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INTRODUCTION

AN INTRODUCTION TO CLEMENCY'S IMPORTANCE

MARK OSLER*

Countless academic articles, scholarly essays, editorials, and blog posts have begun with quoting either Barack Obama, Dr. Martin Luther King, Jr., or abolitionist minister Theodore Parker as saying that “the arc of the moral universe is long, but it bends towards justice,” a statement so compelling that Obama had it woven into a rug in the Oval Office.¹

I think about that arc a lot. Beloved as the quotation is, it doesn't seem to fully address the way I see the movement towards social justice. To my own mind, there is an arc of history, curved upwards and then back down. Resting on that arc, on the uphill part of the curve, is a boulder. Those seeking justice struggle, pushing that boulder up the arc towards the crest. If they falter, the stone rolls back down the hill, away from justice (and perhaps right over those trying to move it). If they succeed and slowly move the boulder up the hill, they find that the slope becomes more even and the task less difficult until they reach the peak, and then gravity begins to do its work and the boulder rolls on its own. A few must push and endure until they reach the point that the shape of the world has changed.

In the justice-driven work to re-enliven clemency as a force for mercy in our criminal justice systems, that boulder is only partway up the hill. Those pushing the stone are weary, but not defeated. The state of that effort is well-described from a variety of perspectives in the articles found in this issue.

That weariness is understandable. The pardon power, both in the federal system and in our home state of Minnesota, has failed to fulfill its intended role as a tool with which to sand off the roughest edges of our

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1. Mychal Denzel Smith, *The Truth About 'The Arc of the Moral Universe'*, HUFFPOST (Jan. 18, 2018), https://www.huffpost.com/entry/opinion-smith-obama-king_n_5a5903e0e4b04f3c55a252a4.

criminal justice systems: sentences that were needlessly long in the first place; sentences being served by people who have fundamentally changed; and people sentenced pursuant to laws (i.e., marijuana prohibitions) that are passing from favor as our nation evolves. As Alexander Hamilton put it, without the institution of clemency, “[J]ustice would wear a countenance too sanguinary and cruel.”² To ignore clemency is to enable, unencumbered, the simple cruelty that always lingers at the margins (and sometimes at the center) of criminal law.

The federal system, for example, is simply stuck in a pattern of inaction. As of January of 2023, more than 17,000 clemency petitions remain pending, many of them having sat for three presidential administrations without a ruling.³ Through two years, the Biden administration not only failed to act on this backlog by granting petitions, it failed to even *deny* any by presidential action.⁴ Rather than accepting the constitutional responsibility to use clemency actively, or the moral responsibility to address the petitions submitted by people—many of them in prison—who followed the rules, filled out the forms, and hoped for the best, Biden and his staff have simply ignored the whole thing.⁵ This inaction is especially disappointing given that President Biden was part of a previous administration that took clemency seriously. Under President Obama, we saw clemency restored as a principled and significant responsibility of the presidency.⁶ While Obama’s initiative had its flaws and left too much on the table,⁷ it did represent a serious and concerted effort to use clemency for its intended purpose—something we have not seen yet from Obama’s successors.⁸

Minnesota’s clemency system faces different challenges but a similar lack of productivity. While other states farm out clemency to independent

2. THE FEDERALIST NO. 74, at 453 (Alexander Hamilton) (Project Gutenberg ed., 1998).

3. U.S. DEP’T OF JUST., CLEMENCY STATISTICS, <https://www.justice.gov/pardon/clemency-statistics> (Feb. 10, 2023).

4. U.S. DEP’T OF JUST., CLEMENCY DENIALS, <https://www.justice.gov/pardon/clemency-denials> (Feb. 7, 2023).

5. Rachel E. Barkow & Mark Osler, *Biden’s Cowardice on Clemency*, N.Y. DAILY NEWS (Dec. 20, 2022), <https://www.nydailynews.com/opinion/ny-oped-biden-pardon-20221220-3k5b5ooqurghobv3bwhtt4mm-story.html>.

6. Vann R. Newkirk II, *President Obama’s Last Clemency Push*, ATLANTIC (Jan. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/01/president-obama-chelsea-manning-clemency-list/513431>.

7. Rachel E. Barkow & Mark Osler, *We Know How to Fix the Clemency Process. So Why Don’t We?*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2021/07/13/opinion/biden-clemency-justice-dept.html>.

8. Like Biden in his first two years, President Donald Trump largely failed to use clemency for its intended purpose and made no progress on the backlog of cases. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Trump Abused the Clemency Power. Will Biden Reform It?*, WASH. POST (Nov. 16, 2020), https://www.washingtonpost.com/opinions/trump-abused-the-clemency-power-will-biden-reform-it/2020/11/16/6c9a58c2-2832-11eb-8fa2-06e7cbb145c0_story.html.

boards or leave it up to a governor's discretion behind closed doors,⁹ Minnesota's system is at once fabulously transparent, uniquely compelling, and sadly inefficient and unproductive.¹⁰ In short, petitioners for clemency appear personally before a Pardon Board consisting of the state's governor, attorney general, and the chief justice of the Minnesota Supreme Court and argue for relief. Those officials discuss the case in open court before announcing their decision directly to the petitioner.¹¹ As one might imagine, this process limits the number of petitions that can be considered, and a requirement of unanimity among the panel limits the number of grants made.¹² Recently, a challenge to the system's constitutionality failed at the state Supreme Court.¹³ Any real change will have to come through legislation—but the time for such reform may be ripe, with Democrats holding a trifecta of the governorship and both houses of the state legislature after the 2022 midterm elections.¹⁴

This issue of the *St. Thomas Law Journal* drops at exactly the right moment—as stasis threatens to overwhelm those clemency advocates trying to keep their grip on that arc towards justice even as they hope for new opportunities which may appear.

As you dig into the remarkable and worthwhile clemency articles in this issue, I hope you will read them all, and in a particular order. Begin with Gina Evans's heartbreaking and uplifting essay, then move on to Cynthia Roseberry's striking piece. Both of these establish the imperative for action. Then, turn to the heftier articles by Paul Larkin and Karl Procacini, which help lay the groundwork for further action.

Gina Evans's humility stops her from telling her full story in the essay printed here. She is eloquent and honest in describing her struggles with narcotics and crime in her early life and the role of faith in her rehabilitation and redemption.¹⁵ Her story is the best argument to be made for an active and healthy clemency system that can see and root decisions in the present moment for people like her who bear no resemblance to the person who committed crimes. The full truth, though, is that Ms. Evans has become a

9. U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (Mar. 1988), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/guide-executive-clemency-among-american-states>.

10. Mark Osler, *A New Pardons Process Would Nix Drama, Meet Constitutional Standard*, STAR TRIB. (Oct. 11, 2019), <https://www.startribune.com/a-new-pardons-process-would-nix-drama-meet-constitutional-standard/562859252>.

11. Jennifer Brooks, *Minnesota Lawbreakers Beg Your Pardon This Holiday Season*, STAR TRIB. (Dec. 17, 2018), <https://www.startribune.com/minnesota-lawbreakers-beg-your-pardon-this-holiday-season/502857471>.

12. MINN. STAT. § 638.02, subd. 1 (2022).

13. *Shefa v. Ellison*, 968 N.W.2d 818 (2022).

14. Brian Bakst & Dana Ferguson, *Minnesota Democrats Win Capitol 'Trifecta': Governor, House and Now Senate*, MINN. PUB. RADIO NEWS (Nov. 9, 2022), <https://www.mprnews.org/story/2022/11/09/minnesota-democrats-win-capitol-trifecta>.

15. See Gina Evans, *Redeemed*, 19 U. ST. THOMAS L.J. 521 (2023).

strikingly successful advocate for reform and a beacon to those who seek to emulate her individual success. Working with groups including Minnesota Adult and Teen Challenge and the Second Chance Coalition, Ms. Evans has made Minnesota a better place.

While Gina Evans speaks to the conscience of our state, Cynthia Roseberry has long spoken to the conscience of the nation. Currently serving as the Acting Director of the ACLU's Justice Division, she has previously worked as the head of the Federal Defenders in Central Georgia, as a law professor in Chicago, and for a number of projects addressing criminal justice. Most relevant to the topic of this issue was her key role in the Obama clemency initiative, where she served as the head of the coalition of non-profits marshalled to prepare petitions for deserving people in prison. In this issue, she brings the argument for clemency exactly where it needs to go: into the broader discussion of race and disparity in the United States.

Our school is physically located only a few miles from where George Floyd was murdered; the issue of race cannot be far from hand if we are going to work with realities rather than hypotheticals. In connecting clemency to larger realities, Roseberry observes that "racism in our criminal legal system comes from every corner of society. The carceral system is sort of the hub in the wheel, and the spokes include, *inter alia*, poverty, health, and education."¹⁶ While Gina Evans speaks to the unique ability of clemency to redeem people like her, Cynthia Roseberry, in turn, concludes by turning to the broader project of seeking "the moral thing to do to redeem our nation."¹⁷ Individuals must be reconciled with the larger society they re-enter; so too may clemency have a role to play in the reconciliation of Black Americans with a larger society that bears a tragic and unhealed legacy of racism.¹⁸

Paul J. Larkin's longstanding and influential work at the Heritage Foundation has honed his expertise as a national expert on clemency. His article here begins with the strikingly deep roots of clemency, which stretch back not just to a millennium of practice in England but to the very beginnings of human societies.¹⁹ He then turns to a particular type of clemency of special importance, which he describes as "wholesale-level clemency grants" that give relief to entire categories of people.²⁰ Through American history, as Larkin notes, such categorical grants have been fairly regular: President Thomas Jefferson granted them to those subjected to the Alien and Sedition Acts, Lincoln and Johnson to those involved in the Civil War,

16. Cynthia W. Roseberry, *Clemency: Redeeming the Soul of America*, 19 U. ST. THOMAS L.J. 525, 531 (2023).

17. *Id.* at 533.

18. *See id.* at 529.

19. *See* Paul J. Larkin, *Wholesale-Level Clemency: Reconciling the Pardon and Take Care Clauses*, 19 U. ST. THOMAS L.J. 534, 534–35 (2023).

20. *Id.* at 536.

and Ford and Carter to draft evaders and army deserters during the Vietnam era, among others.²¹ Because clemency is relatively immune to legal challenge—generally, no one besides the recipient has standing to challenge the grant, and recipients rarely object to mercy—the legality of these grants has not been thoroughly examined in case law. Here, Larkin considers the possible conflict between the pardon power²² and the Constitution's Take Care Clause, which directs the president to "take care that the laws be faithfully executed."²³ Does the use of the pardon power—that is, changing the outcome of a criminal case—violate the president's duty to faithfully execute the criminal statutes directing a sentence in the first place? Larkin concludes it does not, paving the way for the use of such wholesale grants by a president—though Larkin properly urges the executive to take into consideration the heightened risks that go with such an action.²⁴

Finally, Karl Procaccini examines the practice of clemency in Minnesota. Mr. Procaccini is the right person for the task: he serves as the General Counsel and Deputy Chief of Staff to Minnesota Governor Tim Walz and Lt. Governor Peggy Flanagan. Gov. Walz has (as a non-lawyer) taken seriously his role as the chair of the Minnesota Board of Pardons. Having helped the governor navigate that task, Mr. Procaccini expertly describes the current process and all of its anomalies, which extend beyond the theatrics of the pardon hearings. For example, in Minnesota, someone with a long-ago conviction can elect either to pursue (1) a pardon, or (2) a "pardon extraordinary." The latter would seem to be some kind of super-pardon with spectacular benefits, but that's hardly the case—it has largely the same function as a "regular" pardon but adds a few additional requirements for the petitioner. Mr. Procaccini also describes an increase in clemency grants since 2019—the year, perhaps not coincidentally, that Tim Walz took office as the governor.²⁵ Even at that, Procaccini notes that Minnesota still "lags behind other similarly-sized and smaller states in the overall level of clemency granted."²⁶ He concludes that structural changes are needed to bring Minnesota towards a full and proper use of clemency.²⁷

The University of St. Thomas Law School is marked by certain characteristics, and one of them is a persistent doggedness. Scholars here have fought the same battles consistently in seeking to fulfill the school's mission to integrate "faith and reason in the search for truth through a focus on morality and social justice." It is within this character to focus on clemency

21. GRAHAM G. DODDS, *MASS PARDONS IN AMERICA: REBELLION, PRESIDENTIAL AMNESTY, AND RECONCILIATION* 5 (2021).

22. U.S. CONST. art. II, § 2, cl. 1.

23. U.S. CONST. art. II, § 3.

24. See Larkin, *supra* note 19, at 560–61.

25. See Karl C. Procaccini, *The Prerogative of Mercy in Minnesota: Current Clemency Process and Recent Trends*, 19 U. ST. THOMAS L.J. 569, 579 (2023).

26. *Id.*

27. See *id.* at 585–86.

when movement on the issue seems to have stalled. We are, after all, those who feel compelled to push that boulder upward along that arc towards justice, until that weight gets lighter and the path begins to bend.