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ARTICLE

CLINICAL CLEMENCY: SCALING CLEMENCY MOUNTAIN WITH STUDENT GUIDES

ADAM STEVENSON*

INTRODUCTION

*“Change will not come if we wait for some other person or if we wait for some other time. We are the ones we’ve been waiting for. We are the change that we seek.”*¹

While many may see change around them, in the economy, culture, or on other fronts, those in the legal community sit at the confluence of change. Everywhere you turn, dramatic shifts in long-solid ground provide both challenges and opportunities. This is just such a time when the Earth is shifting in many ways for those in legal fields.

On one front, legal education is at what many knowledgeable commentators have called a “crossroads.”² Decreasing enrollments and other fiscal changes are forcing law schools to reexamine all aspects of the legal education system.³ Following the economic challenges of the last five years and the new employment realities, schools are also looking for better, more

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1. Senator Barack Obama, Speech to Campaign Supporters (Feb. 5, 2008), *in* N.Y. TIMES (Feb. 5, 2008), <http://www.nytimes.com/2008/02/05/us/politics/05text-obama.html?pagewanted=print>.

2. Blake D. Morant, President, Ass’n Am. Law Sch., Presidential Address, Benefits from Challenge: The Continual Evolution of American Legal Education (Jan. 4, 2015), *in* 64 J. LEGAL EDUC. 4, 523 (2015), <http://jle.aals.org/cgi/viewcontent.cgi?article=1294&context=home>.

3. Enrollment was down by nearly a quarter in 2014 from what it had been in 2010. This has led to a variety of changes in academic programs at law schools. Margaret Loftus, *Drop in Applications Spurs Changes at Law Schools*, U.S. NEWS & WORLD REPORT (Mar. 11, 2015), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2015/03/11/drop-in-applications-spurs-changes-at-law-schools>.

effective ways to equip their students to be practice-ready when they leave after three (and more and more often, two-and-one-half) years.⁴ This movement, along with a new and significant American Bar Association requirement that a law student complete six credit hours of experiential learning prior to graduation,⁵ calls for exploration of options on how to efficiently account for these transformations.

The degree of change in legal education is paralleled, and perhaps even surpassed, by the substantial level of change in the criminal justice system. The President, many in Congress, and several presidential candidates have started to recognize the dramatic number of individuals serving significant sentences as a result of the War on Drugs and other criminal justice programs.⁶ This bipartisan group has also started to recognize the problems raised by thousands of aging and ill inmates, along with the service of longer and longer determinate sentences without a chance for early release. This follows the Supreme Court's work in narrowing the reach of many sentencing enhancements and giving sentencing courts more discretion to freely consider appropriate sentences. However, much of this reform work is yet to occur, and many changes remain out of reach for individuals who were sentenced "too early" to take advantage of more recent legal and policy changes. Those inmates' time may have come.

President Obama came into office after running a campaign about change. In keeping with that theme, he signed legislation that significantly altered the sentencing landscape for federal crack cocaine offenders. However, perhaps more notable to the broader criminal justice changes, in 2013, President Obama commuted the sentences of several cocaine base offenders.⁷ Though few in number, the grants represented a dramatic increase over

4. Some schools have started to give their students more advice on just how to graduate in under three years. For example, Colorado Law provides a how-to guide to graduate in two and a half years. *Graduating in 2.5 Years*, COLORADO LAW, <http://www.colorado.edu/law/academics/degrees/graduating-25-years> (last visited June 25, 2015).

5. Beginning in the 2016–17 term, schools will now need to ensure their curriculum requires students to complete at least six credit hours of experiential learning courses. This will phase in with the first students under this standard being the Fall 2016 1L class. A.B.A. Section of Legal Educ. and Admission to the Bar, *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, A.B.A. (Aug. 13, 2014), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules_authcheckdam.pdf.

6. See, e.g., Christopher Ingraham, *Barack Obama Talks the War on Drugs with the Creator of 'The Wire'*, WASH. POST (Mar. 26, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/03/26/barack-obama-talks-drug-reform-with-the-creator-of-the-wire/>; Jeremy Haile, *Bipartisan Moment for Drug Sentencing Reform*, THE HILL (Mar. 19, 2015, 7:30 AM), <http://thehill.com/blogs/congress-blog/civil-rights/236155-bipartisan-moment-for-drug-sentencing-reform>; Janelle Bouie, *Hillary Clinton's Impressive Criminal Justice Speech*, SLATE (Apr. 30, 2015, 12:11 PM), http://www.slate.com/articles/news_and_politics/politics/2015/04/hillary_clinton_s_impressive_criminal_justice_speech_the_democratic_front.html.

7. All eight individuals to have their sentences commuted were convicted of cocaine base ("crack cocaine") offenses. Press Release, White House, President Obama Grants Pardons and

his limited use of the executive clemency power⁸ and more importantly signaled a notable shift in clemency policy.⁹ This broadened use of the presidential power of equity and error-correction provided the last in a series of changes that led to a new clinical endeavor to assist law students in helping inmate clients and is a possible catalyst for significant reforms.

This Article will discuss a clinical model that could address many of the non-retroactive legal reforms, as well as changes in legal education, and provide great service to students and clients alike. It will also aim to identify some of the challenges and benefits of such work. Part I will discuss the history of the clinical legal education model. It will also examine the unique and formative history and present status of the University of Wisconsin Law School's Frank J. Remington Center. The evolution of clinical legal education and the Center will show the fertile ground for student education, social justice, and a workforce to help effect the change that the president seeks to achieve through clemency. Part II will review some of the noteworthy changes in federal criminal law over the past decade that, while significant, remain out of reach for thousands of inmates who remain under the effects of old, outdated law. These individuals represent not only potential clemency applications but also an opportunity for students to learn about the criminal justice system as a whole through interactions with this work. Part III will provide a short history and snapshot of the present initiatives for presidential clemency, a possible solution to the postconviction problems. Part IV then reviews the University of Wisconsin Law School's clemency work and provides some analysis of the costs and benefits of such work, along with some future areas for consideration for clinicians, practitioners, and policymakers alike. The mountain may present quite a climb, but this Article will begin the conversation about how students and clients alike can summit the peak.

I. CLINICAL EDUCATION: THE GUIDES FOR CHANGE

The evolution of legal education, at least in recent times, is partially a story of the birth, development, and rapid expansion of experiential learning and clinical teaching. This growth also has helped facilitate a movement toward greater legal services for those in need. It is this service where the potential lies for providing the legwork necessary for clemency review.

Commutation (Dec. 19, 2013), <https://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation>.

8. Of recent presidents, only President George W. Bush granted a similarly small percentage of commutation applications, granting one in every 779 applications. P.S. Ruckman Jr., *Obama: Updated Clemency Statistics*, PARDON POWER BLOG (Mar. 19, 2015), <http://www.pardonpower.com/2015/03/obama-updated-clemency-statistics.html>.

9. James Cole, Deputy Attorney Gen., Remarks at the New York State Bar Association Annual Meeting (Jan. 30, 2014), in *Justice News*, U.S. DEP'T OF JUSTICE (Jan. 30, 2014), <http://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>.

In order to understand how we find ourselves at the current iteration of clinical education, a short review of a few foundational moments and reports is necessary. After all, “[y]ou have to know the past to understand the present.”¹⁰ However, we start with a significant caveat. Like any historical review that forms the foundation of an article such as this one, this work only presents a small slice of the much larger evolutionary pie.¹¹ That small slice provides insight into how clinical education has arrived at this moment and why it is well-situated for clemency work and similar problem-solving efforts.

The present world of clinical legal education can largely trace its origins back to two key reports¹² on the status of legal education: the MacCrate Report¹³ and the Carnegie Report.¹⁴ The first to arrive on the legal education scene was the MacCrate Report. That report set forth ten fundamental lawyering skills and four professional values the committee felt new lawyers should acquire.¹⁵ The MacCrate Report also assessed the legal profession and “The Educational Continuum Through Which Lawyers Acquire Their Skills and Values.”¹⁶ Connecting the two, the authors emphasized skills training and the role of clinical opportunities in legal education. “Clinics have made, and continue to make, an invaluable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. Their role in the curricular mix of courses is vital.”¹⁷

The MacCrate Report’s conclusions about skills and clinics drew immediate attention.¹⁸ The report called for an increase in both skills and values instruction.¹⁹ The MacCrate Report even caused the American Bar

10. Carl Sagan, *Cosmos: One Voice in the Cosmic Fugue* (Turner Home Entertainment 1989).

11. For an overview of the history of clinical legal education into the 21st century, see Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000).

12. David I. C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 6 (2015).

13. A.B.A. SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report]. While there are more recent perspectives for a deeper review of the MacCrate Report, I recommend Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001).

14. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter Carnegie Report]. This report was a part of the Carnegie Foundation for the Advancement of Teaching. For more information, I recommend the following article: Mark F. Kightlinger, *Two and a Half Ethical Theories: Re-Examining the Foundations of the Carnegie Report*, 39 OHIO N. U. L. REV. 113 (2012).

15. MacCrate Report, *supra* note 13, at 135–36.

16. *Id.* at 223.

17. *Id.* at 238.

18. See Engler, *supra* note 13, at 111–12.

19. MacCrate Report, *supra* note 13, at 259–60.

Association to amend law school standards to ensure participation in, and attention to, real-life practice experiences.²⁰ However, many clinicians saw the focus on skills training as taking away from a law school clinic's social-justice and substantive components.²¹

Nearly fifteen years later, the Carnegie Report continued the review of legal education and emphasized the need for three "apprenticeships" in legal education: knowledge/understanding, practice expertise, and professional identity/judgment.²² Despite identifying three components, the Carnegie Report endorsed a more "coherent and integrated" path toward the legal profession.²³ Like the MacCrate Report before it, the Carnegie Report saw clinical education as a way to achieve the dual missions of attaining both skills and substantive training.²⁴ The Carnegie Report concluded that such an approach would also help students learn the social and ethical consequences of legal practice. This helped to fill the perceived void in the MacCrate Report with regard to social-justice education in the legal system. Despite the 1992 and 2007 reports, the principles of skills, substantive training, and social justice were already underway in serving the criminal justice system.

At the University of Wisconsin Law School, these reports echoed a key member of the clinical community and amplified much of what the school's clinical programs were founded to foster. Professor Frank J. Remington was a distinguished professor at the University of Wisconsin Law School from 1949 until 1992.²⁵ In addition to his classroom teaching, Professor Remington also conducted an American Bar Foundation (ABF)-funded, ten-year empirical study of the criminal justice system in the 1950s and early 1960s.²⁶ The findings, though commonplace now, were ground-

20. COMMITTEE ON THE PROFESSIONAL EDUCATION CONTINUUM, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 3 (Mar. 20, 2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf.

21. See Engler, *supra* note 13, at 127–28.

22. Carnegie Report, *supra* note 14, at 27–29.

23. *Id.* at 147.

24. Research points to "the value of clinical education as a site for developing not only intellectual understanding and complex skills of practice but also the dispositions crucial for legal professionalism." *Id.* at 120.

25. Robert McG. Thomas, Jr., *Frank Remington, Who Shaped Laws and Football, Dies at 73*, N.Y. TIMES (Feb. 12, 1996), <http://www.nytimes.com/1996/02/12/nyregion/frank-remington-who-shaped-laws-and-football-dies-at-73.html>.

26. The results of the study were published in five volumes. Published volumes include the following: ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (Frank J. Remington ed., 1969); WAYNE R. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (Frank J. Remington ed., 1965); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (Frank J. Remington ed., 1969); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL

breaking. The work led to a conclusion, among others, that the criminal justice system is complex and interrelated, with decisions by an actor at any point affecting actors at other points.²⁷ This led Professor Remington to conclude that “law graduates, while they had sufficient technical legal skills, had an insufficient understanding of the complexities of the criminal justice system.”²⁸ As a result, in the early 1960s, Professor Remington determined that a method of legal education was necessary to prepare law students for the complexities of real-world practice.

Professor Remington’s work on legal education featured common themes throughout. Like the MacCrate and Carnegie Reports would suggest many years later, “Prof. Remington’s approach . . . was to educate law students about the real workings of the criminal justice system, so that they would, in turn, use their knowledge to improve . . . the system on behalf . . . of defendants, . . . police office[r]s,” judges, and other actors in all aspects of the system.²⁹ This formed the core of a “systems approach,” wherein lawyers and non-lawyers working within a system learn its complexities and interrelated decision-making.³⁰ This balanced real-world legal education with a mission of social justice. While the program started out as student placements within prisons in non-legal capacities,³¹ this soon expanded into a thriving clinical center that eventually took on its founder’s name.

The Frank J. Remington Center is one of the largest law school clinical centers in the country.³² Several clinical programs sit under the broader umbrella of the Center,³³ yet all provide legal service to incarcerated indi-

(Frank J. Remington ed., 1966); LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTENBERG, *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* (Frank J. Remington ed., 1967). Many years later, a follow-up volume was published entitled *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

27. For more discussion of the topic, see EDWARD L. KIMBALL, *FRANK J. REMINGTON: CONTRIBUTIONS TO CRIMINAL JUSTICE* 35 (1994).

28. Meredith J. Ross, *A “Systems” Approach to Clinical Legal Education*, 13 *CLINICAL L. REV.* 779, 787 (2007).

29. *Id.* at 788.

30. *Id.* at 789.

31. *Id.* at 793. The original approach placed law students in observational capacities within the correctional system. However, inmates and correctional staff soon asked for legal advice, and the program evolved into a direct service law school clinic. *Id.*

32. *About the Frank J. Remington Center*, UNIV. OF WIS. LAW SCH., http://www.law.wisc.edu/fjr/about_fjrc/ (last visited Aug. 3, 2015).

33. The current projects at the Remington Center include the Legal Assistance to Incarcerated Persons project, the Wisconsin Innocence Project, the Oxford Federal Project, the Family Law Project, the Restorative Justice Project, the Criminal Appeals Project, and the Federal Appeals Project. In addition, the Center includes two externship programs and the Public Defender and Prosecution Projects, which place students in public defender or prosecutor offices across Wisconsin. More information about all projects is on the Remington Center’s website. See *Frank J. Remington Center*, UNIV. OF WIS. LAW SCH., <http://law.wisc.edu/fjr/> (last visited Jan. 14, 2016). Together, the clinics enroll over 100 students during a given school year. *The Remington Center*

viduals. These clinics take the “systems approach” to legal education and add a strong skills component to follow the direction of Professor Remington, the MacCrate Report, and the Carnegie Report. This was and is an important aspect of Remington Center clinics and many other clinics across the country. Clinical legal education does more than just provide a forum for students to practice skills. “[I]t does not neglect doctrine or substantive law. Rather, clinical experiences can deepen students’ understanding of doctrine in ways that pure classroom experiences cannot.”³⁴ The clinic’s focus is on having students provide high-quality representation, take primary responsibility for cases, and learn to tell a persuasive story.³⁵ In a time of increasing requirements for law schools and students relating to experiential learning, this triangle of substantive education, skills training, and social justice build a strong foundation for students and future practitioners.

This is true in the federal justice system as well. Specifically, on the topic of federal legal assistance, two of the Remington Center clinics provide direct assistance to federal defendants: the Oxford Federal Project and the Federal Appeals Project. In the Oxford Federal Project, students provide direct assistance to inmates at a medium-security federal correctional institution.³⁶ The students frequently visit and communicate with their clients; investigate, research, and litigate their concerns; and in all other ways work as a form of general counsel to the individuals.³⁷ The Federal Appeals Project represents individuals on direct appeal to the Seventh Circuit Court of Appeals. Working in pairs, students act as appellate counsel from record collection to issue formation and on to litigation. Students research, brief, and argue the cases on behalf of their clients.³⁸ As a part of both clinics, students learn federal criminal law, practice client and legal skills, and help indigent and underrepresented people remedy legal problems. In theory, these clinics meet the Remington, MacCrate, and Carnegie recommenda-

Student, UNIV. OF WIS. LAW SCH., <http://law.wisc.edu/fjr/students/index.html> (last visited Jan. 14, 2016).

34. Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT’L L.J. 295, 314 (2006). This also fits within the unique legal tradition of the University of Wisconsin Law School, “law in action,” where students learn legal rules, as well as how the rules evolved to address social concerns and how the rules operate in the real world. *Our Law-In-Action Tradition*, UNIV. OF WIS. LAW SCH., <https://law.wisc.edu/law-in-action/> (last visited Jan. 14, 2016).

35. These principles were articulated in the Criminal Appeals Project, though they eventually spread throughout the Center. John Pray & Byron Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School’s Remington Center*, 75 MISS. L.J. 795, 804 (2006).

36. *Oxford Federal Project*, UNIV. OF WIS. LAW SCH., <http://www.law.wisc.edu/fjr/oxford/> (last visited Aug. 3, 2015); *Federal Appeals Project*, UNIV. OF WIS. LAW SCH., <http://www.law.wisc.edu/fjr/fac/index.html> (last visited Aug. 3, 2015).

37. *Id.*

38. *Id.*

tions. However, that is not necessarily the “law in action,”³⁹ the reality of how the law truly functions, for the clinics, and particularly criminal post-conviction clinics.

Over the past few decades, there has been movement in many aspects of federal law, much of which is mirrored in state legislatures across the country. On one hand, there have been dramatic shifts in how our country punishes those who violate the law. On the other hand, there have been dramatic new restrictions on the ability to remedy wrongs through postconviction litigation. As a result, fewer and fewer postconviction motions and other litigation methods are viable, decreasing the opportunities for students to learn advocacy skills in an experiential setting. Similarly, students now practice in a world where change happens, but tens of thousands of people are left behind while social justice is left on the sidelines. But before you start to ascend Clemency Mountain, even with eager guides, you need a reason to climb.

II. CHANGES IN FEDERAL LAW: THE REASON TO CLIMB

While there may be willing guides ready to help climbers summit, there needs to be a drive to climb—a reason to make the trip. In the land of federal criminal law, the past decade has seen many developments that encourage efforts to improve representation and procedural fairness for criminal defendants (the climb). However, despite the significant changes that have come about from a number of different sources, many individuals remain unable to take advantage of enlightened policies, clarified procedures, and substantive fixes to problems that existed in years past. Clemency may provide the only way to remedy these lasting results from the former systems.

Just as with clinical legal education, a caveat is needed in the description of the changes in federal criminal law. Since 2004, ten years before the President started his initiative, there have been several significant changes in federal charging policy and sentencing that affect the terms of incarceration for thousands of individuals. A comprehensive review of even the majority of changes would require a dedicated article or two. However, through its work at a medium-security institution in a postconviction setting, the Oxford Federal Project experienced a number of legislative and judicial reforms that have the potential to dramatically change the circumstances of inmates.

But the reforms have significant barriers to their implementation to past cases. Whether one believes in the underpinnings of particular changes, such as whether drug sentences should be longer or shorter, this work as-

39. The University of Wisconsin Law School has a tradition of how people actually interact with the rules and how they actually work in practice. *Our Law-In-Action Tradition*, *supra* note 34.

sumes that individuals sentenced in two different eras should not be treated differently. Therefore, this review presents a small but real-world slice of issues impacting federal inmates who may take advantage of clemency.

One of the more significant criminal law changes to come out of the legislature addressed a problem that has existed since the start of the infamous “War on Drugs”: the sentencing disparity between crack and powder cocaine. Under the old regime, one hundred grams of powder cocaine received the same statutory treatment as one gram of crack cocaine.⁴⁰ In recent decades, observers started to note that the initial reasons for the disparity were being seen as incorrect or misguided. Instead, the statutory and Guidelines sentencing differences were having a dramatic and disproportionate impact on minority communities.⁴¹ Though there had been other changes touching upon the issue,⁴² the Fair Sentencing Act of 2010 (“FSA”) changed the quantities of cocaine base that triggered the increased maximum and mandatory minimum sentences.⁴³ Though many championed this change as a great move toward sentencing reform, those who previously received 100:1 sentences (now viewed to be without support) are still without relief.

Almost immediately after passage of the FSA, the question arose of whether incarcerated individuals could avail themselves of the statutory changes. However, the FSA did not contain a statement with regard to retroactive application.⁴⁴ Courts addressing the issue initially came to mixed answers as to whether the FSA applied to individuals in different procedural

40. 21 U.S.C. § 841(b) (2009). For more discussion of the disparity and evolution of the treatment of cocaine and crack cocaine, I recommend the following article: Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-Kimbrough World*, 42 AKRON L. REV. 105 (2009).

41. “Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack’s potency and low cost were making it increasingly popular.” *Kimbrough v. United States*, 552 U.S. 85, 95–96 (2007); see generally U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (discussing disproportionate impact on minority communities).

42. The United States Sentencing Commission has issued two crack-specific Guidelines amendments and also an all-drug reduction. The Commission has published information about the reductions and their effects here: *Materials on Federal Cocaine Offenses*, U.S. SENTENCING COMM’N, <http://www.ussc.gov/amendment-process/materials-federal-cocaine-offenses> (last visited Jan. 15, 2016).

43. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in 21 U.S.C. §§ 801, 841, 844 & 960, and 28 U.S.C. § 994).

44. Unlike S. 1789, the bill ultimately enacted as the FSA, H.R. 265, the competing bill, actually contained a provision on retroactivity, stating “there shall be no retroactive application of any portion of this Act.” Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, H.R. 265, 111th Cong. § 11 (2009).

postures.⁴⁵ The Supreme Court later ruled on at least a portion of the question, holding that the FSA applied to people who were not yet sentenced before the enactment of the FSA, regardless of the offense date.⁴⁶

To date, the FSA's changes remain unavailable to people sentenced before its enactment. The obvious impacts from the FSA would be the reduction or elimination of mandatory minimum sentences in cases with drug quantities under the new thresholds. However, the changes in mandatory minimum sentences are accompanied by changes in the statutory maximum penalties as well, which could cap the penalties for some individuals or affect the confinement of others serving sentences impacted by recidivist sentencing enhancements.⁴⁷ These changes have led to a push for greater inclusion in the reductions.

Bipartisan support exists for retroactive application of the FSA, and sponsors from both parties have introduced such legislation in successive sessions of Congress.⁴⁸ However, at the time of drafting this Article, the passage possibilities for these bills look slim.⁴⁹ Clemency may be the only option for universal application of the reforms.⁵⁰

Beyond the realm of statutory change, the Supreme Court has been actively narrowing the reach of sentencing enhancements. One of the largest areas of Supreme Court litigation is in the area of interpreting the definition of two terms: "violent felony"⁵¹ and "crime of violence."⁵² Unlike the states that have recidivist enhancements or "three strikes laws," the federal

45. See, e.g., *United States v. Blewett*, 719 F.3d 482, 493–94 (6th Cir. 2013) (applying FSA retroactively to all individuals), *vacated and reversed en banc*, 746 F.3d 647 (6th Cir. 2013); *United States v. Douglas*, 644 F.3d 39, 45–46 (1st Cir. 2011) (applying FSA to individuals whose offense was committed before the FSA's enactment, but were sentenced after); *United States v. Holcomb*, 657 F.3d 445, 446–47 (7th Cir. 2011) (stating that FSA applies only to individuals whose offense occurred on or after the date of the FSA).

46. *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012).

47. A commonly used sentencing enhancement under the United States Sentencing Guidelines, the career offender designation, sets an individual's Guidelines range on the statutory maximum of their crime of conviction. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM'N 2015). As a result, a decrease in the maximum sentence could also lower an individual's Guidelines range.

48. Maxwell Tani, *Democrats and Republicans in Congress Actually Found Something to Agree On*, HUFFINGTON POST (Mar. 30, 2015, 4:21 PM), http://www.huffingtonpost.com/2015/03/30/bipartisan-summit-criminal-justice_n_6971242.html; Justice Safety Valve Act of 2015, S. 353, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/s353>; Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/s502>. In fact, the most recently introduced sentencing reform legislation, the Sentencing Reform and Corrections Act of 2015 (S. 2123), also includes such a provision with regard to the FSA. Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/s2123>.

49. *Id.*

50. Justice Kennedy has used his time in oral argument to explore the possibility of clemency, namely commutations, as a way to address federal criminal justice issues. Transcript of Oral Argument at 40–41, *Dillon v. United States*, 560 U.S. 817 (2010) (No. 09–6338).

51. 18 U.S.C. § 924(e)(2)(B) (2012).

52. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2015).

government does not have the luxury of direct statutory citations to offenses that qualify as a “strike.”⁵³ Instead, the Armed Career Criminal Act of 1984 (“ACCA”) and United States Sentencing Guidelines (“Guidelines”), advisory sentencing recommendations required in the federal system, define their respective terms by statutory elements or by a list of generic offenses (“burglary, arson, etc.”).⁵⁴ In addition, the definitions include identical catchall provisions following the list of generic offenses. These clauses are commonly referred to as a “residual clause.”⁵⁵ It is in interpreting these clauses where there has been an explosion of litigation in the past ten years, with the scope of what constitutes a “violent felony” or “crime of violence” seemingly shrinking every year.

First, the Supreme Court ruled that only crimes that were purposeful, aggressive, or violent would qualify under the residual clause.⁵⁶ Reviewing circuits held this to mean that strict liability and negligent and reckless offenses no longer fit under the catchall provision.⁵⁷

Second, the Court looked to statistics to evaluate whether crimes were as likely to lead to injury as a “burglary,” which was the offense the Court felt was the least violent of the enumerated crimes.⁵⁸ These two cases excluded several crimes from use as a “violent felony” or “crime of violence” to enhance the mandatory minimum or Guidelines range, respectively.⁵⁹ However, just as with the FSA, the question was whether the change would actually help those previously affected.

As with any criminal law Supreme Court ruling, one key question is whether the Court’s holding will apply retroactively. Unless there is an explicit statement on the subject, this involves analysis of the case under principles set forth in *Teague v. Lane*.⁶⁰ With regard to the ACCA, circuits have held that *Begay*, *Chambers*, and other cases apply retroactively, in large part because the mandatory-minimum sentence the individual is serving under the ACCA would be above the ten-year maximum sentence the individual would have otherwise faced under 19 U.S.C. § 922(g).⁶¹

53. For example, Minnesota defines “crime of violence” by specific statutory cross-reference. MINN. STAT. § 624.712(5) (2015).

54. 18 U.S.C. § 924(e)(2)(B); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

55. David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 211 (2010).

56. *Begay v. United States*, 553 U.S. 137, 144–45 (2008).

57. *Id.* at 147.

58. *Chambers v. United States*, 555 U.S. 122, 128–29 (2009).

59. There have been several other changes that have narrowed ACCA’s reach and the career offender enhancement for different reasons. *See, e.g.*, *James v. United States*, 550 U.S. 192, 223–24 (2007) (addressing the level of “force” necessary to meet the first prong of the definition); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (minimizing the use of the modified categorical approach in analyzing whether a prior conviction met the definition).

60. *Teague v. Lane*, 489 U.S. 288 (1989).

61. *See, e.g.*, *Welch v. United States*, 604 F.3d 408, 413–15 (7th Cir. 2010) (addressing *Begay* and *Chambers*); *Lindsey v. United States*, 615 F.3d 998, 1000 (8th Cir. 2010) (holding

However, the same has not held true for the identically worded career-offender designation under the Guidelines, the required first step in the federal sentencing process that results in a narrow recommended sentencing range. For those sentenced under the pre-*Booker* Guidelines, which are binding on the sentencing court, circuits have allowed relief in an analogous fashion to ACCA offenders.⁶² The same is not true for those facing advisory Guidelines designations, regardless of whether their resulting sentences conform with the designation's recommendation.⁶³ This is because the Guidelines are only advisory, and individuals could still have "legally" received their sentences. As a result, the circuits have deemed such errors not to be "miscarriages of justice" or cognizable on postconviction review.⁶⁴ This is just one hurdle to litigating these issues on past cases.⁶⁵ However, the ground is still unsettled on this front, with active and very recent litigation changing the scope of the definitions going forward.

Much of the substantive work on the violent felony/armed career criminal front may now be over. In the *Johnson v. United States* opinion, the Supreme Court ruled that the residual clause of the "violent felony" definition is unconstitutionally void for vagueness.⁶⁶ The Court held that the clause "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates."⁶⁷ However, the same questions remain in terms of applicability to career offenders⁶⁸ and individuals who were already sentenced under even the ACCA.⁶⁹ While this was a visible iceberg with potential impact for thousands of individuals, there remains much more not as

Begay to be retroactive); *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) (holding *Chambers* to be retroactive).

62. See, e.g., *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011).

63. Though not every circuit has addressed the issue of whether designation errors made clear by *Begay*, *Chambers*, or other cases are cognizable on postconviction review, all circuits have denied relief. See, e.g., *Whiteside v. United States*, 775 F.3d 180 (4th Cir. 2014) (en banc); *Hawkins v. United States*, 706 F.3d 820 (7th Cir. 2012); *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011); *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (en banc).

64. *Id.*

65. With the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), there are now significant limitations on when individuals can file federal postconviction motions and filing second or successive petitions. Pub. L. No. 104-132, 110 Stat. 1220.

66. *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015).

67. *Id.*

68. Courts that have previously addressed the question of whether the career offender guideline was subject to vagueness challenges have come up with mixed results. Compare *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990) (stating that the Guidelines are not susceptible to vagueness challenges), and *United States v. Smith*, 73 F.3d 1414, 1417-18 (6th Cir. 1996) (same), and *United States v. Tichenor*, 683 F.3d 358, 367 (7th Cir. 2012) (same), and *United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) (same), with *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (permitting Guidelines vagueness challenges), and *United States v. Maurer*, 639 F.3d 72, 77-78 (3d Cir. 2011) (implying that vagueness challenges are permitted).

69. Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 56 (2015), http://columbia-lawreview.org/residual_litman/.

visible that affects even more who were sentenced to much more time in prison.

In the 1980s, a call rose up from liberals and conservatives for sentencing reform that led to greater uniformity in sentencing and for sentences that reflected “real conduct.”⁷⁰ This led to the Sentencing Reform Act of 1984, which established the United States Sentencing Commission (“Commission”) and instructed it to create federal sentencing guidelines.⁷¹ The result was the United States Sentencing Guidelines. Before the 2000s, these Guidelines essentially bound judges to small ranges, expressed in months, within much larger statutory sentencing ranges.⁷² However, starting with a series of cases that were foreshocks,⁷³ eventually the federal sentencing earthquake hit.

In January 2005, the Court held that requiring sentencing courts to impose sentences within the Guidelines violated the Sixth Amendment jury right.⁷⁴ Because the Guidelines were mandatory (as they rose and fell based on judicially found facts), they violated the same principles reviewed in *Apprendi* and *Blakely*. Despite these constitutional concerns, circuit courts have not held that the changes in *Booker* are retroactive.⁷⁵ Even when resentencing based upon changes in Guidelines that are retroactive, or as a result of some other matter, sentencing courts still apply the Guidelines with mandatory effect as if the resentencing occurred prior to *Booker*.⁷⁶ As a result, many individuals serving long sentences (which even the sentencing courts did not want to issue) unfortunately stand without judicial remedy. Even when the Guidelines change due to practical or political reasons, there are often many left to suffer under outdated calculations.

In addition to judicial changes to the Guidelines—the “lodestone” of federal sentencing⁷⁷—the Commission has also changed individual guidelines that reflect changes in policies with regard to federal sentencing.⁷⁸ Unfortunately, these changes are also unavailable to many current inmates. As a part of the Commission’s work, the agency is required to promulgate

70. U.S. SENTENCING GUIDELINES MANUAL §§ 1A1.1(1)–(2) (U.S. SENTENCING COMM’N 2015); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 8 n.35 (2010) (calling Sen. Ted Kennedy and Sen. Strom Thurmond “strange bedfellows” with regard to their co-sponsorship of the Sentencing Reform Act of 1984).

71. Pub. L. No. 98-473, 98 Stat. 1987.

72. U.S. SENTENCING GUIDELINES MANUAL §§ 1A1.1(1)–(2).

73. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (stating that facts that increase the maximum sentence must be proven by a preponderance of the evidence in front of a jury or admitted to by the defendant.); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that the state trial court violated the Sixth Amendment by basing the sentence on facts that violated *Apprendi*).

74. *Booker v. United States*, 543 U.S. 220, 232–34 (2005).

75. *See generally* Nicholas J. Eichenseer, *Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System*, 2005 WIS. L. REV. 1137 (2005).

76. *See, e.g.*, *Dillon v. United States*, 560 U.S. 817, 829–30 (2010) (post-*Booker* principles do not apply to Guidelines modifications).

77. *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013).

78. 28 U.S.C. § 994 (2012).

amendments and policy statements so that the Guidelines remain “consistent with all pertinent provisions of any Federal statute.”⁷⁹ However, the Commission has the discretion to make those changes applicable to old cases, as it recently did with the series of cocaine-base and drug-quantity-offense-level amendments.⁸⁰ The Commission has issued several such amendments in recent years, including narrowing the scope of criminal activity subject to inclusion in the individual’s offense level⁸¹ and a provision that increases the criminal history score for committing an offense recently after release.⁸² Even recent changes to offense levels for fraud, which increase the dollar amounts for given levels, are not applied retroactively.⁸³ While future individuals will benefit from these shifts in policy, those already in prison serving sentences under the outdated Guidelines cannot benefit from the modifications.

These legislative, judicial, and executive shifts reflect just a small portion of the recent changes to federal criminal sentencing. They speak largely to direct and numerical shifts in sentence lengths. However, in a world focused on numbers, they represent major changes for individuals who already went through the federal criminal justice system.⁸⁴ As federal practitioners and clinicians can attest, there are a significant number of people whose sentences would be different if sentenced today. However, few changes are within reach of that population, and many struggle with why changes to make rules fairer, legal, or constitutional do not apply to them. This frustration is often matched by students working through how a system could come to an incorrect or unfair result and not have a way to remedy the situation. That is where President Obama has an opportunity to once again help law students while also helping spread mercy.⁸⁵

79. *Id.* § 994(a).

80. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (U.S. SENTENCING COMM’N 2015); *U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences*, U.S. SENTENCING COMM’N (July 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

81. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 439 (U.S. SENTENCING COMM’N 2015).

82. *Id.* amend. 742.

83. *Sentencing Commission Proposes Amendments to Federal Sentencing Guidelines*, FAMILIES AGAINST MANDATORY MINIMUMS (Jan. 12, 2015), <http://fammm.org/sentencing-commission-proposes-amendments-to-federal-sentencing-guidelines/>.

84. Another area of note, one beyond the scope of this particular topic, has to do with the aging prison population. The number of elderly inmates in the federal system and state correctional systems are at all-time highs. This increase leads to increased costs as a result of medical care and other specialized services. Even if their sentences may not change, these individuals may also be a source pool of potential clemency applicants. Such releases would benefit the inmate and also the financial condition of our prison systems. See Sari Horowitz, *The Painful Price of Aging in Prison*, WASH. POST (May 2, 2015), <http://www.washingtonpost.com/sf/national/2015/05/02/the-painful-price-of-aging-in-prison/>.

85. From 1992 until his election to the Senate, President Obama served as a professor at The University of Chicago Law School. Robin I. Mordfin, *From the Green Lounge to the White*

III. CLEMENCY: TOOLS FOR THE CLIMB

While some may think that the Great Writ stands alone to ensure that no problem in criminal law goes unanswered,⁸⁶ another tool stands alongside to help right wrongs that may otherwise go unresolved. While presidents have used clemency over the years to right wrongs and affect social change, clemency has been used less frequently in recent decades.⁸⁷ But with the renewed interest by President Obama, new life is filling this historical procedure.

Clemency as an executive power is designed to accomplish multiple goals, including amelioration of injustices and correction of legal errors.⁸⁸ In many ways, clemency is a critical and integral part of the criminal justice system—one that courts explicitly rely on in applying the rules of criminal procedure.⁸⁹ The Framers initially did not include clemency language in the constitution but ultimately decided to give the president virtually unlimited clemency authority.⁹⁰

The use of this power included situations in which the law provided for an unfair result.⁹¹ One of the primary reasons that this usage has decreased is the rise of indeterminate sentencing, parole, and greater appellate review of convictions and sentences, which have created greater error-correcting and mercy potential outside of the executive branch.⁹² However, as the discussion above demonstrates,⁹³ that was then, this is now, and many individuals cannot avail themselves to mercy or legal remedy through non-existent parole or judicial review. The most recent trend is a shift toward clemency to right the wrongs of statutory limitations and other aspects of our evolving criminal justice system.⁹⁴

The federal criminal legal world changed on December 19, 2013, with the issuance of eight commutations.⁹⁵ While the announcement of the petition grants did not contain detailed explanations of any policy change,⁹⁶

House, THE RECORD ONLINE (Alumni Magazine), <http://www.law.uchicago.edu/alumni/magazine/spring09/greenloungetowhitehouse>.

86. *Fay v. Noia*, 372 U.S. 391, 399–402 (1963).

87. *Clemency Statistics*, DEP'T OF JUSTICE, <http://www.justice.gov/pardon/clemency-statistics> (last visited July 14, 2015).

88. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 252 (2003).

89. *Id.* at 253.

90. Jeffrey Crouch, *The President's Power to Commute: Is It Still Relevant?*, 9 U. ST. THOMAS. L.J. 681, 684 (2012).

91. THE FEDERALIST NO. 74 (Alexander Hamilton).

92. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1491–92 (2000).

93. *See supra* Sec. II.

94. Love, *supra* note 92, at 1501.

95. Press Release, Barack Obama, President of the United States of America, President Obama Grants Pardons and Commutation (Dec. 19, 2013), <https://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation>.

96. *Id.*

people immediately began to wonder if this was a shift in policy toward drug convictions and sentences, especially those based on outdated crack cocaine sentencing ratios.⁹⁷ President Obama later issued a statement confirming that the clemency grants were for individuals “sentenced under an unfair system” and asked for more petitions that would meet similar criteria.⁹⁸

While many wondered just how wide the scope of those criteria might be, the Department of Justice, charged with helping orchestrate the presidential clemency power, provided the qualifications for the new initiative.⁹⁹ These included that the individual would have been eligible for a different sentence today, similar to the situation of those who received the initial grants.¹⁰⁰ However, there were also other qualifications, such as no violence in the present offense and criminal record, service of at least ten years of the original sentence, and absence of significant ties to large-scale criminal organizations.¹⁰¹ Review of the criteria required significant outreach and detailed review of applications and records, so the Department of Justice tasked the Bureau of Prisons (“BOP”), the corrections-wing of the federal government, with notifying inmates and inspired the formation of Clemency Project 2014, a pro bono organization of outside, independent groups.¹⁰² Clemency Project 2014 reviews potential clemency petitions for qualification under the criteria.¹⁰³

By October 2014, Clemency Project 2014 had received over 25,000 applications for review.¹⁰⁴ While many attorneys volunteered to review the cases,¹⁰⁵ the project initially lost one of its largest sources of attorney support: the work of federal defenders.¹⁰⁶ That void led to having less than

97. Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES (Dec. 19, 2013), <http://www.nytimes.com/2013/12/20/us/obama-commuting-sentences-in-crack-cocaine-cases.html>.

98. *Id.*

99. Press Release, James M. Cole, Deputy Attorney General, Announcing New Clemency Initiative, Deputy Attorney James M. Cole Details Broad Criteria for Applicants (Apr. 23, 2014), <http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

100. *Id.*

101. *Id.*

102. *Id.* The organization includes the Federal Defenders, American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers. CLEMENCY PROJECT 2014, <http://www.clemencyproject2014.org> (last visited July 16, 2015).

103. *Id.*

104. *Clemency Project Well Underway and Reviewing Thousands of Federal Prisoner Applications*, CLEMENCY PROJECT 2014 (Oct. 31, 2014), <https://www.clemencyproject2014.org/media/141031>.

105. Clemency Project 2014 reported that as of October 2014, over 1,500 attorneys had volunteered for the project. *Id.*

106. The Administrative Office of the Courts, an organization that provides some oversight for the Federal Defenders services, issued a memorandum that effectively bars such lawyers from drafting or submitting clemency petitions. Alia Malek, *Federal Defenders Barred from Massive*

one-quarter of applications under review by that same time.¹⁰⁷ Enthusiastic law clinic students are one source to fill that void, and they could learn tangible skills, substantive knowledge, and social justice while doing so.

Clemency clinics would not be a new invention as a result of President Obama's initiative. Law schools such as the University of Akron School of Law,¹⁰⁸ Columbus School of Law,¹⁰⁹ and the University of Michigan Law School¹¹⁰ have established clemency-based clinical programs. However, most clinics focus on the pardon power as a part of Innocence Project-style work, trying to exonerate the actually innocent, or dedicate their efforts to a particular class of individuals, such as the Michigan Women's Justice & Clemency Project.¹¹¹ In addition, there is very little literature on the subject of clemency clinics—commutation or otherwise—to guide their formation and provide insight as to their challenges and benefits.

For commutations, especially those for federal inmates, the honor of being the first in the field goes to the University of St. Thomas School of Law and Professor Mark Osler.¹¹² Students in Professor Osler's clinic interact with clients and provide them with guidance and assistance in the federal commutation process.¹¹³ It was in following that vision, with the renewed push from President Obama's clemency initiative and the desire to expand clinical opportunities and criminal justice system education opportunities, that the University of Wisconsin Law School aimed to serve clients and students through federal commutations.

Clemency Drive, AL JAZEERA AMERICA (Aug. 1, 2014), <http://america.aljazeera.com/articles/2014/8/1/drugs-clemency-attorneys.html>.

107. See *Clemency Statistics*, *supra* note 87.

108. *The Clemency Project*, UNIV. OF AKRON SCH. OF LAW, <http://www.uakron.edu/law/clinical/clemency.dot> (last visited Aug. 5, 2015).

109. *Innocence Project Clinic and Clemency Project*, THE CATHOLIC UNIV. OF AMERICA, <http://clinics.law.edu/innocenceproject.cfm> (last visited Aug. 5, 2015).

110. *Michigan Women's Justice & Clemency Project*, UNIV. OF MICH. LAW SCH., <http://www.umich.edu/~clemency/index.html> (last visited Aug. 5, 2015).

111. See *supra* notes 109–10.

112. Kate Metzger, *Federal Commutation Clinic at School of Law the First in the Nation*, U. ST. THOMAS NEWSROOM (Sept. 12, 2011), <http://www.stthomas.edu/news/federal-commutation-clinic/>. More recently, Professor Osler and the NYU School of Law founded the Clemency Resource Center, a pop-up law office housed at the NYU School of Law with the sole purpose of preparing and submitting federal clemency petitions under the President's new clemency initiative. *Clemency Resource Center*, NYU SCH. OF LAW, <http://www.law.nyu.edu/centers/adminof-criminallaw/clemency> (last visited Feb. 24, 2016).

113. The clinic is a two-credit, fall semester opportunity for up to a total of four students. *Federal Commutation Clinic*, U. ST. THOMAS SCH. OF LAW, <http://www.stthomas.edu/ipc/legal/fedcom/> (last visited Aug. 5, 2015). In addition, West Virginia University College of Law's West Virginia Innocence Project is also now devoting clinical efforts to the new clemency initiative. Kate White, *WVU Law Students Work on Federal Clemency Petitions*, CHARLESTON GAZETTE-MAIL (July 19, 2015), <http://www.wvgazette.com/article/20150719/GZ01/150719300/1101>.

IV. THE UNIVERSITY OF WISCONSIN LAW SCHOOL CLEMENCY WORK: A CLIMBING PARTY FOR THE JOURNEY

To say that the clemency work at the University of Wisconsin Law School was “designed” is a little bit like saying MacGyver “designed” his contraptions to escape ticking time bombs. Both were born of serendipity, urgency, and need. In the Remington Center federal clinics, students were experiencing legal problems or injustices for which there was no clear remedy.¹¹⁴ While they could see the various parts of the criminal justice system, from offense and arrest onward and identify problems or changes, the students could not find a way to experience the complete arc of the system. This meant less experience improving social justice and fewer opportunities for advocacy skills education. The clinic started quickly following the President’s announcement of the new initiative, and work carries through to today. While the work has great promise for educating students, there are many challenges that the clinic faced that others can learn from and craft an even better student and client experience.

When President Obama issued his commutations in 2013, the students in the Oxford Federal Project latched onto the opportunity to be a part of the “system” while also working toward true social justice—the goals of the Remington Center.¹¹⁵ There were challenges along the way, but the students in 2013 and those who followed have had the opportunity to not only observe the criminal justice system from beginning to end but also to play a part in that system. Their work and experience can serve as a window for other schools looking to serve clients and educate students in a similar clinical setting.

In following with the traditions of the Remington Center clinics, once the decision was made to venture into clemency work, the clinics focused on giving students maximum responsibility over cases while expecting (and facilitating) the highest level of work product.¹¹⁶ For example, four students’ experiences display the clinic’s challenges and benefits. Student A was a third-year student who did not have any experience with federal law, including any clinical work. Student A worked on five applications in a “mini-clinic” devoted just to this clemency work. Students B and C were third-year students formerly in the Oxford Federal Project. These two students also had additional federal and state criminal law experience. They worked on a single application during their final semester of law school, again as a stand-alone clinical experience. Student D was a second-year student concurrently enrolled in the Oxford Federal Project, so he had some federal criminal law experience, but not to the extent of Students B and C.

114. *See supra* Sec. II.

115. *See supra* note 32.

116. *See Pray & Lichstein, supra* note 35.

Student D worked on a single application as a part of his Oxford Project duties.

The students all started working in the fall of 2014, following the formalized roll-out of Clemency Project 2014, from which the clinic received its applicants.¹¹⁷ The students' work included communicating with the clients, who all filled out electronic surveys provided by the BOP,¹¹⁸ along with the process of collecting and reviewing court and BOP documents to determine whether the applicant qualified under the new initiative's criteria. This area presented the particular challenges that may speak to the feasibility of such clemency work for law school clinics. However, these difficulties also provide additional learning opportunities for students.

Many of the clemency initiative's criteria, such as whether the individual's sentence would be different today, require complicated analysis of sentencing information, court records, and BOP documents. This includes review of the individual's presentence investigation report ("PSR"), which contains the preliminary, and often final, Guidelines calculation.¹¹⁹ However, obtaining the PSR is difficult.¹²⁰ Federal rules, as well as court practice, significantly limit disclosure of these documents, especially absent a court order.¹²¹ In addition, most inmates are not able to possess their PSRs while incarcerated, so they cannot provide them to their attorney.¹²² As a result, this critical component was often difficult to obtain.

Additionally, since individuals must have served at least ten years of their sentence, many documents—even public court records—are not available electronically,¹²³ and most files are likely archived.¹²⁴ Retrieving these documents requires fees that some clinics, especially those without dedi-

117. See *supra* note 99.

118. *Id.*

119. *Necessary Documents and How to Obtain Them for Federal Defenders*, DEFENDER SERVICES OFFICE/TRAINING DIVISION, <http://www.fd.org/docs/select-topics/sentencing-resources/clemency-necessary-documents-and-how-to-obtain-them.pdf?sfvrsn=7> (last visited Aug. 5, 2015).

120. Given the nature of the document's content, including personally identifying information, as well as information that could lead to danger or further criminal liability for the individual, protection of the document is understandable.

121. Keith A. Findley & Meredith Ross, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 848–49 (1989). Federal Rule of Criminal Procedure 32 also guides disclosure of the PSR, but gives courts discretion over any broader disclosure beyond that listed in the rule. Requiring a court order could make assisting clemency applicants difficult for law school clinics if they are not located in the district of conviction. It is worth noting that Clemency Project 2014 has announced a new procedure to accomplish a more efficient disclosure of the PSR from the BOP. *Untitled BOP PSR Release Form*, CLEMENCY PROJECT 2014, https://www.clemencyproject2014.org/ref/materials/_documents/bop%20psr%20consent.pdf.

122. BUREAU OF PRISONS, PROGRAM STATEMENT 1351.05: RELEASE OF INFORMATION 16 (2002), <http://www.lb7.uscourts.gov/documents/10-16281.pdf>.

123. The federal court online record system, PACER, contains court records, but the availability of the records varies by each court. For example, the Northern District of Illinois's electronic filing system, and therefore its electronic file access, started on January 18, 2005, so documents filed before that date would not be readily available online. *Court Information*, U.S. COURTS,

cated funding, may not be in a position to pay.¹²⁵ One way to solve this dilemma would be to obtain the materials directly from prior counsel, who would have access to both the confidential and public documents in their files. However, that has proven to be challenging. With cases over ten years old, and many much older than that, many attorneys have left their practice for one reason or another. Some attorneys could not be located or had passed away, so their files remained out of reach.

Even when students could find clients' prior attorneys, it was unlikely that the attorneys even had the necessary documents. There is no universal rule with regard to the retention of client files, and there are a variety of policies among states. Many states, including Wisconsin, require retention of files for a period of less than ten years, so many files were destroyed before the inmate even became eligible under the initiative.¹²⁶ With fiscal or legal barriers to obtaining documents from the courts, and with the files being unavailable from prior counsel, the necessary information to represent the applicants was difficult to obtain.

Even once the students obtained the information, the next step—the review—demonstrated that creating a project around the new clemency initiative would prove difficult and may not have the desired clinical education results. The first problem with this clemency initiative from an educational perspective is the focus on sentencing. While commutation is uniquely focused on sentences—a worthy aim—it offers only a limited perspective on the federal criminal justice system. While the students will learn about the Guidelines, statutory sentencing regimes, and judicial developments, there is little focus on failures of process, evidentiary issues, or other critical aspects of a well-rounded criminal law education. Although there is some tangential review of the role of police, prosecutors, and other actors within the system, the focus is more on the sentencing court and less on corrections.¹²⁷ Again, this limits the potential for commutation work to provide a wide “systems” education from investigation to sentencing.¹²⁸ However,

https://pacer.psc.uscourts.gov/psco/cgi-bin/courtinfo.pl?court=E_ILNDC&rss=y (last visited July 23, 2015).

124. Courts transfer criminal cases to the National Archives and Records Administration (NARA) for preservation after a certain time period. U.S. COURTS, GUIDE TO JUDICIARY POLICY, APPX. 6B: RECORDS DISPOSITION SCHEDULE 2 (2014), <http://www.uscourts.gov/file/vol10ch6appx6bpdf>. For example, in the Central District of California, cases before 2007 require retrieval from the NARA. *Archived Case Information*, U.S. DIST. CT. CENT. DIST. OF CAL., <https://www.cacd.uscourts.gov/records/archived-cases-information> (last visited July 23, 2015).

125. In the case of the Western District of Wisconsin, the court has established a \$64 fee for the first box retrieved and \$39 for each additional box. *Fee Schedule*, U.S. DIST. CT. WEST. DIST. OF WIS., <http://www.wiwd.uscourts.gov/fee-schedule> (last visited July 23, 2015).

126. *Materials on Client File Retention*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch/materials_on_client_file_retention.html (last visited July 23, 2015).

127. The criteria include “good prison conduct,” so students have the opportunity to review and experience correctional discipline and process.

128. See Ross, *supra* note 28, at 789.

even in sentencing (the substantive area where clemency has significant opportunity for review), the chances of a broad-field view of the practice are small under the new initiative.

While clemency as a whole may provide a chance to explore any of a number of changes in or components of a criminal case, the President's criteria is somewhat narrow. The qualifications focus on a number of otherwise non-retroactive changes that have the potential to explicitly and numerically change an individual's sentence if he were sentenced today.¹²⁹ While this is good news to those who are experiencing the ill effects of those outdated sentencing structures, in some ways such work does a disservice to students. Instead of client-centered work exploring the sentencing process from start to finish, the process focuses on discrete components, such as the career offender designation, drug quantity determination, and other somewhat nuanced aspects of sentencing.

Depending on the length of a student's tenure in the clinic, they may only see one or two clients in a single semester placement, further limiting the nature of their experiences. For example, Student A was in the program for over one year and worked directly with five different applications. He was able to work with questions about the application of drug quantities and specific offense characteristics, the career offender designation, and charging policy, among other things. On the other hand, Students B, C, and D (whose time with the program was limited to only one semester and thus only one client-applicant) had experiences that were much narrower.

In order to truly gain a quality substantive legal education through such clemency projects in the field of criminal law—at least in the realm of sentencing—a student would need to experience a great number of cases and thus spend a significant amount of time in the clinic. Otherwise, exposure to the topic and the application of skills training is constricted significantly. In addition, if the client-applicant is not eligible after initial review, entire aspects of advocacy training, such as the crafting of the petition and narrative, will be out of reach. This is also true with regard to the other side of the equation: social justice through working with the underserved.

The focus of many clinics, if not the vast majority, is the exploration of social justice through client contact.¹³⁰ For example, in the Remington Center, students communicate directly with clients on a regular basis through in-person meetings, phone calls, and letters. It has become a core component of the Center's mission.¹³¹ While there is a federal facility in Wisconsin (FCI-Oxford), and Oxford Project students regularly meet with their clients, students who engaged in clemency work were not as lucky.

129. Many of these changes are the very "problems" addressed above postconviction attorneys and clinics, and their clients, were experiencing. *See supra* Sec. II.

130. Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 BOSTON COLL. J.L. SOC. JUSTICE 331, 331–32 (2012).

131. *See* Pray and Lichstein, *supra* note 35.

Through consultation with others, the clinic chose to work with clients whose cases arose in the federal district courts in Wisconsin.¹³² This option ensured that students could file the necessary court documents to obtain forms, including PSRs. The unfortunate side effect of this choice was that all clients were located out of state.

With limited funding, travel for in-person meetings was not possible during the initial run of the clemency work. Instead, work with the clients was limited to phone calls and written correspondence, decreasing the client-centeredness of the experience. The limited nature of client interaction of the initial screen process, where many of our cases ended, compounded this weakness. The paper review did not give the students the opportunity to explore as much social justice and criminal justice systems as would be possible. However, in this area and others, “when one door closes, another opens.”¹³³

While the students who have done the initial clemency work have not had the amount of client contact as other students and had a limited-scope substantive education, the students walked away with significant experience arising from the growing pains of the new initiative. For example, with regard to the difficulty in obtaining documents, through the cooperation of the District Court for the Western District of Wisconsin and the Probation and Pretrial Services Office in the district, the students worked out a process for obtaining archived documents and those that are confidential or sealed. They could contact the probation office to obtain documents the office had on file, and that office would work with the court for necessary approval and retrieval of other documents for review. The process balances the interest of the court in the protection of their sensitive documents while granting access to critical documents in the clemency process. Such work represents the “systems” educational approach at a micro level. Students had to work through the court “system” to obtain documents, just as they will in practice. If a door was shut, such as a prior attorney no longer having a document, dedication to the client requires trying another door. This dedication, creativity, and systemic understanding is a critical skill for a new lawyer.¹³⁴ And with those skills comes the opportunity for education in the field.

With regard to substantive education, there was an easy remedy. To go along with the clinical work, whether it was for one client or five, a com-

132. There were two key reasons for this decision. First, selecting cases from Wisconsin gave an increased connection to prior attorneys and families of the defendants. Second, and perhaps more importantly, if there were difficulties obtaining court records, such as presentence reports, an appearance could be filed in the court to move the court for leave to obtain the document. That process may be more difficult in other federal district courts.

133. This is a portion of a quote universally attributed to Alexander Graham Bell.

134. Marjorie Schultz & Sheldon Zedeck, *Looking Good on Paper is Low Indicator of Effective Lawyering*, UNIV. OF CAL. BERKELEY LAW (Aug. 10, 2011), <https://www.law.berkeley.edu/article/looking-good-on-paper-is-low-indicator-of-effective-lawyering/>.

panion seminar grounded in the clemency initiative could supplement the experience gained through direct client service. The overall clemency program actually offers a vast potential education in federal sentencing when moving beyond a single client or two and their unique situations. The changes noted above, coming from Congress, courts, the Commission, and others, cover the full expanse of sentencing at the federal level. The Guidelines have undergone numerous changes, so a review of the Guidelines geared toward clemency could cover the Guidelines process and substance. Such a course is critical to quality representation of a clemency client, especially with students who have little to no experience in the field, so it really would kill two birds with one seminar stone. There is significant work and time necessary for creating such a course, but it provides dividends for all involved.

Finally, with regard to client contact, while there was not much, if any, face-to-face contact, there was significant contact in other ways. Students spoke on the phone with their clients and frequently wrote to them. Such contact is often the norm for federal appellate practitioners, where their clients may be located across the country from their court of conviction. The skill of developing rapport without face-to-face communication is an important one. In-person meetings are sometimes difficult due to cost, distance, and time, but rapport remains vital to quality representation.

The federal system also offers the unique possibility of inmate e-mail through a system called TRULINCS.¹³⁵ E-mailing clients has become the norm in legal practice, especially outside criminal law, where most of the University of Wisconsin Law School clinic students will end up practicing after graduation. However, there are significant challenges relating to content, tone, confidentiality, and other aspects of the medium.¹³⁶ These concerns are all the more significant given that the e-mail system is not confidential, even for attorney-client communications, and the BOP and federal government both monitor it.¹³⁷ This requires extra care and training but provides a wonderful opportunity for students to develop professional habits when it comes to electronic client communications.

As with many fields of law, there are significant possibilities for clinical education in clemency. Clients could receive excellent legal service from excited and dedicated law students, who in turn learn about the prac-

135. *Stay in Touch*, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/inmates/communications.jsp> (last visited Aug. 5, 2015).

136. Kristin J. Hazelwood, *Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices That Comply with the Ethical Duties of Confidentiality, Competence, and Communication*, 83 MISS. L.J. 245, 246–47 (2014); Marian C. Rice, *Email Communications with Clients*, A.B.A. L. PRAC. (Jan.–Feb. 2013), http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/ethics.html.

137. Stephanie Clifford, *Prosecutors Are Reading Emails From Inmates to Lawyers*, N.Y. TIMES (July 22, 2014), <http://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html>.

tice of law and the federal criminal justice system, with an emphasis on sentencing. However, great care needs to be given to ensure that the work can help those it serves—both the clients and the students.

V. CONCLUSION: STILL ON THE WAY TO THE SUMMIT

At the convergence of changing attitudes about criminal justice and the evolving nature of legal education stands opportunity. However, no one said change would be easy. The clemency work at the University of Wisconsin Law School is ongoing, as it is at law schools across the country. However, even at these early stages, there are a few important takeaways with regard to the work.

First, when providing clinical opportunities, especially with an eye toward the new ABA requirements for six credits of experiential learning, there are important caveats. Depending on when a student takes over a case, reviewing an entire application can take longer than a semester to complete. While this is not necessarily a problem, it may result either in transfer or take-over by the supervisor, causing delays.

However, if the aim is to have a student's work reach some conclusion, whether the result is a clemency petition or an explanation of ineligibility, a significant amount of preparation may need to be done by the clinic staff, such as collecting records or establishing communications with clients. This would mean that students would be missing out on building two critical skills. There may not be an answer to the situation, and it may not be a problem, but it is something to consider.

Another major consideration is the students' substantive education. As mentioned above, the students who were most successful in their early work were those who had prior federal criminal clinic experience, along with the broad-field seminar that accompanied it. It was only after Student A was in a concurrent seminar that his work started to gain traction. Law students have little direct experience with federal criminal procedure, especially sentencing. The Guidelines are exceedingly complicated, and that complexity is magnified due to the need to analyze changes in their components and shifts in case law. A clemency program needs a seminar component that either precedes or happens alongside the clinic work. For an experience where the students take the lead in the work and gain the best educational value, they need to be properly equipped.

Third, there are also the significant practical challenges of clemency work, such as record collection and client identification. These include the choices of where clients will come from. That is, whether to accept clients convicted in a district or incarcerated in a facility near the clinic. Each option has its own advantages, as mentioned above in Section IV.¹³⁸ Much of this work can be done before the clinic begins or accepts students. How-

138. *See supra* Sec. IV.

ever, the initiative may have an effective deadline of the end of President Obama's term, so the clock is ticking. The development of an effective clemency clinic requires deliberate preparation, but this must be done in short order.

While the University of Wisconsin Law School's clemency work has just started to hit its stride,¹³⁹ there is great promise for the initiative and clinical education's role in the work. Significant shifts in criminal justice have come and gone, but have left many behind. Clemency offers one method to apply these reforms to those serving sentences that have been deemed unwise by the very entities that enacted them in the first place.¹⁴⁰ Law students can help correct that injustice, learn about the criminal justice system, and work toward social justice simultaneously. Reviewing files and advocating for clients can equip students to be thoughtful and prepared practitioners. However, the promise for clients and students, as well as for law schools looking for new ways to educate their students, comes with initial and ongoing challenges. Through thoughtful consideration and preparation, climbers can summit the mountain and plant the flag of justice at the peak.

139. Of the eight applicants with whom the students began working, four of the cases have been closed, the clinic has submitted two petition, and the clinic continues to work on drafting petitions for the remaining two.

140. While clemency may be one potential remedy, to date, the promise has not led to results. The Obama administration has set a record for the number of clemency applications that have been denied or closed without presidential action, and the number of all types of grants has remained as low as it has for the last six presidential administrations. P.S. Ruckman, Jr., *So Little Mercy, And a Year to Go!*, PARDON POWER BLOG (Feb. 20, 2016), <http://www.pardonpower.com/2016/02/so-little-mercy-and-year-to-go.html>.