letter from my wife, I have full medical and dental insurance coverage from Blue Cross insurance. For further confirmation, I have included an image of my insurance card with this release plan.

Substance Abuse Counseling / Treatment:

- » If you participated in RDAP, describe how you anticipate participation in the after-care component.

Sample Response:

I do not have a history of abusing illicit substances or alcohol, so I did not participate in the RDAP program. The RDAP program did not exist when I began serving my sentence in 1987.

If I had a history of substance abuse, however, I would have memorialized the steps I took to participate in RDAP. I also would write a synopsis to describe how my participation in substance abuse treatment programs prepared me

for success upon release. I would have written about how I recognized substance abuse as a trigger for criminal-thinking patterns and how the courses would have helped me avoid such triggers.

Family Situation:

- » Describe your family situation, including:
 - » Do you have custody or visitation established with children?
 - » Is family counseling necessary?
 - » How has the family responded to the sentence?

Sample Response:

Authorities arrested me in 1987 when I was 23 years old. I did not have any children. My family has blessed me with their support through the multiple decades I served. My parents passed away, but my wife and I have close relationships with my two sisters, Julie and Christina. They are married, and each sister has two children. I have a close relationship with my sisters, husbands, nephews, and three nieces.

Carole has two adult children, Michael and Nichole. I have a good relationship with her son and daughter.

Education:

- » Describe your educational credentials

Sample Response:

While locked in the Pierce County Jail, before a judge sentenced me to 45 years, I committed to working toward reconciling with society for the crimes I committed. My three-pronged strategy included a commitment to earning academic credentials.

I had been a poor student in high school.

Staff members in the BOP helped me appreciate how my lack of education before imprisonment led to poor decisions. They influenced relationships with criminogenic people, which became “triggers” that led to my criminal behavior.

By working to earn academic credentials, I hoped to advance prospects for a triumphant return to society as a law-abiding citizen.

Through perseverance, I persuaded universities to admit me.

- » In 1992, Mercer University awarded me a bachelor's degree in Human Resources Management.
- » In 1995, Hofstra University awarded me a master's degree in interdisciplinary studies, focusing on cultural anthropology and political science; I studied America's prison system.

By studying America's prison system, I hoped to acquire knowledge and skills that would lead to income opportunities upon release. Further, those educational credentials opened publishing opportunities. While incarcerated, I published several books. Those books helped me establish relationships with many of America's leading penologists. Those relationships led to speaking opportunities and a job opportunity as a San Francisco State University professor.

Employment:

- » Job skills and training you have:
- » Job skills and training you need:
- » Job placement status:
- » Special skills you've developed or have:

Sample Response:

While incarcerated, I spent time developing marketable skills. Specifically, I became skilled with:

- » Verbal communications and public speaking are evidenced by the many courses I created and taught inside the various prisons that confined me.
- » Writing and editing skills, as evidenced by publishing contracts with some of the nation's leading publishers.
- » Critical-thinking skills, as evidenced by the support network I built while serving time in prisons of every security level.
- » Business development, as evidenced by the six-figure savings account I built while serving multiple decades in prison.
- » Self-directed work ethic, as evidenced by the body of work I created during my term.
- » Relationship building, as evidenced by the media attention and testimonial letters that I received, is part of my release plan.

Through all those efforts, numerous income opportunities await me upon release. Among those opportunities include a valid job offer from the Prison Professors Charitable Corporation, a nonprofit with an annual budget of more than \$1 million, and a chance to teach as an adjunct professor at San Francisco State University.

Financial Obligations:

- » Detail your financial status
- » Detail your contribution to financial responsibility:

Sample Response:

With guidance from my unit team, I participated in the Bureau of Prisons' Financial Responsibility Program. My obligation to pay a fine ceased after 20 years.

Through hard work and ingenuity, I began creating income-generating products to assist my transition to society upon release. I set a goal of having sufficient savings to live for at least one year, regardless of income.

That plan has led to more than \$100,000 in savings that I can use to begin my life upon release.

Further, my contributions to financial responsibility are evidenced by the tax returns I filed during the final five years of my incarceration and the contributions I made to my wife, which allowed her to return to school and earn the following credentials: certified nurse aid, licensed vocational nurse, registered nurse, and master's degree in nursing.

Course participation during imprisonment:

- » Detail projects you've participated in and how they relate to your risk assessment survey.
- » Post-release Support System:
 - » Describe services you can access for support, if appropriate

Sample Response:

My risk-assessment survey evolved over the time that I served my sentence. At the start of my prison odyssey, a self-assessment showed the triggers that led to my criminal behavior. I had a predisposition to pursue immediate gratification without much thought to my obligation to live as a law-abiding Amer-

ica. I missed the importance of the social contract and proceeded to traffic in cocaine.

The authorities charged me with violating many laws for those bad decisions, and a federal judge sentenced me to serve a 45-year term.

With encouragement and support from my unit team, I began to work toward earning academic degrees. I earned an undergraduate degree from Mercer University and a master's degree from Hofstra University.

Simultaneously, I participated in BOP work programs and volunteered in many productive activities, including teaching courses that I developed with support from my unit team.

Through active release panning, I built an extensive support network nationwide. As the testimonial letters show, I can draw upon the support I've received from many community leaders, including:

- » Bill McGlashan, Founder of The Rise Fund
- » Dr. Brant Choate, Assistant Director, California Department of Corrections
- » Diane Bass, Attorney at Law
- » Joan Petersilia and Robert Weisberg, Stanford University Law School

Reentry Accountability Plan:

- » Describe ways that you've introspected on risk factors:
 - » My self-defeating behavior that blocks my success include:
 - » My behavior goal to address my issue is:
 - » My action plan to meet the above purpose is: Target completion date/completion date
 - » Accountability metrics:

Sample Response:

I've written about how introspection has helped me identify risk factors through numerous publications.

In *Earning Freedom: Conquering a 45-Year Prison Term*, I wrote extensively to describe the incremental stages I went through to identify the self-defeating behavior that blocked my success as a young man. By pursuing a fast life, driven by a pursuit of immediate gratification, I fell under criminogenic in-

fluences. I began trafficking cocaine. Those crimes led to my lengthy prison term.

In *Prison: My 8,344th Day*, I wrote to describe the discipline that would carry me through a typical day during my 23rd year of imprisonment. The book describes how daily decisions can advance toward a path of success after prison or lead us into cascading problems that could include homelessness, unemployment, or further difficulties with the law.

With support from my unit team, I set behavior goals to address my issues. Those goals included:

- » Focus on developing academic credentials and marketable skills, as evidenced by the university degrees I would earn within the first 10 years of my term;
- » Focus on contributing to society by becoming a published author within the first 10 years of my imprisonment;
- » Focus on building a support network that would include building relationships with 10 mentors during my first 10 years of imprisonment.

I set my target completion date for those goals in 1997, which would have been 10 years after I set the goals at the start of my sentence in 1987. Using this strategy, I achieved those goals two years ahead of schedule.

To hold myself accountable throughout, I kept a daily journal. The journal would show how daily decisions open prospects for new opportunities. I intend to use the journal entries as a resource that will contribute to my success upon release.

Completion of Plan:

- » Discuss the board of advisors with whom you've gone over the plan.

Sample Response:

While creating my release plan, I relied upon guidance from my unit team. At every institution where I served my sentence, my unit team supported my release plan. I began serving my sentence in a high security penitentiary. After seven years, my unit team transferred me to medium-security prisons. In my tenth year, administrators transferred me to a low-security prison. Once I advanced to within ten years of my release date, administrators transferred me to minimum-security camps.

Besides relying upon my unit team, I built an extensive board of advisors over the years. My release plan includes copies of testimonial letters. It also links to a personal website that I created to document the journey.

Case Manager / Counselor Information at final institution:

- » Facility Name: USP Atwater, Satellite Camp
- » Housing Area: Bunk 17-U
- » Case Manager Name: Leticia Ortiz
- » Counselor Name: Jorge Rios
- » Work Detail: Unit Orderly
- » Work Detail Supervisor: Jorge Rios

Future Plans/Goals:

- » Discuss your plans and goals for the future
- » Immediate plans/goals
- » Intermediate plans/goals for 1-5 years
- » Long Term plans/goals for 5+ years

Sample Response:

As detailed through my release plan, I've worked to prepare for a law-abiding, contributing life upon release. The academic credentials I've earned, together the professional accomplishment of publishing has opened numerous income opportunities. In the pages that follow, I include several testimonial letters, showing the job opportunities that await me.

I am fortunate to have a supportive wife and a strong support network. Further, I have sufficient savings in the bank. My resources will cover all my immediate expenditures, and give me cushion that will cover all housing, transportation, and living expenses during my first year of liberty.

During the initial months that of my release, I intend to get stable. I expect to earn an initial income by teaching as an adjunct professor at San Francisco State University. Simultaneously, I will learn how to use the Internet and to learn digital marketing skills.

My intermediate goals, during years one through five after my release, I intend to acquire appreciating real estate assets while simultaneously building a digital-products business.

By the time I reach my fifth year of liberty, I anticipate that I will own more than \$1 million in performing assets that will grow. I also will continue working to build my digital products business.

November 11, 2017

Dear Administrative Law Judge,

My name is Joan Petersilia, and I am currently the Adelbert Sweet Professor of Law at Stanford Law School. I also co-direct Stanford University's Criminal Justice Center. I have over 30 years researching and teaching about the criminal justice system, specializing in prisoner reentry and recidivism prediction. I am also the former Director of RAND's Criminal Justice Program, and in 2014 was awarded the Stockholm Prize in Criminology, known as criminology's Nobel prize. I am also the former President of the American Society of Criminology, the largest international association of professional criminologists, and the author of the book, *When Prisoners Come Home: Parole and Prisoner Reentry*.

I am aware that Michael Santos is striving to obtain a clearance from the Department of Health and Human Services so that he may join his wife, Carole Santos, to build Pacific Vista Senior Living, a business they have recently launched. That is the matter before you, and I want to assure you that Mr. Santos is without a doubt most deserving of this clearance. I feel I know him very well—both personally and professionally. I believe this personal connection, combined with my professional experience, qualifies me to write this character reference letter on his behalf.

Over the past ten years, I have become friends with (and a great admirer of) Michael. I began corresponding with him when he was a federal prisoner, and have met personally with him on many occasions since his release from prison in 2012. After his release, he lived in a federal halfway house in San Francisco and then settled in the Bay Area before moving to Orange County. I have watched Michael's transition over the last 5 years since his release, and to put it mildly, he is an inspiration not only to thousands of former inmates but to all of us who struggle to live a life with purpose, compassion and integrity.

You no doubt have seen Michael's record of accomplishments while in prison. He attracted the attention of academic criminologists nationwide as he struggled to prepare for reentry while still behind bars. He became a well-known scholar to prison activists--earning degrees, writing several books (e.g., *About Prison*, *Adjusting to Prison*, *Earning*

Freedom), and emotionally preparing for a time when he would return to the free world.

Michael and his lovely wife, Carole, are an incredibly inspiring couple—both are smart as a whip but also concerned with how best to give back to society. I watched their relationship and marriage grow as she stood by him throughout his prison term.

As I mentioned in my introductory paragraph to this letter, one of my areas of expertise is recidivism prediction. Because of that background and my personal knowledge of Michael, I wrote a letter supporting his petition for parole release. I had never before written a letter supporting release action for *any* prisoner. But Michael's case was so compelling that I had to write. I felt he was the safest possible candidate for release. Not only did he enjoy an existing support network from his family and the wider community, but he also had a great future awaiting him in productive work. In fact, since his release, he has several important jobs and become quite successful. His honesty with everyone he meets has in fact let to many professional opportunities, each of which he has taken advantage of and excelled.

In addition to his entrepreneurial pursuits, he has also gone above-and-beyond in terms of his volunteer and community service activities. He has spoken to my Stanford Law School class on several occasions—and to universities throughout the nation. He even taught his own college class since release! He also developed a video series for adult and juvenile prisoners, trying to educate them on the process of successfully reentering free society. And he writes a popular blog about his personal journey of returning to society after prison. He has also recently begun a new venture to assist families and individuals who are facing incarceration. I also serve with him on the Advisory Board of the Robina Institute at University of Minnesota, a philanthropic venture devoted to national parole issues. In all these activities, Michael has been completely forthright about his criminal background.

Michael is a model citizen. He figures out what needs to be done, meets collaboratively with those who are germane to implementation, and goes about the hard work of making it happen. I have seen this time and time again. For much of the work he does, he is a volunteer. Just trying to do what he can, wherever he can.

He is honest, hard-working, acts with integrity, and inspires all those around him. If I did not believe that, I would not allow him to teach in

my course or collaborate on my research projects. I believe he is of the highest moral character. His life has not been easy nor fair, but he is motivated to teach others how to live a decent, honest, and productive life even when faced with daunting life experiences.

I know both Michael and Carole Santos very well, and they are an awe-inspiring team. The highest compliment I can give them is to say that I would have *no* hesitation placing my own elderly parents in any assisted living facility Carole and Michael were associated with!

I understand that Michael now needs an exemption for his criminal background in order to work in Pacific Vista Senior Living. He should be given this exception without any hesitation or reservation. Like everything else he has devoted his attention to, he will contribute positively to this business and the aging population served at Pacific Vista Senior Living.

I ask that you grant Michael Santos the exemption he is seeking so that he can work in the healthcare industry.

I sign this letter under the penalty of perjury.

Sincerely,

A handwritten signature in black ink that reads "Joan Petersilia". The signature is written in a cursive, flowing style.

Joan Petersilia

November 12, 2016

EDWARD RHINE, Ph.D.

PROJECT DIRECTOR
Parole Release Project

Letter of Recommendation for Michael Santos

To Whom It May Concern:

It gives me great pleasure to write a letter of recommendation on behalf of Michael Santos in support of his application to become an administrator of a Residential Care Facility for the Elderly. I am a Lecturer at Ohio State University where I have served in the Sociology Department for nearly twenty years. I currently direct a national parole project for the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota's Law School having retired in 2013 as the Deputy Director over the Office of Offender Reentry for the Ohio Department of Rehabilitation and Correction.

I first met Michael in 2011 at a time when he was confined in the federal prison system. He was finishing a chapter for a book co-edited by Joan Petersilia and Kevin Reitz entitled *The Oxford Handbook of Sentencing and Corrections* that was published the next year. His chapter – "Living Life Behind Bars in America" appeared alongside a related chapter I wrote called "The Present Status and Future Prospects of Paroling Authorities and Parole Supervision." We began a conversation over issues of mutual concern that quickly evolved into a shared professional relationship and a friendship.

Though I found Michael's chapter striking in its content, even more, I value the quality and richness of insights that inform the whole of his publication track record, much of which he completed despite the challenges of doing so while incarcerated. Over the course of several years, he has written 10 books, and authored numerous journal publications. I have used his chapter above and assigned one of his books on several occasions for my OSU students. Last Spring, Michael skyped in to my "Prisons, Jails, and Community Corrections" class. He delivered a presentation on the prosocial and employment-focused pathways he has taken in reintegrating into society.

The activities mentioned thus far cover only a small modicum of what Michael has accomplished before and since his return home. With respect to his overall capabilities, Michael earned a B.A. and M.A. while serving time. This is an extraordinary achievement that very few individuals subject to incarceration ever reach in confinement. In moving from his notable academic portfolio to post-release employment, here again Michael has demonstrated a unique work ethic and an expansive set of skills that have served him well since 2013. Whether teaching at San Francisco State University, or working with the MSG Group, or as a "Prison Professor" Michael has taken the initiative to embed himself seamlessly in the labor market. These opportunities did not just happen. They required planning, foresight, self-discipline, and once on-the-job, a talent to produce. Michael has displayed remarkable entrepreneurial assets in all the occupational niches he has elected to pursue and a sincere desire to improve the welfare of others in all that he does.

There is more to say. As alluded to above, I have been fortunate to serve as the project director for a national parole initiative that was launched in 2014 by the Robina Institute of Criminal Law and Criminal Justice. Michael was appointed as a member of an Advisory Council that was formed at the start of the project. In this role, he has provided wide-ranging expertise and sound guidance ever since. His contributions have been incisive throughout the twice-yearly meetings of the Council. Of equal note, the members themselves have found Michael to be an invaluable participant and valued colleague.

The comments above, I believe, are more than sufficient to demonstrate the strength and moral fiber of Michael's character. They also furnish evidence of his full rehabilitation. He has long ago and continues even now to express remorse and ownership for the crimes for which he was convicted. I have worked in senior executive positions in corrections in New Jersey, Georgia, and Ohio spanning three decades. During the course of my career, and experiences with men and women who have "done time," I can say Michael stands out above everyone I have ever encountered in his incredible commitment to becoming a contributing and law-abiding member of the community. He is not just an exemplary citizen, but the embodiment of someone who has earned redemption.

I offer my highest endorsement of Michael Santos for your consideration. Michael is fully trustworthy and well qualified to become an administrator in a Residential Care Facility designed to provide services for the elderly. In addition to his remarkable skills and strong ethical compass, he will bring both compassion and caring to each and every resident his facility serves. As he has demonstrated convincingly and repeatedly, he is committed to paying forward to those who need the assistance of others.

Sincerely,

A handwritten signature in cursive script that reads "Edward Rhine". The signature is fluid and elegant, with a large initial "E" and a long, sweeping underline.

Edward Rhine, Ph.D.

March 31, 2017

To Whom it May Concern:

I'm a federal criminal defense attorney based in Irvine, California. I'm happy to write this letter of endorsement for Michael Santos.

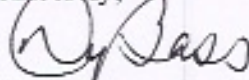
Over the course of my 25-year career, I've developed great relationships with judges and prosecutors. Since 90 percent of defendants in federal cases plead guilty, I consider myself somewhat of a specialist on sentencing issues in federal court. When Michael initially approached me and offered to assist with sentencing matters, I told him that I didn't think I needed help. Undaunted, Michael told me how his experience helped him communicate with defendants. Through interviewing and listening, he could find mitigating themes in their stories, he said. He asked for an opportunity to show the value he could provide.

A few months later, I had a client who was charged with possession of child pornography. My client had trouble articulating the factors I needed for him to express to the court in order to show that he was truly remorseful for his conduct and what he had learned. He also had difficulty drafting his personal history which is a critical part of sentencing. I referred him to Michael. Michael interviewed my client. He then proceeded to write one of the best, most thorough and compelling first-person sentencing narrative letters I have ever seen. The personal narrative supported my zealous representation at sentencing. We ended up with a non-custodial sentence. I now send all of my clients to Michael. He works on their letters with them and provides guidance to my clients about how to handle matters after the sentencing hearing.

I submit the narrative letters that Michael writes with my clients to the probation officer who will be writing the pre-sentence investigation report prior to the probation interview. As a consequence, several probation interviews have lasted 30 minutes rather than two plus hours. The probation officers have thanked us profusely for the letters. They are impressed with and appreciative of our level of preparation. The probation officers often cut and paste directly from my client's letter, using the client's version of the offense conduct rather than the government's version, and my client's statement of remorse, directly into their report. Michael's diligence and effectiveness helps me place my clients in the best possible position for sentencing.

My clients also truly appreciate the time Michael takes to emotionally guide them through the legal process and how he prepares them and their families for what lies ahead. This is a service I cannot provide. Michael is there long after my legal representation ends. I strongly encourage you to take the time to speak with Michael about how he can help you and your clients. I consider Michael a true asset to my practice and I highly recommend his work to other defense attorneys.

Sincerely,



Diane Bass

Merit-Based Sentencing Reductions: Moving Forward on Specifics, and Some Critique of the New Model Penal Code

RORY K. LITTLE*

In the Essay that follows, Michael Santos tells a remarkable story. Arrested at age twenty-three, Santos served twenty-six years in the federal prison system. While in prison, Santos published articles and books,¹ and earned college and master's degrees, despite what he describes as affirmatively obstructionist decisions by "corrections" personnel.² Immediately after his release in 2013, Santos began lecturing at a respected state university.³ Today, he has a website;⁴ course materials for persons facing lengthy prison sentences; scores of supporters and mentors;⁵ and the charisma and character to hold a law symposium audience spellbound for every minute of his thirty-minute presentation. Those who teach know how difficult that can be!

* Professor of Law, University of California Hastings College of the Law, San Francisco. My thanks go to Allen Dreschel (UC Hastings '15) for indefatigable research assistance; Rob Taboada (UC Hastings '15) for his invitation and support for the Symposium, of which this Essay is a small part; and to Emily Goldberg Knox (UC Hastings '15), the Editor-in-Chief for Volume 66 of the *Hastings Law Journal*, and my sometimes student, for her always stimulating yet understanding patience.

1. MICHAEL G. SANTOS, ABOUT PRISON (2003); MICHAEL G. SANTOS, EARNING FREEDOM: CONQUERING A 45-YEAR PRISON TERM (2012); MICHAEL G. SANTOS, GANGSTERS AND THUGS: CONSEQUENCES THAT HUSTLERS PAY (2007); MICHAEL G. SANTOS, INSIDE: LIFE BEHIND BARS IN AMERICA (2007); MICHAEL SANTOS, PROFILES FROM PRISON: ADJUSTING TO LIFE BEHIND BARS (2003); MICHAEL G. SANTOS, TRIUMPH!: STRAIGHT-A GUIDE: CONQUERING IMPRISONMENT AND PREPARING PRISONERS FOR RE-ENTRY (2013); MICHAEL G. SANTOS, WHAT IF I GO TO PRISON?: LONG-TERM PRISONER DESCRIBES CRIMINAL JUSTICE SYSTEM, PRISON, AND ISSUES TO CONSIDER WHEN CONTEMPLATING THE POSSIBILITY OF IMPRISONMENT (2003).

2. See Michael Santos, *Incentivizing Excellence: A Suggestion for Merit-Based Reductions from a Twenty-Six-Year Prison Insider*, 66 HASTINGS L.J. 1549 (2015).

3. See Michael Santos, *Fall 2013 Syllabus for Criminal Justice 451: The Architecture of Imprisonment*, S.F. STATE UNIV., <https://syllabus.sfsu.edu/syllabus/view/20134-R-11878> (last visited Aug. 5, 2015).

4. MICHAEL G. SANTOS: EARNING FREEDOM, <http://michaelsantos.com/> (last visited Aug. 5, 2015).

5. See, e.g., *Former Inmate Speaks Out Against U.S. 'Commitment' to Mass Incarceration*, PBS NEWSHOUR (Apr. 2, 2014, 6:29 PM), <http://www.pbs.org/newshour/bb/santos-former-prisoner-looks-help-others/>; *Partial List of Endorsements (More Available upon Request)*, MICHAEL SANTOS: ENSURING FREEDOM, <http://michaelsantos.com/endorsements/> (last visited Aug. 5, 2015).

But in contrast to what I think is often the unspoken reaction of lawyers to “prisoner example speakers,” Santos ought not be viewed simply as an object of fascination like some museum piece. He is plainly an intelligent person, hard-working and a thinker. He is also a living example of the mistakes—and the hopes—of America’s bureaucratized long-term imprisonment system, popularized in recent years as “mass incarceration.”⁶

Just as significant as Santos’s “story” is his message. Santos adds his voice of experience to an increasingly large and politically diverse chorus that recommends various mechanisms for permitting the safe release of convicted felons “early” from their imprisonment terms.⁷ Certainly this chorus is driven by some extent to the budgetary imperatives of the times.⁸ But it is also driven by people like Santos, whose crime was serious and who may well deserve both the retributive as well as deterrent sanction of imprisonment, but who also demonstrate, by a record of “merit-based” achievement, that some sentences initially imposed are unnecessarily long. I would join Santos in suggesting that proposals for “interim looks” at lengthy prison sentences be considered, as well as systems of measurable “merit credits” toward release. And I offer some constructive criticisms of the American Law Institute’s (“ALI”) recent adoption of some steps in this direction.

6. See, e.g., JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014); Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. & CRIMINOLOGY 1225 (2010). The phrase “mass incarceration” is of relatively recent vintage, but recognition of the phenomenon is not. See SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE (Michael Tonry & Kathleen Hatlestad eds., 1997). See generally MARC MAUER, *RACE TO INCARCERATE* (1999) (discussing three decades of prison expansion in America).

7. Thus in 2011, the ALI adopted, as part of its long-running project to revise the Model Penal Code, three provisions that address various paths for the reduction of criminal imprisonment sentences. MODEL PENAL CODE §§ 305.1, 305.6–305.7, reprinted in MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 10, 2014) (on file with author). In a different bipartisan vein, Congress in 2010 enacted the Fair Sentencing Act, co-sponsored by Republicans and Democrats alike, which, among other things, increased the quantities of crack cocaine that trigger federal statutory mandatory minimum sentences. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a)(1)–(2), 124 Stat. 2372 (2010); 21 U.S.C. § 841(b)(1)(A)–(C) (2006 ed. & Supp. IV) (prior to 2010 amendment). Further, 18 U.S.C. § 3582(c)(2) provides that upon motion of the defendant (or the Director of the Bureau of Prisons, or on its own motion) the court may retroactively reduce the term of imprisonment for inmates sentenced under the old guidelines. Finally, in July 2015, President Obama commuted dozens of lengthy sentences imposed on nonviolent drug offenders. Julie Hirschfeld Davis & Gardiner Harris, *Obama Issues Reductions of Sentences in Drug Cases*, N.Y. TIMES, July 14, 2015, at A11.

8. See generally HADAR AVIRAM, *CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015).

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I. A BRIEF HISTORICAL SKETCH OF CRIMINAL SENTENCING IN THE UNITED STATES

Since prisons were first implemented as a more humane alternative to death penalties or other physical torture,⁹ the pendulum has swung, not in a line, but in a circle or even a sphere, among various methods for determining how long convicted criminal offenders should be imprisoned. This introductory Essay is hardly the place to catalogue all the ideas that have been generated around the simple question, “how long?” But perhaps a short historical sketch, focused primarily on recent decades, will prove useful.

A. JUDICIAL SENTENCING DISCRETION HAS BEEN A CENTERPIECE OF U.S. CRIMINAL SENTENCING

History has largely neglected the progressive views that our constitutional Framers expressed in their first enactments on criminal sentencing in the 1790s. As I have explained elsewhere,¹⁰ the Framers confronted a world where much criminal sentencing was automatic (“determinate”) upon conviction. Laws, or common law customs, that provided something like, “Anyone convicted of [specific crime] shall be

9. See, e.g., HERBERT A. JOHNSON & NANCY TRAVIS WOLFE, HISTORY OF CRIMINAL JUSTICE 183 (3d ed. 2003); PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS xi (1991). Jails of course existed previously, to hold persons accused of crime and the convicted for short periods (before exile or execution). But lengthy prison terms were uncommon. See *id.*

10. Rory K. Little & Teresa Chen, *The Lost History of Apprendi and the Blakely Petition for Rehearing*, 17 FED. SENT’G REP. 69 (2004).

sentenced to death,” were not uncommon at the time. Automatic imprisonment terms were sometimes similarly specified.¹¹ There was no allowance for judicial sentencing discretion in that centuries-old model.

But contrary to the Supreme Court’s simplistic (and erroneous) view, “fixed term sentences,” specifying imprisonment terms that were automatically set upon conviction, were not uniformly endorsed by our American Framers.¹² Rather, our progressive Framers clearly envisioned that sentencing discretion exercised by judges, within indeterminate ranges set by the legislature, would be central to the new federal system. Nondiscretionary, mandatory criminal sentencing may have been the predominate sentencing philosophy before the Framers took over.¹³ But in 1790, the very first Congress enacted numerous indeterminate criminal sentencing laws, such as zero to seven years for falsifying court records or misprision of treason, and zero to three years and a fine of zero to five hundred dollars¹⁴ for misprision of felony.¹⁵ The fact is, the First Congress launched the federal sentencing system into the universe of setting broad *ranges* for potential criminal sentences that we have today. Just as obviously, they expected federal judges to decide where, within legislatively specified ranges, an individual defendant would be placed.

Fast-forwarding 180 years, America in the 1970s still uniformly reflected the idea that the legislatures would set sentencing ranges for crimes, and then judges would choose a sentence within that range. In 1972, however, U.S. District Judge Marvin Frankel published a path-breaking book entitled *Criminal Sentences: Law Without Order*.¹⁶ Judge Frankel exposed the emperor’s naked truth: judicial discretion within indeterminate sentencing regimes appeared to operate without rationality or fairness, and the most influential factor in determining the overall length of sentence actually imposed was not the character of the offender or the severity of the crime, but rather simply the identity of the judge exercising the discretion.¹⁷

11. See *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (noting a “19th-century shift in this country from statutes providing fixed-term sentences”).

12. Little & Chen, *supra* note 10, at 72, 74 n.5 (citing numerous points in *Apprendi* asserting a different view).

13. *Apprendi*, 530 U.S. at 479, 481.

14. Five hundred dollars in 1790 was a hefty sum, worth over \$13,000 in inflation-adjusted 2015 dollars. See Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present, MEASURINGWORTH, <http://www.measuringworth.com/uscompare/> (enter “1790” in Initial Year, “500” in Amount, and “2015” in Desired Year; then look to “real price of that commodity”) (last visited Aug. 5, 2015).

15. Little & Chen, *supra* note 10, at 72 (citing an Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112-119 (1790)); see also 2 ANNALS OF CONGRESS 1522 (1790).

16. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

17. *Id.* at 6 (sentences are “depending upon the judge”); *id.* at 23 (“a regime of substantially limitless discretion is by definition arbitrary, capricious, and antithetical to the rule of law”); *id.* at 25 (“our sentencing judgments splay wildly as results of unpredictable and numerous variables”); *id.* at 49 (“the unbridled power of the sentencers to be arbitrary and discriminatory”).

Moreover, in the intervening 180 years, an additional discretionary component had been added to the indeterminate sentencing regime the Framers first endorsed: parole.¹⁸ In the late nineteenth and early twentieth centuries, progressive sentencing advocates developed the idea that, in fact, some if not all criminal offenders might demonstrate, over time, that they deserved not to serve the “top end” of their sentences.¹⁹ The idea was that while some offenders might be compelled to serve all twenty years of a zero-to-twenty-years sentence, a larger majority ought to be released sooner than the end. A “rehabilitative model” came to predominate in criminal sentencing,²⁰ hence the “Department of Corrections” title that was adopted by many state prison systems in the mid-twentieth century.²¹ While society might hold a maximum twenty-year “hammer” over the head of would-be criminals, convicted offenders could be released well before reaching that top end if they were judged to be no longer a danger and capable of living by society’s rules. Once “corrected,” this philosophy averred, criminal offenders should be “paroled” into a supervised release situation, for their own good and the good of society.

Once a concept of “parole” was accepted, another question was quickly—if unreflectively—answered: *who* should exercise the discretion to grant parole? The rationale for the answer—the executive branch—is unclear. Why should executive branch officials, appointed by a president or governor, be the ones to decide when prisoners should be released? If judges had been entrusted to make the original sentencing decision, why shouldn’t judges be similarly given the decision to parole? The answer, as best I can determine, was based on administrative convenience. Given that prisoners, once sentenced, were already placed into the custody of the executive branch—prisons being an executive branch agency—the idea seems to have immediately been adopted that the executive branch should also decide when to release the prisoner from custody, if early.

18. See, e.g., ANDREW A. BRUCE ET AL., *THE WORKINGS OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS: A REPORT TO THE HONORABLE HINTON G. CLABAUGH, CHAIRMAN, PAROLE BOARD OF ILLINOIS* iv (1928) (noting that Illinois was “one of the first states, if not the first, to enact a parole law . . . about thirty years ago”).

19. PETER B. HOFFMAN, U.S. PAROLE COMM’N, *HISTORY OF THE FEDERAL PAROLE SYSTEM* 23, available at <http://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

20. See *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

21. In 1912, the agency managing the California prison system was called the California State Detentions Bureau. In 1951, it was renamed the California Department of Corrections. *Department of Corrections and Rehabilitation*, ALLGOV CALIFORNIA, http://www.allgov.com/usa/ca/departments/independent-agencies/departments_of_corrections_and_rehabilitation?agencyid=223 (last visited Aug. 5, 2015). In 2004, this agency was renamed the Department of Corrections and Rehabilitation, although given California’s budgetary difficulties it is difficult to find hard evidence of a true return to rehabilitative philosophies in California prison management. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1932–33 (2011) (describing how California state prisons have failed to provide basic mental health care services to inmates); Sara Mayeux, *The Unconstitutional Horrors of Prison Overcrowding*, NEWSWEEK (Mar. 22, 2015, 2:55 PM), <http://www.newsweek.com/unconstitutional-horrors-prison-overcrowding-315640>.

This allocation of authority may also have felt natural because the executive branch—the king—historically decided pardon, clemency, and commutation issues. Yet the rationale for why the executive and not the judicial seems unexamined.²² Perhaps a grant of release from custody, before the maximum end of a sentence was reached, felt more like those historically executive branch actions. But history, while providing an explanation, is not a rationale.

In any case, parole boards were born, and they acted in an unarticulated partnership with the original sentencing judge to set the actual term that a criminal offender would serve.²³ But the experience was not always a happy one.²⁴ The position of parole board member was generally not viewed as prestigious, and the appointees were often perceived as appointed more on the basis of patronage than merit. Moreover, while “expertise” might be developed by parole commissioners presiding over hundreds of cases, empirical data suggested that the choices made—parole or no parole—were no better than if they were made randomly.²⁵ That is, offenders who were paroled often re-offended; and conversely, some prisoners thought by many to deserve parole did not receive it.²⁶

Thus in the 1970s and ‘80s, the pendulum swung again. It had apparently swung too far, from determinate (legislatively directed) sentences, to wildly and seemingly arbitrarily varying discretionary sentences within indeterminate legislative ranges. To address this problem, the concept of trying to “guide” or regulate judicial sentencing discretion in individual sentences had been brewing in the states since Judge Frankel’s book. States experimented with increasingly detailed “guidelines” for their judges to consult before imposing a particular sentence.²⁷ Finally in 1984, Congress lost all patience with judicial discretion, and enacted the Sentencing Reform Act, which would (1) make individual sentencing subject to mandatory “guidelines,”

22. See Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W. L. REV. 55, 64 (2014).

23. See BRUCE ET AL., *supra* note 18, at 3 (“The [Parole] Board, in the final analysis, is the real sentencing body and to all intents and purposes acts and functions as a court.”).

24. See FRANKEL, *supra* note 16, at 47–48 (criticizing parole boards).

25. S. Rep. No. 98-225, at 57 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3240, 1983 WL 25404 (“As Professor Norval Morris of the University of Chicago Law School has illustrated, parole boards are not able to predict with any degree of certainty which prisoners are likely to be ‘good’ release risks and which are not.”).

26. I had some early experience with the Federal Parole Commission in this regard, having litigated while in law school the court-ordered release of a federal offender because the Commission’s decision to not grant parole was palpably arbitrary and capricious. See *Hearn v. Nelson*, 496 F. Supp. 1111 (D. Conn. 1980).

27. See *Mistretta v. United States*, 488 U.S. 361, 364–68 (1989).

heavily restricting judicial discretion, and (2) abolish parole.²⁸ The animating precepts were to (1) eliminate “unwarranted” disparities in sentencing between like offenders committing like crimes, and (2) establish transparent “truth in sentencing”: the numerical sentence imposed at the beginning would be the number of years or months that an offender actually served.²⁹

The 1984 Sentencing Reform Act (“SRA”) generated the 1987 Federal Sentencing Guidelines that are one focus of this Symposium.³⁰ The 1984 Congress gave the Sentencing Commission a three-year gestation period in which to develop the guidelines³¹—but in 1986, while the guidelines were still unpublished, a new Congress was elected. Driven in part by a more “tough on crime” orientation, and in part by what was perceived as a crack cocaine violence epidemic of the mid-1980s, this Congress had an even more severe conception of appropriate criminal sentencing, and “mandatory minimum” criminal sentencing statutes were quickly enacted.³² The pendulum had now come full circle: under the new statutes, addressing what were perceived as very serious crimes,³³ lengthy mandatory sentences would be required, without parole or any other possibility of release before expiration, simply upon conviction of the

28. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

29. That is, with the exception of credits for “good time served,” which is another aspect of criminal sentencing that has been long accepted and vigorously advocated for by the authorities who have the difficult job of supervising prison inmate populations. Especially with parole eliminated, prison authorities demanded that some kind of credit for “good behavior” be retained. See S. Rep. No. 98-225, at 53 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3236, 1983 WL 25404. Without some kind of “carrot” for good behavior, which could be taken away if a prisoner behaved badly, prison authorities feared they would lose all incentive for good behavior of any kind. See *id.*

30. Hon. Charles R. Breyer, *Keynote Address*, 66 HASTINGS L.J. 1525, 1529 (2015).

31. 18 U.S.C. § 3551 historical and statutory notes: effective and applicability provisions (2014) (stating the three-year deadline for development of guidelines).

32. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ch. 2 (2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf (detailing the history of the 1986 mandatory minimum sentencing statutes); see, e.g., 21 U.S.C. §§ 841(a), 841(b)(1)(A)–(B) (2010).

33. The shift toward mandatory minimums and rising fears of a crack cocaine epidemic were pushed into overdrive by the ultra-high profile, powder cocaine overdose-induced death of college basketball star Len Bias. In the wake of Bias’s death, Congress adopted an increasingly aggressive and vocal “tough on crime” stance, and the House Judiciary Committee drafted and passed new drug sentencing laws on an expedited schedule—specifically, in one week’s time. H.R. 5394, 99th Cong. (2d Sess. 1986); H.R. Rep. No. 99-845, at pt. 1 (1986); Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408 (1995) (describing how no committee hearings were held in order to move bills swiftly); U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (1995), <http://www.ussc.gov/crack/chap5-8.pdf> (describing lack of legislative history in passage of 1986 law). Indeed, the legislative history of this period reveals no hearings, debate, or study preceding the adoption of these provisions.

defined crime.³⁴ The Federal Sentencing Commission has repeatedly expressed its opposition to mandatory minimum sentences, as plainly inconsistent with even the SRA's discretion-limiting sentencing philosophy.³⁵ Justice Anthony Kennedy, hardly an ultra-liberal, and Justice Stephen Breyer, one of the architects of the Sentencing Guidelines, have also so opined, as have many other experienced federal judges.³⁶ Indeed, given their enactment of undefined indeterminate sentencing ranges,³⁷ one imagines that the progressive Framers of 1790 would agree.

1. *The Contemporary Desire for Sentencing Reduction Mechanisms*

This brief history of criminal sentencing brings us back to the current moment, and Santos's suggestive Essay. Why *not* have a regime that provides "a mechanism that would allow defendants to work toward increasing levels of liberty"—including early release, I presume—"through merit?"³⁸ And why not have a mechanism for "a formal review that could include release?"³⁹ I want to briefly expand, and expound, on both ideas, which I think raise different issues. One involves the concept of establishing a system of "merit" by which offenders could "earn" privileges and release. Here, we hear echoes of many others, both current and ancient.⁴⁰ The second concept—establishing a system of review for determining when merit deserves additional privileges or release—

34. See, e.g., 21 U.S.C. § 841. "Three strikes" legislation is another version of mandatory minimum sentencing—unforgivingly lengthy imprisonment sentences imposed on any offender with two prior qualifying convictions, no matter what the circumstances or offender's characteristics. Again, after the 2008 budget crisis hit California, the people of California voted to establish sentencing reduction mechanisms for now-costly three strikes sentences. See AVIRAM, *supra* note 8, at 138–44.

35. See, e.g., U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/special-report-congress>.

36. See Jess Bravin, *Two Supreme Court Justices Say Criminal-Justice System Isn't Working; Justice Breyer Says Mandatory Minimum Sentences Are "a Terrible Idea,"* WALL ST. J. (Mar. 24, 2015, 7:46 AM), <http://www.wsj.com/articles/two-supreme-court-justices-say-criminal-justice-system-isnt-working-1427197613>; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03; Letter from the Honorable Robert Holmes Bell, U.S. Dist. Court Judge, to Senator Patrick Leahy, Chairman, Comm. on the Judiciary (Sept. 17, 2013), available at <http://news.uscourts.gov/sites/default/files/Judge-Bell-Chairman-Leahy-mandatory-minimums.pdf>; Lynne Marek, *Circuit Judge Asks for Loosening of Federal Sentencing Guidelines*, LEGAL INTELLIGENCER, Sept. 14, 2009, at 4; Matt Apuzzo, *Judge Attacks Disparity in Cocaine Sentencing: Far More Jail Time for Crack Crimes*, BOSTON GLOBE (Nov. 15, 2006), http://www.boston.com/news/nation/washington/articles/2006/11/15/judge_attacks_disparity_in_cocaine_sentencing/.

37. See *supra* text accompanying notes 12–15.

38. Santos, *supra* note 2, at 1557.

39. *Id.*

40. Santos highlights a system of reforms championed by one Alexander Maconochie in a nineteenth-century Australian island penal colony. See *id.* at 1561. In this system, prisoners could earn "gradual increases in liberty" through merit-based achievements. *Id.* at 1561–62.

presents different questions, not so much of “what” as of “who” and “when.”

2. *Establishing “Merit-Based” Sentencing Reduction Opportunities*

Certainly others have expounded on the concept of “merit” sentencing reductions—indeed, this is perhaps the original foundation of parole as developed in the 1900s: early release when a prisoner appears to be “reformed” and no longer a danger to society. Thus, longtime practitioner and professor Margaret Love recently published a report on the “Second Look Roundtable” discussion of the American Bar Association’s Commission on Effective Criminal Sanctions.⁴¹ The idea of enacting a mechanism for “midcourse correction of a sentence lawfully imposed” is a centerpiece of these discussions,⁴² and I would leave interested readers to the account provided there. Much of the discussion focused on the ALI’s Model Penal Code (“MPC”) revision project.⁴³ In 2011, the ALI adopted three proposals,⁴⁴ suggesting legislative “principles” for establishing mechanisms of sentence-reduction consideration.⁴⁵ I will refer to those proposals as a foil for the following thoughts.

II. THE “WHAT”: WHAT FACTORS SHOULD PERMIT A SENTENCING REDUCTION?

Interestingly, the MPC proposals divide the “what” into two very different sections, apparently based on the answer to the “when.” Thus, section 305.7 would permit a sentencing reduction for various specific factors, (including “other compelling reasons”) *at any time* during an imprisonment sentence. Section 305.6, meanwhile, would permit consideration of release for *any reason*,⁴⁶ but only after fifteen years of a sentence have been served. Section 305.7 evidently envisions things like terminal or incapacitating illnesses of the prisoner, or perhaps of a family member. “Other compelling reasons” are not defined; perhaps this would

41. Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT’G REP. 211 (2009).

42. *Id.*

43. MODEL PENAL CODE §§ 305.1, 305.6–305.7, *reprinted in* MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 10, Sept. 3, 2014) (on file with author).

44. Because the Model Penal Code (“MPC”) has no legal force unless adopted by a legislature or other authoritative body, everything it adopts is really just a “proposal.” Thus, the distinction announced in MPC § 305.6 (“does not recommend a specific legislative scheme” but “instead” just “principles”) seems a bit artificial.

45. *See* MODEL PENAL CODE § 305.1, *reprinted in* MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 10, Sept. 3, 2014) (on file with author) (“Good-Time Reductions”); *id.* § 305.6 (“Modification of Long-Term Prison Sentences; Principles for Legislation”); *id.* § 305.7 (“Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmary, Exigent Family Circumstances, or Other Compelling Reasons”).

46. *See, e.g., id.* § 305.6 (if “the purposes of sentencing . . . would be better served by a modified sentence”).

include the prisoner who saves the lives of guards or others in a prison fire, or undertakes in other heroic actions. One could easily imagine “compelling circumstances” overlapping with the “sentencing purposes” rationale of section 305.6—thereby making the fifteen-year minimum limit of section 305.6 somewhat arbitrary, or at least vaguely patrolled.

But my basic comment here is that the MPC’s proposals do not expressly specify educational *achievements* like Santos’s while in prison as a basis for early release.⁴⁷ The good-time provision of section 305.1 refers to “educational programs,” but only for “satisfactory participation.” Educational and other “merit” achievements, like Santos’s, should be expressly specified.

Moreover, the MPC proposals do not recommend any rules directing prison authorities to facilitate, rather than obstruct, such educational programs for in-custody offenders. They should. Achievements like Santos’s should be encouraged and rewarded (absent other countervailing factors), expressly and without a fifteen-year minimum limitation.

Of course, the criteria for what constitutes “merit” and how it is to be measured need to be published before any such system can succeed. The criteria should be as specific as possible, for the benefit of the prisoner (and her advocate) as well as the decisionmakers. Yet, like MPC section 305.7 (“other compelling reasons”), any such criteria should also have some kind of general provision for accommodating merit requests outside the envisioned specific criteria (for example, “the prisoner discovered a cure for cancer”). And the goal of such criteria must be kept in mind. It is not merely to reward for something achieved in prison; it is, as Santos discusses, to give the prisoner something to shoot for, something to strive for and to work to achieve, while in prison.⁴⁸ This means that a prisoner who won the Pulitzer Prize while in prison for a book she wrote before arrest would presumably not merit a sentencing reduction.⁴⁹

Of course, difficult decisions must be made about what should constitute educational “merit” as opposed to just “participation,” and, as in all reward systems, precautions should be taken to avoid “gaming” the system with meritless online educational credits or other standardless programs. It may be that the ALI’s 2011 proposals were all that that large and diverse body could achieve. One hopes that legislatures will seriously study the concepts and add as much specific detail as possible. Regardless, it is a sea-shift in current thinking that legitimate political and legislative actors are coming to see value in the idea.⁵⁰

47. *See id.* §§ 305.6, 305.

48. *See Santos, supra* note 2, at 1563–66.

49. Arguments can be imagined, of course, on the other side. Welcome to the joy of trying to write specifics to capture general ideas.

50. *See, e.g.,* ALISON LAWRENCE, NAT’L CONFERENCE OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS I (2009), http://www.ncsl.org/documents/cj/Earned_time_report.pdf (detailing that in at least twenty-one states, inmates can earn

III. THE “WHEN” AND “WHO” OF POST-SENTENCING SENTENCE REVIEW

Even if the concept of a merit-based sentencing reduction system is accepted—despite widespread academic endorsement, it is not clear that States have accepted it yet—it leaves at least two large questions to be answered: when, and by who? The following Parts address these questions.

A. TIMING

The “when” needs to balance the desire to imprison no longer than necessary against the administrative costs of constant or repetitive applications for sentence reductions. Moreover, sufficient time needs to have elapsed in the service of a sentence, so that an offender can legitimately claim to having accomplished some “merit” achievement that deserves a sentence reduction. Two general directions seem possible. Either a set time could be established (for example, after five years or after half the service of the sentence⁵¹), with a period of repose then to follow (for example, may not be reviewed again for three, or five, or whatever, years); or, a merit review could be triggered by the prisoner’s own motion. For example, something like “a prisoner may apply for merit reduction after three years; but in the event reduction is denied, the prisoner may not reapply for three more years.”⁵²

Here I think the MPC proposal could use amendment. Serving a minimum of fifteen years as provided by section 305.6 of the MPC seems too long. Further, the MPC does not provide for any “waiting period” of repose after an application for reduction has been denied. Meanwhile, section 305.7 (“other compelling reasons”) does not have any minimum time period. It seems to me that only one section is needed, not two, and that after some minimum period that is not too long (three or five years), a sentencing reduction system should be driven by a prisoner’s own application, rather than by “notice” from the “department of corrections,” as required by section 305.7(1).

time off their sentences by participating in or completing educational courses; in at least thirty-one states, merit-based “earned time” incentives are available).

51. The MPC proposal apparently could not be invoked until fifteen years of imprisonment has passed—thereby eliminating many potential reductions (for example, any sentence of less than sixteen years). MODEL PENAL CODE § 305.6. Other than perhaps “political” acceptability, the rationale for such a lengthy triggering time is obscure. The MPC proposal would allow an earlier application for “extraordinary and compelling circumstances.” MODEL PENAL CODE § 305.7. But that seems too narrow and extraordinary. If fifty-five percent of inmates achieve a college degree in the first five years—and thus not “extraordinary”—ought they all not be included in, at least, a merit-based review?

52. The MPC proposal apparently would permit only one application for “changed circumstances” reductions. MODEL PENAL CODE § 305.6. This simply seems like a bad idea—administrative convenience being valued over the philosophical rationale for such reductions.

B. WHO DECIDES

On this question, sections 305.6 and 305.7 of the MPC come down solidly on the side of a “judicial decisionmaker,” and I firmly agree. But interestingly, when I proposed the idea to a panel of four excellent U.S. district judges at this Symposium, they appeared to uniformly reject it.⁵³ The question of who should decide when a prisoner qualifies for a sentencing reduction will, inevitably, be fraught with the uncertainties of the ultimate question: Who, really, can tell if a prisoner is sincere in her achievements?⁵⁴ Who, really, can tell if a prisoner remains a danger to society, regardless of achievements? Initially, the ALI apparently discussed a number of possibilities: a panel of retired judges; a panel of “administrative judges”; or an executive-appointed sentencing commission or parole board.⁵⁵

But the ALI finally adopted a “judicial decisionmaker” as its answer. This, on balance, makes sense. The reluctance of sentencing judges is understandable: they do not want or need more work, and they may sincerely believe that after the passage of a number of years, they do not remember much about any particular offender or offense.⁵⁶ These concerns may well be accurate. But in the end, my rationale boils down to “someone has to do it, and judges are the best of the alternatives, all of which are inevitably imperfect.”

First, even if memory dims, the original sentencing judge will be *more* familiar with the offender and the crime than any other potential decisionmaker. At least at the time of the original sentencing, that judge studied both the crime and the offender in order to impose a sentence. And second, frankly, judges are on the whole more practiced, and (we hope) more careful and talented in making difficult judgments about sensitive matters based on less-than-perfect information. It is true that a discretionary sentence reduction system would inevitably allow some of the “law without order” variability in judicial decisionmaking to creep back into the system.⁵⁷ But presumably rules and guidelines more precise

53. The Judicial Perspective at the *Hastings Law Journal* Symposium: Federal Sentencing Reform (Feb. 13, 2015).

54. Cf. Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 195 (2009) (“inmates (and perhaps some staff) have a strong incentive to deceive the parole board”).

55. *Id.* at 198–99.

56. Although in my experience, such judicial claims are over-modest. Most judges can recall a remarkable number of their past criminal cases. Judges routinely say that sending offenders to jail is “the most difficult part of the job.” If so, then memory of those cases is unsurprising.

57. Less than one might expect, however, as Judge Breyer’s Keynote Address indicates. Breyer, *supra* note 28 (noting that since *Booker*, which made the federal sentencing guidelines “advisory” rather than mandatory, a very large percentage of offenders are still sentenced within the recommended guideline range).

than existed in 1970 would be part of a well-considered sentencing reduction system.

It is also true that some judges will retire or die, and their replacements, with no special knowledge about the matter, will have to be relied upon. Moreover, it is true that the human weaknesses and fallibilities of human judges, that always provide room for critique of judicial decisionmaking, will not be absent. But these are dangers in our human system that we must always guard against; a merit-based sentencing reduction regime will be no more, or less, free of such issues than any other aspect of our imperfect world. Again, judges are on balance better—not perfect.

In addition, judges on the whole carry a number of institutional advantages over other actors, such as executive-appointed officials or retired judges. First is their familiarity with the particular offense and the offender. Even years later, they can be reminded of the facts by transcripts, recordings, and copies of pleadings. Second, judgeships in the U.S. legal system tend to come with some prestige. This means both that they tend to attract a talented group, and that they carry a sense of public responsibility and scrutiny not found as prevalently in other justice-system actors. Yes, the flaws of politically elected judgeships persist, although states as well as federal districts are increasingly implementing merit-based judicial selection systems.⁵⁸ But again, mine is a “comparison among the imperfect” kind of rationale. On balance, I think judges are better.

Third, virtually all judges are protected from immediate removal by terms of office or, in the case of federal judges, life tenure. I am a fan of life tenure, in general, for federal judges; and even its critics advocate lengthy judicial terms.⁵⁹ Such terms insulate judges, to some extent, from the pressures that might result from criminal sentencing reductions. And to some extent, those pressures are not illegitimate, but will serve to limit the scope of sentencing reductions to truly deserving inmates.⁶⁰

Of course, the impact on judicial workload of any merit-based sentencing reduction system must be assessed and the dangers protected

58. See John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES, Dec. 23, 2009, at A12; JAMES SAMPLE ET AL., THE BRENNAN CENTER FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE (2010).

59. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 48–56 (Roger C. Cramton & Paul D. Carrington eds., 2006) (endorsing eighteen-year staggered terms through constitutional amendment); Sanford Levinson, *Contempt of Court: The Most Important “Contemporary Challenge to Judging,”* 49 WASH. & LEE L. REV. 339, 341 (1992) (advocating single, nonrenewable terms of eighteen years); L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 197 (1995) (suggesting nonrenewable eighteen-year terms); Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 570–73 (1999) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)) (recommending term limits).

60. Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657 (1999).

against. This is true of any proposal that will add to the judicial workload. But there is an interesting historical parallel, now largely forgotten, in the federal system: the existence, until the enactment of the Sentencing Guidelines in 1987, of Federal Rule of Criminal Procedure 35(b),⁶¹ which granted discretion to any federal sentencing judge to reduce (or correct) a sentence within 120 days of its imposition.⁶² The rule was abolished once the goal of “truth in sentencing” became embedded.⁶³ But when Rule 35(b) was in existence, it did not generate overwhelming workload for federal judges.⁶⁴ Once clear criteria for merit-based sentencing reductions are in place, judges should be able to quickly separate the potentially valid from the frivolous.⁶⁵ And, of course, legislative authorities should always be mindful of the workload of judicial actors, and design and fund a system that does not allow justice to fail for want of resources.

CONCLUSION

I hope the foregoing has provided food for thought, and not distraction from reading Santos’s fascinating Essay. My overarching point is that there is legitimate and increasing support for the ideas that Santos advances, in his layman’s terms, and he has made a valuable contribution to our literature. Beyond that, my view is that judges, and not “lesser” legal actors, should be the ones to act as decisionmakers in a system of merit-based sentencing reductions, once such a system is developed as thoughtfully and as specifically as possible. And there ought not be a lengthy “mandatory minimum” of time served before application for reduction can be made. From that point on, as Justice Holmes so famously suggested, experience will be our teacher.⁶⁶ And the pendulum will undoubtedly continue to swing, until we get it right.

61. FED. R. CRIM. P. 35(b) (prior to 1987 amendment).

62. Kate Stith, *Two Fronts for Sentencing Reform*, 20 FED. SENT’G REP. 343, 343 (2008); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1224–25 (2008); Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL’Y & L. 1034, 1054 (1999); Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 134–35 (2010).

63. See 5 ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 35:6 (2014).

64. See generally B. Carole Hoffman, Note, *Rule 35(b) of the Federal Rules of Criminal Procedure: Balancing the Interests Underlying Sentence Reduction*, 52 FORDHAM L. REV. 283 (1983) (examining among other things whether a court should retain jurisdiction under Rule 35(b) after 120 days).

65. Section 305.6(4) of the MPC recommends this: “procedures for the screening and dismissal of applications that are unmeritorious.” MODEL PENAL CODE § 305.6(4).

66. “The life of the law has not been logic: it has been experience.” O.W. HOLMES, JR., *THE COMMON LAW* I (1881).