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Clemency Must Play a Pivotal Role in Reversing the Damage Caused by the "Tough on Crime Era"

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ARTICLE

CLEMENCY MUST PLAY A PIVOTAL ROLE
IN REVERSING THE DAMAGE CAUSED BY
THE “TOUGH ON CRIME ERA”

MARK V. HOLDEN*

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We must develop and maintain the capacity to forgive. He who is devoid of the power to forgive is devoid of the power to love. There is some good in the worst of us and some evil in the best of us. When we discover this, we are less prone to hate our enemies.

– Martin Luther King, Jr.

I. INTRODUCTION

Bryan Stevenson of the Equal Justice Initiative has explained that to care about an issue and be able to remedy it, you must be proximate to it. Those closest to the problem are best equipped to address it.¹

From a young age I have been proximate to the criminal justice system. My personal experiences, first as a prison guard while in college, then as general counsel of Koch Industries, opened my eyes to the dire need for a more sane and effective system. I also have been fortunate to advocate for

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1. See generally BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014).

common-sense criminal justice reforms as part of my job over the past decade.

Any illusions I had about the criminal justice system quickly dissipated when I worked as a prison guard in Worcester, Massachusetts, in the early 1980s during the “Tough on Crime Era.” I saw the failings of our system firsthand: on the other side of the bars were former classmates and friends with whom I played sports throughout high school. I was fortunate not to end up as an inmate. I had better opportunities, strong parents, and luck on my side. Some of my former classmates and friends were not so lucky, and their poor choices led them to prison.

Driven more by political considerations than public safety concerns, from the 1970s forward, punitive measures were used as the solution to ensure public safety and address criminal behavior. Instead of rehabilitation, the focus was on retribution and warehousing, which only made things worse. As is still often the case today, when my former classmates left prison, most could not find support, housing, or jobs, and soon returned to prison.

They were trapped in a destructive cycle, even though they had paid their debt to society—but society never truly forgave that debt. As many as one in three Americans with a criminal record experience the same situation today: they leave a physical prison only to land in a virtual prison for the rest of their lives, often relegating them to poverty, homelessness, and despair. The current system still creates barriers to opportunity for the least advantaged, producing what Professor Bruce Western, Director of the Justice Lab at Columbia University, calls a generational “poverty trap”: a cycle of poverty, despair, and incarceration at the very bottom of American society.²

While the data-driven reforms started by the states in 2007 have made the system better, there is still a long way to go before we can ensure equal justice and equal rights for the formerly incarcerated. The reforms overwhelmingly prove that crime rates can be safely reduced, while simultaneously reducing prison populations. These reforms focused on enhancing public safety, advancing rehabilitation, and providing returning citizens an opportunity to change their lives to become a positive force for good in their communities.

Though many more reforms must be implemented to improve the criminal justice system, the federal First Step Act (“FSA” or the “act”) was a major accomplishment. It is the first comprehensive federal criminal justice reform bill based on data and science and focuses on advancing rehabilitation rather than just implementing punitive measures. The FSA will help individuals returning from prison to society have a real second chance,

2. John Tierney, *Prison and the Poverty Trap*, N.Y. TIMES (Feb. 18, 2013), <https://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html>.

make our communities safer and better, and reduce the waste of human potential and resources of the past several decades.

While forward progress seems to move at a glacial pace, Article II of the US Constitution, which established the presidential power of clemency, is an important tool to provide relief for worthy individuals. It should be used more often to right individual injustices and to shine a light on the more egregious examples of draconian overreach in our system. Additionally, the clemency power should be used to make our system more just and fair.

II. UNDERSTANDING THE PROBLEM AND RECOGNIZING THE SOLUTION

I am extremely fortunate to have worked the past twenty-five years at Koch Industries. I have worked with many talented and passionate people, especially Charles Koch, our chairman and CEO. Mr. Koch cares deeply about removing external barriers to opportunity so that people can succeed, reach their full potential, and then help others do the same. One of the key issues we focus on is criminal justice reform because the current system is one of the great injustices of our time.³

The vision for a more effective and just system is straightforward. The system must provide for public safety as well as provide for equal rights and equal justice. It also must treat everyone involved in the system with dignity and respect. This includes crime victims, the accused, the incarcerated, law enforcement, returning citizens, and their communities. Finally, the system should be focused on rehabilitation, restoration, and redemption, so the 95 percent of people coming out of prison can get a real second chance and do not recidivate.

While working at Koch and in a prison, I have seen the system's failures firsthand. In the summer of 1995, a Koch refinery in Corpus Christi, Texas, discovered that an employee had filed a false quarterly report with the Texas state environmental regulator regarding benzene emissions.⁴ In response, the individual responsible was fired. That November, Koch employees met with the state regulator to disclose the issue and discuss the path forward. They explained that the refinery was out of compliance, they were working to bring the refinery back into compliance, and they would report back with the details after the investigation—all of which ultimately

3. Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal-Justice System is Racist. Here's the Proof*. WASH. POST (Sept. 18, 2018, 8:00 AM), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof>.

4. John Hinderaker, *Bloomberg Whiffs, Part 3*, POWER LINE BLOG (Oct. 6, 2011), <https://www.powerlineblog.com/archives/2011/10/bloomberg-whiffs-part-3-2>.

happened.⁵ This discussion was documented in the regulator’s official record of the meeting.⁶ As promised, the Koch employees subsequently advised the regulator after the facility was brought into compliance later that year.

This should have been the end of the issue, as other companies had faced similar issues in Texas and paid a regulatory fine. However, the federal government stepped in, claiming a cover-up had occurred. Four of our employees who worked to correct the issues were indicted by a federal grand jury on ninety-seven counts.⁷ The individual who had made the false statement was not charged and became a witness for the government. The federal government’s case against the company and our employees ultimately collapsed when Koch was finally allowed to challenge the government’s claims during an expert witness hearing less than a month before the trial.⁸ The government’s expert testified that sampling evidence used to prove criminal or civil violations of the benzene regulation had to be collected and analyzed according to a strict set of specific protocols set forth in the Environmental Protection Agency’s (EPA) regulations. However, on cross-examination, this expert admitted the samples the government relied upon for the basis of the prosecution had not been collected in accordance with the EPA’s rules.⁹ As a result, the government had no factual basis for its prosecution.¹⁰

The case was over-prosecuted from the start. We discovered that, during the grand jury process, key exculpatory evidence had been tampered with—someone had altered the official government record of the first meeting in November 1995.¹¹ The original record demonstrated that our employees fully disclosed the noncompliance in the first meeting with the Texas state regulator.¹² But the record used in the federal grand jury proceedings deleted that information to support the federal government’s false allegations that our employees never disclosed the information. In the end, the ninety-seven-count indictment and a superseding nine-count indictment were dropped entirely, and the company pled guilty to the false statement it

5. *See generally* United States v. Koch Indus., Inc., No. 2:00-cr-00325-2 (S.D. Tex. Apr. 9, 2001), <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/dockets/KochPetroleum2001.html> (listing records of the proceedings); *see also* Hinderaker, *supra* note 4.

6. Hinderaker, *supra* note 4.

7. *Id.*

8. *Id.*

9. *Id.*

10. Press Release, U.S. Dept. of Justice, Koch Pleads Guilty to Covering Up Environmental Violations at Texas Oil Refinery (Apr. 9, 2001), <https://www.justice.gov/archive/opa/pr/2001/April/153enrd.htm>.

11. Hinderaker, *supra* note 4.

12. Koch Indus., No. 2:00-cr-00325-2 (noting the record of Grand Jury proceeding still under seal); *see also* Hinderaker, *supra* note 4.

had self-reported six years earlier.¹³ Our employees were vindicated, and in exchange for that vindication, they were required to waive their right to sue the government for wrongful prosecution.¹⁴

Mr. Koch has been a longtime advocate and supporter of reforming the criminal justice system so that it is more just and provides individuals with second chances. The Corpus Christi experience led us to become more involved with criminal justice reform efforts, especially for those without the resources to defend themselves in our two-tiered justice system.

As Mr. Koch put it at the time, “What happens to those who are faced with these wrongs and don’t have the financial resources to fight them?”¹⁵ The answer, unfortunately, is that if you lack resources and connections, you will most likely face an adverse outcome from the system.

The justice system often operates counterproductively and creates more issues than it solves. It is, in many ways, a failed big government program; a two-tiered system where one’s resources and connections largely dictate outcomes. As many commentators have noted, people often plead guilty to crimes they did not commit because of the overwhelming power of the government.¹⁶ This is compounded by a lack of skilled and full-time lawyers needed to assist the more than 80 percent of defendants who cannot afford a lawyer. This is contrary to the Sixth Amendment and *Gideon v. Wainwright* requirements that the accused have a competent lawyer to defend them. Making matters worse is the fact that the government that fails to provide a full-time lawyer is the same one prosecuting individuals, creating what would seem to be a constitutional crisis.¹⁷ Individuals sentenced to prison had, until recently, few, if any, meaningful opportunities for self-improvement. The lack of opportunities for self-improvement relegates them to second-class citizenship upon leaving prison, shackled by the more than forty thousand one-size-fits-all collat-

13. Dan Eggen, *Oil Company Agrees to Pay \$20 Million in Fines*, WASH. POST (Apr. 10, 2001), <https://www.washingtonpost.com/archive/politics/2001/04/10/oil-company-agrees-to-pay-20-million-in-fines/4efef0ee-e00d-4557-85e1-d8b92b6adcf8>; see also Hinderaker, *supra* note 4.

14. Press Release, Koch Industries, Inc., All Charges Against Koch Industries, Koch Petroleum Group, L.P. and Employees Dropped; Koch Petroleum Group, L.P. Agrees to Single New Count to Resolve Litigation (Apr. 9, 2001), <https://news.kochind.com/CMSPages/GetFile.aspx?guid=06dde7a6-7644-44fa-a3b1-e9aa2f356a4c>; see also Hinderaker, *supra* note 4.

15. Mark V. Holden, *The Evolution of Criminal Justice Reform*, KOCH NEWSROOM: DISCOVERY (May 2019), <https://news.kochind.com/discovery/2019/may/the-evolution-of-criminal-justice-reform>.

16. See, e.g., Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>; see also Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>; see also NAT’L ASS’N OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.

17. See NAT’L ASS’N OF CRIM. DEF. LAW., *supra* note 16.

eral consequences to a conviction.¹⁸ Ultimately, many returning citizens are prevented from fully reintegrating into society due to the denial of employment, housing, education, licenses, loans, and access to positive social networks because of their criminal history.¹⁹

In addition, the US Constitution demands better of the system. Four of the ten amendments in the Bill of Rights deal directly with criminal justice issues and are a warning against the powers of an overreaching government.²⁰ Aside from the ability to wage war, the most awesome power a government has is the ability to take away the life, liberty, property, and the pursuit of happiness of its people, something the founders understood all too well. The US Constitution and Bill of Rights were intended as a check on the government to protect and ensure liberty through the Fourth, Fifth, Sixth, and Eighth Amendments.²¹

Finally, our current justice system wastes both human potential and financial resources, with little real return on the investment. Many states spend far more per year on the average prisoner than we do on the average student.²² Our nation spends more than \$80 billion a year on incarceration, which is marginally effective at best, and three to four times more per capita than we spend on kindergarten through twelfth grade education annually.²³ Research has shown that the social costs of the system are over a trillion dollars every year, while at the same time there is no data that shows the policies enacted since the 1970s and through the 1990s reduced crime.²⁴ This leads to the reasonable conclusion that the overall fiscal, human, and societal costs created by the system outweigh any unverifiable crime reduction due to long prison sentences.²⁵ These shortcomings led to calls for reform starting in Texas over a decade ago. Unlike the “Tough on Crime Era,” the recent reforms are driven by science and data.

The sheer scope of the criminal justice system’s moral and fiscal impacts requires more reforms. According to the Bureau of Justice Statistics, about 2.17 million Americans were held in local jails or in state and federal

18. AM. BAR ASSOC., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS JUDICIAL BENCH BOOK 2 (2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>.

19. *Id.* at 4–7.

20. U.S. CONST. Amends. IV, V, VI, VIII.

21. *See* THE FEDERALIST NO. 51 (James Madison).

22. *Education vs. Prison Costs*, CNN MONEY, <https://money.cnn.com/infographic/economy/education-vs-prison-costs/> (last visited Jan. 16, 2020).

23. White House Council of Econ. Advisors, *Economic Perspectives on Incarceration and the Criminal Justice System*, EXEC. OFF. OF THE PRESIDENT (2016) [hereinafter *Economic Perspectives on Incarceration*], https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf.

24. DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 1–2 (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

25. *See generally* NAT’L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, et al. eds., 2014), https://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.

prisons in 2015.²⁶ In the United States, we incarcerate 670 out of every one hundred thousand residents, a rate five times the average rate of Organisation for Economic Co-operation and Development's (OECD) thirty-six member countries.²⁷ Overall, there were an estimated 2.3 million people incarcerated in the US in 2019,²⁸ and almost seven *million* people subject to some form of correctional control or supervision;²⁹ this includes a staggering 3.6 million on probation alone.³⁰

When those under correctional supervision are included, the rise is equally precipitous. This population has grown from 1.84 million in 1980 (0.8 percent of the population)³¹ to about 6.85 million in 2014 (2.1 percent of the population).³² But we should not view this problem as one isolated to the individual; millions of families are impacted by incarceration. At any one point, there are more than 2.7 million children (one in twenty-eight) with an incarcerated parent; at some point in their lives, five million children have been in the same situation (combined one in fourteen).³³ The system often destroys the very communities and families that would otherwise be there to help them.³⁴

Using the criminal justice system to deal with all types of social problems has led to serious negative financial impacts. For a time in the mid-1990s, a new state or federal prison or jail opened every fifteen days.³⁵ In 2012 alone, more than \$265 billion (about \$845 per person) was spent on

26. DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

27. ORG. FOR ECON. COOP. AND DEV., SOCIETY AT A GLANCE 2006: OECD SOCIAL INDICATORS 105 fig. CO2.2 (2007), <https://www.oecd.org/about/publishing/38148812.pdf> (showing an average prison population rate of 136 per 100,000 residents for the thirty-six member countries).

28. WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019, at 1 (2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

29. *Id.*; see also THE PEW CHARITABLE TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES AND MISSED OPPORTUNITIES 4 (2018), http://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.

30. SAWYER & WAGNER, *supra* note 28, at 20.

31. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, ESTIMATED NUMBER OF INMATES HELD IN LOCAL JAILS OR UNDER THE JURISDICTION OF STATE OR FEDERAL PRISONS AND INCARCERATION RATE, 1980–2016 (2018), https://www.bjs.gov/content/keystatistics/excel/Correctional_population_rates_by_status.xlsx.

32. *Id.*

33. Katie Reilly, *Sesame Street Reaches Out to 2.7 Million American Children with an Incarcerated Parent*, PEW RES. CTR.: FACT TANK (June 21, 2013), <http://www.pewresearch.org/fact-tank/2013/06/21/sesame-street-reaches-out-to-2-7-million-american-children-with-an-incarcerated-parent/>; see also Dan Levin, *As More Mothers Fill Prisons, Children Suffer 'A Primal Wound,'* N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/us/prison-mothers-children.html>.

34. FED. INTERAGENCY REENTRY COUNCIL, A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE (2016), <https://csgjusticecenter.org/wp-content/uploads/2017/01/Children-of-Incarcerated-Parents.pdf>.

35. SUZANNE M. KIRCHHOFF, CONG. RES. SERV., ECONOMIC IMPACTS OF PRISON GROWTH (2010), <https://fas.org/sgp/crs/misc/R41177.pdf>.

the system, including corrections, policing, and judicial expenses (of this, states and local governments spent the lion’s share—\$213 billion).³⁶ The rise of incarceration is mirrored by increased spending on corrections. In 2012, state and local governments spent \$72.5 billion on corrections compared to an inflation-adjusted \$20.3 billion in 1982.³⁷ Real expenditures crested more than \$270 billion by 2016.³⁸

Progress has been made to contain incarceration costs by focusing resources on supervision, community corrections, and alternatives to incarceration, but more work must be done.³⁹ Incarceration is the most expensive response to a criminal offense: “In fiscal year 2016, detaining an offender before trial and then incarcerating him post-conviction was roughly eight times more costly than supervising an offender in the community.”⁴⁰

The sheer number of individuals caught up in the system fails to tell the full story of the negative outcomes. A 2009 Villanova study concluded that had we not embraced mass incarceration in the last several decades, poverty would have been reduced by “20 percent[] or about 2.8 percentage points” and “several million fewer people” would have been in poverty in recent years.⁴¹

III. STATE REFORMS LED TO THE FIRST STEP ACT AND PROVIDE MOMENTUM FOR MORE ESSENTIAL REFORMS

On December 21, 2018, President Trump signed the FSA, legislation focused on prison, reentry, and sentencing reform.⁴² The act was a giant leap forward for the federal criminal justice system.

36. DIANE WHITMORE SCHANZENBACH ET AL., THE HAMILTON PROJECT, THE BROOKINGS INST., TWELVE FACTS ABOUT INCARCERATION AND PRISONER REENTRY 4 (2016), https://www.hamiltonproject.org/assets/files/12_facts_about_incarceration_prisoner_reentry.pdf; see also Tim Walz & Mike Parson, *Criminal Justice Reform Shouldn’t Just Focus on People Behind Bars. Here’s How We Can Improve the Lives of Millions More*, TIME (Oct. 15, 2019), <https://time.com/5700747/parole-probation-incarceration/> (“Approximately 95,000 people are incarcerated as a result of technical violations on any given day. Incarcerating people for these types of infractions collectively costs states \$2.8 billion annually, with twelve states each spending more than \$100 million every year.”).

37. WHITMORE SCHANZENBACH ET AL., *supra* note 36, at 4.

38. *Economic Perspectives on Incarceration*, *supra* note 23, at 5.

39. Michael Haugen, *Ten Years of Criminal Justice Reform in Texas*, RIGHT ON CRIME (Aug. 1, 2017), <http://rightoncrime.com/2017/08/ten-years-of-criminal-justice-reform-in-texas/>.

40. U.S. COURTS, JUDICIARY NEWS, INCARCERATION COSTS SIGNIFICANTLY MORE THAN SUPERVISION (Aug. 17, 2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision> (last visited Dec. 19, 2019).

41. Robert H. DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQ. 562, 581 (2009).

42. Most notably, the First Step Act shortens mandatory minimum sentences for nonviolent drug offenses. First Step Act of 2018, Pub. L. No. 115-391 (2018). It also lessens the federal “three strikes” rule (three or more convictions) from a life sentence to 25 years. *Id.* Further, it expands the “drug safety valve” giving judges more discretion on deviating from mandatory minimums when sentencing for nonviolent drug offenses. *Id.* This law also makes the Fair Sentencing Act retroactive. *Id.* Passed in 2010, the Fair Sentencing Act has helped reduce the sentencing

The legislation focused on reforms to improve opportunities for rehabilitation in federal prisons and to shorten some of the unnecessarily long sentences imposed under mandatory minimums. The reforms enacted by the First Step Act were based on the experiences of more than thirty states that reformed their justice systems,⁴³ including Texas, which was the first state to adopt reforms.⁴⁴ The states demonstrated that states can safely reduce crime rates and incarceration rates at the same time.⁴⁵ State legislators and governors initially focused on reforms to reduce waste and to save money; however, the states that experienced the best results have passed additional reforms to make communities safer and more just, including laws that recognized that a criminal record should not permanently forbid a second chance and a productive life.⁴⁶ These state legislators and governors were motivated by savings, but stayed for the salvation of individuals, who were changing their lives and their communities for the better.

On July 19, 2019, the US Department of Justice (“DOJ”) announced that over 3,100 federal prison inmates were released from the Bureau of Prisons’ custody as a result of the increase in good conduct time under the FSA.⁴⁷ Additionally, the act’s retroactive application of the Fair Sentencing Act of 2010 resulted in 1,691 sentence reductions.⁴⁸

disparity between crack and powder cocaine offenses—a disparity that has hurt racial minorities. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—And What Happens Next*, BRENNAN CTR. FOR JUSTICE: ANALYSIS & OPINION (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

43. States such as Texas, South Carolina, Georgia, Mississippi, Michigan, Ohio, Minnesota, Florida, and North Dakota reduced lengthy prison sentences, eliminated most mandatory minimum sentences, expanded parole eligibility, expanded the safety valve, established and strengthened diversion programs, and invested in in-prison education as well as evidence-driven prison alternatives. THE PEW CHARITABLE TRUSTS, *STATE REFORMS REVERSE DECADES OF INCARCERATION GROWTH* (2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth>; see also THE SENTENCING PROJECT, *TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2018* (2019), <https://www.sentencingproject.org/publications/top-trends-state-criminal-justice-reform-2018/>.

44. In 2007, the Texas legislature was at a crossroads—either build more prisons or find another solution. After hearing testimony from criminal justice professionals on the overwhelming issues facing people going through the justice system, legislators passed a \$241 million dollar “justice reinvestment” package to create and to implement diversion and treatment alternatives. See Haugen, *supra* note 39.

45. Texas state criminal justice reforms included additional substance abuse treatment beds behind bars, intermediate sanction beds for short term technical violations, halfway house beds, and capping parole caseloads. *Id.*

46. *Id.*; see also David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY (Nov./Dec. 2012), <https://washingtonmonthly.com/magazine/novdec-2012/the-conservative-war-on-prisons/>.

47. Press Release, U.S. Dept. of Justice, Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System (July 19, 2019), <https://www.justice.gov/opa/pr/departement-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>.

48. *Id.*

This is the first time in the history of the federal system that comprehensive reforms were passed to focus more on rehabilitation and redemption.⁴⁹ This is a historic turnaround from the “Tough on Crime Era,” and marks, at the federal level, the beginning of the “Smart on Crime and Soft on Taxpayers Era.”

IV. A TOOL NOT USED ENOUGH: THE PRESIDENTIAL POWER TO GRANT CLEMENCY

The FSA provides hope for the future, but additional reforms are needed at the federal level consistent with data and evidence-based findings that make the system more just and effective. Among the reforms that will be needed are reducing the over reliance on mandatory minimum sentences. By passing FSA and embracing evidence-based practices that prove individuals can reform and become productive members of society, the federal system should be willing to embrace indeterminant sentencing and parole at the federal level. The data demonstrates that individuals who have access to in-prison education and skills programs are almost 50 percent less likely to recidivate. And for every dollar spent on these programs, it defrays up to five dollars of future incarceration costs in the first two years. While there will always be individuals who can’t be safely reintegrated, the overwhelming majority can and will succeed if given a chance.⁵⁰ The bottom line is that most individuals can be successfully rehabilitated and do not need overly long, draconian sentences.⁵¹

Accordingly, if changes aren’t made to mandatory minimum sentencing, society will not reap the full benefit of the transformative reforms, and it will make communities more dangerous. However, the next round of reforms will most likely take time. The bill that ultimately became the FSA was first proposed in 2014 and was signed into law four years later in December 2018. That does not mean that we have to sit idly by waiting for legislative reforms at the federal level to continue making the system more just and giving worthy individuals a second chance for redemption and freedom.

Article II of the US Constitution can become a bridge from the FSA to the “Next Steps” in reform.⁵² The president should carefully, but aggressively, exercise his clemency and commutation prerogatives. With some

49. JOE RUSSO ET AL., RAND CORP., ENVISIONING AN ALTERNATIVE FUTURE FOR THE CORRECTIONS SECTOR WITHIN THE U.S. CRIMINAL JUSTICE SYSTEM (2017), https://www.rand.org/pubs/research_reports/RR1720.html.

50. Jeremiah Mosteller, *What Makes a Reentry Program Successful?*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/reentry-programs/> (last visited Jan. 16, 2020).

51. LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS (2013), https://www.rand.org/pubs/research_reports/RR1720.html.

52. U.S. CONST. art. II, §2.

important exceptions, no one should be forced to remain in prison for lengthy sentences without an opportunity to demonstrate they have been rehabilitated. The FSA's "second look" reform allows prisoners to submit a petition to the court for a review of their sentence. In addition, the presidential power to grant clemency⁵³ can provide yet another "second look."

Modern presidents have exercised their pardon and clemency powers far less than most of their predecessors.⁵⁴ Article II, Section 2 of the US Constitution provides the president with nearly unlimited power to grant reprieves and pardons for offenses against the United States to individual citizens. The drafters of the Constitution meant to temper justice with mercy⁵⁵ based on the belief that most everyone can change and be redeemed, and that we are a nation of second chances.⁵⁶

It also is based on the understanding that, while a specific punishment may be consistent with the law, it may not necessarily be just. Alexander Hamilton defended the pardon power as a remedy against injustices in criminal proceedings in *Federalist No. 74*, and for this reason, he advocated that this power should be subject to as few restrictions as possible:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.⁵⁷

There are numerous examples of presidential pardons. President Washington pardoned those involved in the Whiskey Rebellion.⁵⁸ President Ford pardoned President Nixon, as well as those who evaded the draft during the Vietnam War.⁵⁹ Through the Civil War, individuals could still personally petition the president for pardons and commutations.⁶⁰

53. There are two types of executive clemency: a pardon and a commutation of sentence. A pardon typically forgives an offender of a crime, erases the criminal record, and restores civil rights. A commutation is granted to an individual serving time in state or federal prison and shortens their sentence to allow for early or immediate release.

54. *Clemency Statistics*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/pardon/clemency-statistics> (last updated Jan. 14, 2020), [hereinafter *DOJ Clemency Statistics*].

55. See THE FEDERALIST NO. 74 (Alexander Hamilton).

56. See Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POLITICS 131 (2019).

57. THE FEDERALIST NO. 74, *supra* note 55.

58. Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN MAG. (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

59. Andrew Glass, *Ford Issues Partial Amnesty to Vietnam Deserters*, SEPT. 16, 1974, POLITICO (Sept. 16, 2018), <https://www.politico.com/story/2018/09/16/ford-amnesty-vietnam-deserters-815747>.

60. Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 94 (2015).

President Lincoln was famous for his compassion and pursued pardons where appropriate. His philosophy is best demonstrated by his comment on a case of desertion: “If a man had more than one life, I think a little hanging would not hurt this one; but after he is once dead we cannot bring him back, no matter how sorry we may be; so the boy shall be pardoned.”⁶¹

Presidents have relied on the advice of their US Attorney General regarding clemency since the 1850s, and over time, the day-to-day administration of the pardon power devolved to the US Attorney General.⁶² In 1870, DOJ was formed with the intent to assist the US Attorney General in his duties, and beginning on June 6, 1893, the State Department relinquished duties relating to the administration of the pardon power to the Justice Department after an order from President Cleveland.⁶³ The official delegation of approving and transmitting clemency recommendations to subordinate DOJ officials did not occur until the end of President Carter’s administration, and was implemented in the early days of President Reagan’s administration,⁶⁴ around the same time the “Tough on Crime Era” gained momentum, leading to the explosion of mass incarceration.

As a result, the petitioner is being evaluated for clemency by the same department, and often by the same prosecutors who advocated for incarceration. With all due respect to the DOJ and their dedicated employees, it defies human reality for the same prosecutors to be open to relief after working hard to incarcerate the individual.

Each year, thousands of individuals file clemency petitions with the DOJ Office of the Pardon Attorney.⁶⁵ Since the delegation of approving and transmitting clemency recommendations, each succeeding administration has generally granted fewer and fewer petitions.⁶⁶

61. *Mr. Lincoln’s Office: Pardons & Clemency*, MR. LINCOLN’S WHITE HOUSE, <http://www.mrlincolnswhitehouse.org/the-white-house/upstairs-at-the-white-house/upstairs-white-house-mr-lincolns-office/mr-lincolns-office-pardons-clemency/> (last visited Jan. 16, 2020).

62. According to Margaret Love, until the U.S. Department of Justice was established in 1870, the Secretary of State had been the official custodian of pardon documents and theoretically responsible for investigating applications. In 1852, Daniel Webster, Millard Fillmore’s Secretary of State, formally handed over responsibility for investigating and making recommendations on clemency petitions to the U.S. Attorney General, though the State Department still issued pardon warrants and kept the pardon archives. Love, *supra* note 60, at 94; *see also* Margaret Colgate Love, *Reinventing the President’s Pardon Power*, AM. CONST. SOC’Y FOR L. & POL’Y (Oct. 2007), <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Presidential%20Pardons%20Issue%20Brief%20-%20October%202007.pdf>.

63. *Records of the Office of the Pardon Attorney*, NAT’L ARCHIVES, <https://www.archives.gov/research/guide-fed-records/groups/204.html> (last visited Jan. 16, 2020).

64. Love, *supra* note 60, at 98.

65. *DOJ Clemency Statistics*, *supra* note 54.

66. The Carter administration received a total of 1,581 petitions for pardons and granted 534; 1,046 petitions for commutation were received, and twenty-nine were granted. The Reagan administration received 2,099 petitions for pardon but granted only 393; 1,305 requests for commutation were received, and only thirteen were granted. The first Bush administration received 731 petitions for pardon and granted seventy-four; 735 petitions for commutation were received, and three were granted. The Clinton administration received 2,001 petitions for pardon and granted

To provide more second chances and to reduce unnecessarily long prison populations, the Obama Administration attempted to reform the clemency petition process.⁶⁷ On April 23, 2014, former Deputy Attorney General James M. Cole announced the initiative to encourage qualified federal inmates to petition to have their sentences commuted or reduced by President Obama.⁶⁸ Under this initiative, the DOJ prioritized clemency applications from those who met certain criteria, although there was no guarantee of a pardon or commutation.⁶⁹

With the strong leadership and Herculean efforts of the Obama Administration, the Clemency Project 2014, non-governmental groups, and DOJ pardon attorneys, the Obama administration ultimately granted 212 pardons (out of 3,395 petitions) and 1,715 commutations (out of 33,149 petitions)⁷⁰—the most granted in the last fifty years.⁷¹

The potential power of presidential clemency also was highlighted by the Trump administration with the president's June 2018 commutation of Alice Marie Johnson.⁷² Ms. Johnson is a sixty-three-year-old grandmother who rejected a three to five-year plea bargain to exercise her right to trial. She was a "telephone mule" who never possessed any drugs during the conspiracy.⁷³

After rejecting the plea bargain, the federal government made her the focal point of the conspiracy, which often happens given the looseness of intent standards in drug conspiracies and the government's use of the trial penalty to those who exercise their constitutional right to a trial. After losing at trial, Ms. Johnson received a life sentence plus twenty-five years for a first-time drug offense and served more than twenty-one years in prison before being released.⁷⁴

396; 5,488 petitions for commutation were received, and sixty-one were granted. The second Bush administration received 2,498 petitions for pardon and granted 189; 8,576 petitions for commutation were received, and eleven were granted. *DOJ Clemency Statistics*, *supra* note 54.

67. OFFICE OF THE PARDON ATTORNEY, *Clemency Initiative*, U.S. DEPT. OF JUST., <https://www.justice.gov/pardon/clemency-initiative> (last visited Jan. 16, 2020).

68. *Id.*

69. Criteria included: currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today; non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels; served at least ten years of their prison sentence; do not have a significant criminal history; demonstrated good conduct in prison; and no history of violence prior to or during their current term of imprisonment. *Id.*

70. The American Bar Association, the National Association of Criminal Defense Lawyers, the Federal Defenders, the American Civil Liberties Union, and Families Against Mandatory Minimums joined together under a working group they called Clemency Project 2014. *Id.*

71. *DOJ Clemency Statistics*, *supra* note 54.

72. *Statements & Releases: President Trump Commutes Sentence of Alice Marie Johnson*, THE WHITE HOUSE, (June 6, 2018), <https://www.whitehouse.gov/briefings-statements/president-trump-commutes-sentence-alice-marie-johnson/> [hereinafter *White House Statement*].

73. *Freed Prisoner Alice Johnson Models Kim Kardashian West's Lingerie*, BBC NEWS (Aug. 30, 2019), <https://www.bbc.com/news/49522419>.

74. *White House Statement*, *supra* note 72.

Since regaining her freedom, Ms. Johnson has become a transformative advocate for all Americans, especially those who are still in prison. She gives them a ray of hope and reminds society of the moral imperative of treating the incarcerated and formerly incarcerated people with dignity and that no one should be forgotten.⁷⁵

Society is a better place due to her release and her strong advocacy on these issues. She never should have received the draconian sentence nor been in prison that long. But even when faced with the hopelessness and sentence of life in prison, she did all the right things and made everyone’s lives that she touched better in prison, from fellow inmates to staff to leadership.

With highly publicized advocacy from Kim Kardashian West, as well as the work of many others such as Jared Kushner, Shawn Holley, and Brittany Barnett, President Trump reviewed Ms. Johnson’s case for clemency. The review gave him a better understanding of the inequality and injustice in our system, especially around the power of prosecutors, drug conspiracy issues, and mandatory minimum sentences. That led the president to commute Ms. Johnson’s sentence.⁷⁶

As Ms. Johnson’s case demonstrated, clemencies can shine a positive light that will lead to changes in our justice system—those who receive a second chance often thrive, blazing a trail of freedom for others to follow. Ms. Johnson’s case changed history. She was freed, and her case was the lynchpin that led to the passage of the FSA. Prior to her clemency, the FSA had stalled in the Senate. Because of her case, the president became a passionate supporter of the Senate bill’s sentencing reforms. That led an overwhelming majority of both the House of Representatives and the Senate eventually passing FSA with four reforms of some of the more punitive federal sentencing laws.

However, due to the volume of cases, our current informal system of clemency is not an optimal solution. Reforms are needed to make the process more in line with the promise of the US Constitution, as well as Hamilton’s view outlined in *The Federalist Papers*.⁷⁷ In 2015, Charles Koch said it well, “Clemency for a few—to me, that isn’t just. If you have 1,000 people who got unjust sentences, to give clemency to [a few]—what about the others? Why should they suffer?”⁷⁸ The system should be changed with an approach that allows the DOJ to weigh in, but not dominate the process. Instead, the system should rely on many stakeholders in the system, such as defense lawyers, prosecutors, former judges, community activists, crime

75. Holden, *supra* note 15.

76. *White House Statement*, *supra* note 72.

77. See *THE FEDERALIST* NO. 74, *supra* note 55.

78. Sari Horwitz, *Unlikely Allies*, WASH. POST (Aug. 15, 2015), <https://www.washingtonpost.com/st/national/2015/08/15/clemency-the-issue-that-obama-and-the-koch-brothers-actually-agree-on/>.

survivors, and others to consider the various petitions for clemency. Such a diverse group can then provide their recommendations to the president to review and decide what to do.⁷⁹

This approach has worked well in states such as Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota because the focus is on process and just outcomes—not politics or an overreliance of just one group of stakeholders.⁸⁰ Restructuring our clemency process will align the federal government with states that have already successfully implemented reforms. It also could start a new era of a more just and equitable application of the presidential powers of clemency, and ultimately to a more just criminal justice system for all.

V. CONCLUSION

The alarming growth of our criminal justice system over the past several decades requires reforms that improve public safety and provide more second chances for worthy individuals who have paid their debt to society. While great progress has occurred, our nation remains stuck in some of the failed policies of the past several decades. As we continue to advocate for systematic reforms in all aspects of the system, the president's clemency power can be a potent tool for bringing about justice tempered with mercy.

This issue is more than just a process that needs to be reformed or another ribbon of red tape to be cut. This involves people who have made mistakes, but who want a chance to move forward with their lives and make a difference in their communities. If the full power of the clemency process was exercised more regularly to highlight individuals or group injustices, it would lead to individual stories of redemption that would in turn lead to a more just and effective use of Article II powers, as the founders intended.⁸¹ It also would ultimately lead to a more perfect union.

79. Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 19–22 (2015).

80. Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 492 (2017).

81. See THE FEDERALIST NO. 74, *supra* note 55.