

# Incentivizing Excellence: A Suggestion for Merit-Based Reductions from a Twenty-Six-Year Federal Prison Insider

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*America's prison population has soared since the early 1970s, when a commitment to mass incarceration began. We now incarcerate more people than any other nation. Further, recidivism rates show that the longer we expose people to "corrections," the less likely those people become to emerge as law-abiding, contributing citizens.*

*As Justice Kennedy has said, our nation incarcerates far too many people, and they serve sentences that are far too long. We can improve the outcomes of our nation's prison system by incentivizing a pursuit of excellence, creating mechanisms through which people in prison can earn freedom in gradually increasing levels through merit. The late University of Chicago Law Professor Norval Morris wrote about a merit-based system on Australia's Norfolk Island. Stanford Law Professor Joan Petersilia has also written about merit-based systems in The Oxford Handbook of Sentencing and Corrections.*

*This Essay, authored by someone who served twenty-six years in federal prisons of every security level, offers suggestions to implement a merit-based system in the U.S. prison system. The article disrupts the concept that we should measure justice through the length of time that an individual serves in prison. Rather, following the principles that have made America prosperous, this Essay posits the theory that we should pursue justice differently. Instead of waiting for calendar pages to turn, we should incentivize people in prison to pursue a path that will lead to their emergence as law-abiding, contributing citizens. The Essay suggests that we should measure the success of our prison system by the outcomes it produces. It makes a contribution to discussions on how we should reform our nation's sentencing and prison systems.*

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## TABLE OF CONTENTS

INTRODUCTION.....	1550
I. MY CRIME.....	1550
II. THE INTROSPECTION.....	1551
III. THE ODYSSEY.....	1553
IV. VISUALIZE, PLAN, AND EXECUTE.....	1553
V. EARLIER CALLS FOR REFORM.....	1555
VI. SENTENCING REFORM AND PRISON REFORM.....	1556
VII. PERSONAL EXPERIENCES.....	1557
VIII. EXECUTIVE CLEMENCY.....	1558
IX. COMPLETING MY SENTENCE.....	1559
X. EARNING FREEDOM.....	1561
XI. SENTENCING REFORM.....	1562
XII. MEANINGFUL REFORM.....	1563

## INTRODUCTION

This Essay on federal sentencing reform is based on an experiential rather than theoretical perspective. The late Judge Jack Tanner in the U.S. District Court for the Western District of Washington sentenced me to a forty-five year, pre-guideline prison term in 1988.<sup>1</sup> I concluded twenty-six years in federal prison in August of 2013. Exactly one year later, Judge Susan Illston in the U.S. District Court for the Northern District of California signed an order to grant early termination of my supervised release. I am not finished with the judicial system, however. Despite receiving support from my U.S. Probation Officer, an Assistant U.S. Attorney, and a federal judge (who agreed that continued supervision was not warranted), my sentence included a term of Special Parole. Only the U.S. Parole Commission has the jurisdiction to release me from this term of post-release supervision. I am scheduled to remain on Special Parole until 2018.

This Essay will describe what I have learned from my observations, studies, and personal experience with the federal criminal justice system. The Essay will conclude with an argument for innovative, disruptive reforms for sentencing and corrections.

## I. MY CRIME

In 1987, when I was twenty-three, three Drug Enforcement Administration (“DEA”) agents ordered me to raise my arms and face

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1. My sentence preceded the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, commonly known as the “new law.” This law established the U.S. Sentencing Commission and abolished federal parole. The new law also introduced the federal sentencing guidelines. As an “old law” sentence, my term was not subject to those guidelines.

the wall. With guns pointing at my head, I did not resist. I had never been arrested before, but I knew that my time had come.

A couple of years earlier, I saw the movie *Scarface*.<sup>2</sup> Being of Cuban-American descent, I admired the swashbuckling recklessness of the movie's protagonist, Tony Montana. That admiration influenced me in a bad way and I began making inquiries on how I could earn a profit from buying and selling cocaine. Some quick market research in Seattle nightclubs gave me an idea of what buyers were willing to pay. With that information, I caught a flight to Miami to locate a supplier. I received a price quote in Miami that convinced me a substantial profit would follow if I were willing to take the risk. Believing that I could minimize my personal exposure to law enforcement, I hired acquaintances to serve as couriers. They flew to Miami. They rented cars. Then they drove the cocaine to Seattle. I profited as they delivered the drugs to my co-conspirators. Since I didn't personally handle the cocaine, I deluded myself into believing that the authorities would never catch me.

Even at the time of my arrest I was not ready to accept responsibility for my crimes. All I cared about was getting out of jail. Rather than concerning myself with the bad decisions I had made, I obsessed about strategies my defense attorney could use to liberate me from the charges. I raised my right hand during trial, and I swore to tell the truth. Then I proceeded to lie, proclaiming my innocence and exacerbating my problems with the law. Members of the jury rightfully convicted me on every count.

## II. THE INTROSPECTION

After the verdict, federal marshals led me away from Judge Tanner's courtroom and returned me to the Pierce County Jail in Tacoma, Washington, where I had been confined for several months on pretrial detention. For the first time the gravity of my situation began to pull me under. The jury convicted of me under 21 U.S.C. § 848,<sup>3</sup> the Continuing Criminal Enterprise statute. That conviction exposed me to a mandatory-minimum term of ten years, and a possible term of life in prison. I did not know how to process that new reality. I began to pray, but not for release. That ship had sailed. After my conviction, I recognized that the possibilities for release were nonexistent. I accepted my new reality. A lengthy prison sentence would become a significant part of my life, so I prayed for the strength to carry me through what would become my odyssey.

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2. SCARFACE (Universal Pictures 1983). This popular film, starring Al Pacino, glamorized the illicit world of cocaine trafficking.

3. 21 U.S.C. § 848 (2006).

I had been a poor student in school, so I cannot say what prompted me to pick up *A Treasury of Philosophy*,<sup>4</sup> a philosophy book that I saw in the jail's book cart. While flipping through the pages of the heavy anthology, I found Crito, the story of Socrates while he waited in jail for his execution.<sup>5</sup> I could identify with the story. Crito, Socrates's trusted friend, visited him in the jail cell and offered a plot to escape.<sup>6</sup> Socrates listened politely, but chose to wait in jail for his scheduled execution.<sup>7</sup> The explanation Socrates gave for his decision to serve the sentence inspired my transformation.

Socrates said that he lived in a democracy and that he had to accept the good with the bad.<sup>8</sup> He had the right to work toward changing laws with which he did not agree, but he did not have the right to break laws.<sup>9</sup> Because he was rightfully convicted of breaking laws, Socrates pledged to live and die as a good citizen, accepting his punishment with dignity rather than by running away from the problems that his action had created.<sup>10</sup>

I set the book on my chest after reading that passage. Socrates' message showed me how badly I had strayed from a life of good citizenship. Somehow I wanted to emulate Socrates and serve my sentence with dignity. That would mean putting an end to a life of reckless pursuits. I would have to find a path to reconcile with society and to redeem the bad decisions that I had made; I would have to make that reconciliation while locked inside various federal prisons.

Introspection led to my plan for reconciliation. During those awkward weeks between my conviction and sentence, I reflected on the influences that led me to such reckless decisions. It was then that I made a commitment to emerge from prison differently, as a good citizen. But how would a sentencing and prison system respond to such a commitment? Although still at the earliest stages of my journey, I did not perceive a methodical, deliberate path to atonement in the corrections system.

I projected far into the future, trying to envision my release date. I questioned whether actions during confinement could convince law-abiding citizens to see me as something other than a convicted criminal. The corrections system may not notice, but I reasoned that if I focused on (1) educating myself; (2) contributing to society; and (3) building a support network, I could possibly lead a meaningful, relevant life. That three-pronged approach became my path toward reconciliation. I aspired to earn freedom through merit.

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4. A TREASURY OF PHILOSOPHY (Dagobert D. Runes ed., 1955).

5. See PLATO, PLATO'S EUTHYPHRO, APOLOGY, CRITO, PHAEDO (Benjamin Jowett trans., 2005).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

Socrates gave me direction. Regardless of sentence length, I vowed to live as a law-abiding, contributing citizen. I could see the future. The vision gave me strength, an inner liberty that I wanted to share. To memorialize my commitment to reconcile with society, I wrote to the journalist who covered my trial for the newspaper. He visited me in the jail and published a front-page article about my proclamations of remorse.<sup>11</sup> My prosecutor expressed cynicism, saying: “If Michael Santos spends every day of his life in an all-consuming effort to repay society, and if he lives to be 300 years old, our community would still be at a significant net loss.”<sup>12</sup>

Judge Tanner agreed that an appropriate sentence would reflect the severity of my crime and past decisions. He did not subscribe to any stated commitment about working toward reconciliation. He sentenced me to an “old law,”<sup>13</sup> pre-sentencing guideline term of forty-five years.

### III. THE ODYSSEY

A sea of imprisonment separated me from my return to society. Inspired by Odysseus, who ventured into turbulent seas without friends or possessions, I focused on how I wanted to return: a good citizen. I had a clear vision. After more than a quarter century of incarceration, I intended, upon release, to wear a suit and tie and to be prepared to contribute to a civil society. If I executed my plan well, after my release no one would know that I had served a day in prison, unless I revealed the journey. Rather than a life wasted by decades of confinement, I would prepare for a life of relevance and contribution.

I had a plan to make that vision a reality. Each day I would work to educate myself, to make meaningful contributions, and to prove worthy of a support network that I intended to build. I set incremental goals with clear timelines to gauge progress.

### IV. VISUALIZE, PLAN, AND EXECUTE

As weeks turned into months, and the months turned into years, and the years turned into decades, I executed the plan. Inspiration from great

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11. Stuart Eskenazi, *An Inside Job*, SEATTLE TIMES (Sept. 24, 2006, 12:00 AM), <http://community.seattletimes.nwsources.com/archive/?date=20060924&slug=pacificpsantos24>.

12. Patti Payne, *Behind the Scenes: He Refused to Let Prison Define His Life*, PUGET SOUND BUS. J. (Apr. 11, 2014, 3:00 AM), <http://www.bizjournals.com/seattle/print-edition/2014/04/11/behind-the-sceneshe-refused-to-let-prison-define.html> (quoting then-Assistant U.S. Attorney Ken Bell).

13. The Comprehensive Crime Control Act applied to crimes committed after November 1, 1987. Pub. L. No. 98-473, 98 Stat. 1837. Crimes committed prior to November 1, 1987, like mine, were sentenced under the “old law,” which existed prior to the Sentencing Reform Act and the U.S. Sentencing Commission. Although most “Old Law” sentences were eligible for parole, I was convicted under 21 U.S.C. § 848 (2006), which precluded parole eligibility. The “old law” included provisions for more Good Conduct Time. Because of credits I earned for Good Conduct Time, I concluded my forty-five year sentence after serving twenty-six years.

leaders like Viktor Frankl, Nelson Mandela, and Mahatma Gandhi fueled my drive to become the change that I wanted to see in the world. To paraphrase Steve Jobs, who paraphrased Pablo Picasso, a good artist copied ideas, but a great artist stole ideas. I stole ideas from the greatest leaders in the world. Those leaders taught that by visualizing the outcome I wanted, I could establish clear plans to reach my desired outcomes; if I executed those plans flawlessly, I could become more than, and better than, my current circumstances allowed.

In contemplating federal sentencing reform, we could take that same principled, innovative, disruptive approach that good leaders across our nation apply to progress in business. Those leaders embrace a principled approach. They look at problems. Then they visualize the best possible outcomes. They establish plans for how they're going to realize the outcome they envision. Then they execute their plans, keeping their goals squarely in front of them. Leaders contemplate ways to incentivize a pursuit of excellence.

As a long-term prisoner, I did not think that the sentencing system or the prison system that confined me had any concerns about how a defendant would emerge from a prison term. Rather than looking forward, the system considers only past bad acts. Once a finding is made that an individual has committed a crime, the focus centers on the crime and how harshly the system should respond. Then everyone in "the system" circles around to ensure finality, regardless of whether the sentence remains appropriate many years after sentencing. The sentencing and corrections system fails to offer a mechanism that incentivizes or encourages an individual to atone.

In my case, that rigidity in "corrections" repeatedly thwarted and obstructed my progress. Rather than encouraging a pursuit of excellence, providing pathways that would yield growth and productivity, the system repeatedly sent the message that, "you've got nothin' comin'." Our system of sentencing and corrections maintains an immutable commitment to policies, procedures and precedent, but those things focus solely on past bad deeds rather than the possibility of actual correction through reform and improvement, or future good deeds. It is a fundamentally different system from anything else in America: the institutionalization of failure versus a focus on actual promotion of law-abiding, contributing citizenship.

From my perspective, the nature of the criminal justice system was in contradiction to the principles of an enlightened society. In America's broader society, we believe in the power of the individual and incentive. We invest in an individual's future, encouraging every individual to aspire to reach her highest potential.

Prisons, in contrast, extinguish hope. They systematically obliterate the identity of each individual, blocking all incentives for reconciliation,

growth, or a brighter future. Prison policies and procedures emphasize the ugliness of the past and dismiss all interest in future outcomes.

Prison administrators replace names with registration numbers. They dictate where the prisoner will live and with whom the prisoner will share space. They determine the job the prisoner will work, what clothes she will wear, when she will communicate with society, what she will eat, and when she will eat. They tell her that the “security of the institution” is paramount to all else until the sentence is served. Regardless of what “good” the individual aspires to accomplish, the system focuses only on the past. Objective mechanisms through which an individual could work to demonstrate that she no longer requires dehumanizing control tactics do not exist. As such, the sentencing and corrections system seems designed to perpetuate the high recidivism rates and subversive subcultures that prison spawns.

#### V. EARLIER CALLS FOR REFORM

During the early years of my sentence, I felt inspired after reading a commencement speech that the late Chief Justice Warren Burger gave to graduating students at Pace University.<sup>14</sup> In his 1983 speech, Chief Justice Burger urged students and leaders to work toward improving outcomes of our nation’s criminal justice system by placing more emphasis on education and training, and less emphasis on creating a system that warehoused humanity.<sup>15</sup> Chief Justice Burger lamented that during the previous “ten years the prison population in America has doubled from less than 200,000 inmates to more than 400,000.”<sup>16</sup> He said, “If we had begun twenty-five, thirty-five, or fifty years ago to develop the kinds of correctional programs that are appropriate for an enlightened and civilized society, the word ‘recidivist’ might not have quite as much currency as it does today.”<sup>17</sup>

Unfortunately, a sufficient number of leaders did not share Chief Justice Burger’s vision for a smarter criminal justice system.<sup>18</sup> Sentencing reform took a different course, with Congress abolishing indeterminate

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14. Warren E. Burger, *Commencement Address*, 4 PACE L. REV. 1 (1983).

15. *Id.*

16. *Id.* at 4.

17. *Id.*

18. Legislators passed laws that led to an increase in prison population levels. See *Public Safety Performance Project*, PEW CHARITABLE TR., <http://www.pewtrusts.org/en/projects/public-safety-performance-project> (last visited Aug. 5, 2015).

sentencing practices<sup>19</sup> and extinguishing hope along the way. Prison population levels soared.<sup>20</sup> Recidivism rates soared.<sup>21</sup> Costs soared.<sup>22</sup>

Professor John DiIulio argued that from an economic standpoint, incarceration rates were a bargain when we took into account the costs of criminal behavior.<sup>23</sup> From his perspective, when it came to people who broke U.S. laws, we should effectively “let ‘em rot”<sup>24</sup> and that “three strikes was the right call.”<sup>25</sup> Our nation’s commitment to mass incarceration led to longer sentences and fewer mechanisms for relief.

Instead of reforms that would lead to the type of enlightened system that Chief Justice Burger advocated for in his commencement speech, a 1995 bill known as the “No Frills Prison Act”<sup>26</sup> became the norm in our tough-on-crime environment. In that climate, when judges sentenced people to the custody of the Attorney General, marshals delivered defendants into a system where entrants should abandon all hope, as in Dante’s *Inferno*.<sup>27</sup> To paraphrase George Bernard Shaw’s wisdom revealed in *Don Juan in Hell: From Man and Superman*, when man has no hope, he has no reason to work toward a pursuit of anything, much less excellence.<sup>28</sup>

## VI. SENTENCING REFORM AND PRISON REFORM

Leaders who contemplate federal sentencing reform may want to consider the relationship between sentencing and corrections. If our nation is ready to embark upon the types of reforms that would lead to an enlightened, effective criminal justice system, then we should reform both. Like leaders of excellent companies who embrace creative thinking and innovative solutions from all stakeholders, prison and sentence reform should begin with a clear idea of the outcomes our nation aspires to achieve from both a sentencing system and a corrections system.

Effective reforms might begin with the following fundamental questions:

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19. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, abolished the indeterminate sentence system and replaced it with mandatory-minimum sentences.

20. *Federal Prison System Shows Dramatic Long-Term Growth*, PEW CHARITABLE TRUSTS (Feb. 27, 2015), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/02/federal-prison-system-shows-dramatic-long-term-growth>.

21. *Id.*

22. *Id.*

23. John J. DiIulio, Jr., *Prisons Are a Bargain, by Any Measure*, BROOKINGS (Jan. 16, 1996), <http://www.brookings.edu/research/opinions/1996/01/16crime-john-j-diulio-jr>.

24. John DiIulio, Jr., *Instant Replay: Three Strikes Was the Right Call*, AM. PROSPECT (Dec. 19, 2001), <http://prospect.org/article/instant-replay-three-strikes-was-right-call>.

25. *Id.*

26. H.R. 663, 104th Cong. (1st Sess. 1995).

27. See DANTE ALIGHIERI, DANTE’S INFERNO (Mark Musa ed. & trans., 1971).

28. GEORGE BERNARD SHAW, DON JUAN IN HELL: FROM MAN AND SUPERMAN act 3 (Mary Carolyn Waldrep ed., 2006).



- When we measure justice, do we serve society best with absolute, determinate sentences?
- Should our sentencing and corrections system provide a mechanism that would allow defendants to work toward earning increasing levels of liberty through merit?
- Although a defendant's criminal actions may warrant a lengthy sentence at the start, should the system periodically review whether the sentence remains appropriate?
- When incarceration or supervision is no longer appropriate, should reforms include mechanisms for a formal review that could include release?
- Can we test whether we improve community safety more effectively through inflexible sentencing and corrections systems versus innovative systems designed to incentivize a path to reconciliation?
- Does society benefit more from a system that requires defendants to serve every day of the sentence, or from a system that releases offenders when further confinement or supervision serves no useful purpose?

We should aspire to a system that enables more people in prison to earn their liberty through measurable, incremental steps. Effective sentencing and corrections reform would incentivize a pursuit of excellence rather than measuring justice exclusively by the turning of calendar pages.

## VII. PERSONAL EXPERIENCES

During the twenty-six years that I served, mechanisms did not exist to encourage people in prison to work toward preparing for the challenges that would await them upon returning to society. Ironically, the infrastructure of confinement actively *discouraged* the pursuit of excellence, as described below. The sentencing system supported that role of the "corrections" system. In fact, I would posit that our corrections structure is designed to encourage a release only into our society's underbelly. Rather than encouraging prisoners to develop the types of skills that would lead to a livable wage, administrators blocked such pursuits, sending a message that prisoners should train for janitorial or food preparation positions.

Authorities at the highest level repeatedly and actively discouraged efforts I made to earn academic credentials. While I studied toward a master's degree at Hofstra University, prison administrators blocked the university from sending me the books I needed, or they blocked me from using typewriters and computers to complete assignments. They blocked me from visiting with academic scholars, who had become mentors, citing rules requiring an individual to have a prior-existing relationship with the inmate for visiting privileges to be bestowed. After graduating, I began working toward a Ph.D. at the University of Connecticut. A warden put an end to the "nonsense" of further study, saying the special

requirements my schooling required “interfered with the security of the institution.” He and his colleagues told me that they did not care about the opportunities I aspired to create for a career upon release. Their only concern was preserving the security of the institution. My formal education and aspiration, costing the U.S. taxpayer nothing and costing the administration and prison nothing,<sup>29</sup> was somehow a threat to the prison’s status quo. The warden’s efforts to obstruct my education undermined one of the core purposes of prison sentences—to reform prisoners.

The sentencing system proved equally rigid. Several defense attorneys volunteered hundreds of hours in a quest to liberate me from the lengthy sentence I served. They encountered resistance from a sentencing system that did not provide a relief valve, or even a review board to determine whether continued incarceration served the best interests of our enlightened society. Without parole, Executive Clemency<sup>30</sup> represented the only mechanism for relief.

#### VIII. EXECUTIVE CLEMENCY

Acts of Executive Clemency have been rare, especially since our nation made its commitment to mass incarceration. Ironically, when our nation’s prison population was much lower, U.S. presidents were much more generous in their willingness to use their Executive Clemency powers. For instance, between 1964 and 1969, during the Johnson administration, the federal prison system confined fewer than 35,000 people.<sup>31</sup> They had the possibility of relief through the U.S. Parole Commission. Still, President Johnson received 4537 requests from inmates for Executive Clemency.<sup>32</sup> He commuted sentences for 226 inmates, or nearly five percent of those who submitted a petition.<sup>33</sup>

Ironically, while federal prison population levels surged, U.S. presidents grew less inclined and more timid in forgiving sentences through a pardon or commutation.<sup>34</sup> As suggested by rapidly escalating prison population levels, politicians distinguished themselves by supporting laws that would show they were tough on crime.

During President George W. Bush’s eight-year term, the Federal Bureau of Prisons housed between 156,572 and 208,759 people at all

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29. Family members provided the funding for me to advance through my graduate education program at Hofstra University and the University of Connecticut.

30. Executive clemency is the executive power of the President to “grant reprieves and pardons for offenses against the United States[.]” U.S. CONST. art. II, § 2.

31. *Clemency Statistics*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (last visited Aug. 5, 2015).

32. *Id.*

33. *Id.*

34. *Id.*

times.<sup>35</sup> During that time, President Bush received more than 11,000 petitions for Executive Clemency.<sup>36</sup> Unlike the people confined during President Johnson's administration, people confined during President Bush's administration did not have access to relief through the U.S. Parole Commission.<sup>37</sup> If President Bush commuted sentences in the same proportion as President Johnson, he would have commuted 547 sentences. Instead, President Bush commuted eleven sentences,<sup>38</sup> including his colleague Scooter Libby.<sup>39</sup>

In a sentencing and corrections system that presides over more than 200,000 people, Executive Clemency as it currently operates is not a viable vehicle for relief. Sentencing and corrections reform should consider the reality that our current system does not allow for prosecutors or judges to grant relief, even when they find that continued incarceration no longer serves the interest of justice. Prosecutors and judges all too often show an allegiance to the 'system' rather than to the pursuit of justice—this is demonstrated by their unwillingness to take chances on new policies and procedures on release, particularly those pertaining to merit-based behavior.

#### IX. COMPLETING MY SENTENCE

After the Bureau of Prisons blocked my path to earning a Ph.D., I turned my attention to writing for publication. Mentors from the academic community introduced me to publishers. Those publishers opened opportunities for me to continue executing my plan. By then, I had earned my undergraduate degree as well as one graduate degree. Through publishing, I felt as if I were contributing to society. By writing chapters and books, more people became aware of my work and I built a stronger support network.<sup>40</sup> Indeed, as a direct result of my writing I received thousands of letters, including one that changed my life again.

In 2002, Carole came across my work. She was living in Oregon at the time and I was incarcerated in New Jersey. Carole wrote me a letter. That letter ignited a correspondence. The correspondence turned into a romance. Carole and I married inside of a federal prison's visiting room on June 24, 2003. We became a team, with her acting as my liaison to the publishing world. Royalties earned through my writing supported Carole,

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35. *Past Inmate Population Totals*, FED. BUREAU OF PRISONS, [http://www.bop.gov/about/statistics/population\\_statistics.jsp#old\\_pops](http://www.bop.gov/about/statistics/population_statistics.jsp#old_pops) (last visited Aug. 5, 2015).

36. *See Clemency Statistics*, *supra* note 31.

37. *See id.*

38. *Id.*

39. Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST (July 3, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070200825.html>.

40. *See* MICHAEL G. SANTOS, *EARNING FREEDOM: CONQUERING A 45-YEAR PRISON TERM* (2012) (telling the story of my entire my journey); *see also* MICHAEL G. SANTOS, *INSIDE: LIFE BEHIND BARS IN AMERICA* (2006) (providing a graphic look at America's prison system).

and she returned to school to earn multiple nursing degrees. I am incredibly grateful to have found the love of my life and to nurture a marriage while I served a forty-five year prison term.

On August 12, 2013, I turned my 312th calendar page, my 9500th day as a federal prisoner, concluding my obligation to the Federal Bureau of Prisons. When I walked out, I had a bachelor's degree from Mercer University and a master's degree from Hofstra University. I had a massive support network, including a loving wife. Numerous career opportunities awaited me. Yet, with regard to the system of sentencing and corrections, all that mattered was that I served my term to the "expiration date." The system did not differentiate between individuals who worked to emerge as law-abiding citizens and individuals who merely kept up with the latest in reality television.

This fundamental flaw in the system's design results in few people preparing to emerge from prison as contributing, law-abiding citizens. The system encourages prisoners to think about release dates rather than how they can prepare for the lives they will lead after they return to society.

A few weeks after concluding my obligation to the Bureau of Prisons, I began lecturing at San Francisco State University. I taught a course called *The Architecture of Incarceration* for criminal justice students. Teaching and speaking became part of a new commitment I made to work toward improving outcomes of our nation's criminal justice system. This meant reducing the high levels of recidivism that exist today. I was grateful to receive support from The California Wellness Foundation and The Michael G. Santos Foundation.<sup>41</sup> Our collaboration strove to:

- Teach defendants strategies they could use to prepare for a law-abiding, productive life regardless of current circumstances.
- Build bridges that would help formerly incarcerated individuals transition into the job market.
- Educate America's civil society on why mass incarceration has become one of the greatest social injustices of our time, leading to societal breakdown and intergenerational cycles of failure.

I have encountered arguments from cynics who hold the position that few people who served lengthy sentences could sustain the level of discipline and energy that allowed me to grow during my imprisonment. My position is that if we were to truly reform our nation's sentencing and corrections system, we would see many more people working to earn freedom. When we build institutions that extinguish hope and cut off all mechanisms to incentivize a pursuit of excellence, we foster a system that few people can overcome. If we want to change the outcome of high

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41. The Michael G. Santos Foundation is a 501(c)(3) organization that others formed to distribute programs and services I designed to prepare people in prison for law-abiding lives.

recidivism rates and intergenerational cycles of failure, we must change the system in ways that incentivize people to grow.

As I mentioned at the outset, my views come from a different perspective than any of the distinguished professionals who spoke before me at the *Hastings Law Journal* Symposium in February. I do not have the academic pedigree or training as the scholars who generally contribute to law journals. However, more than one out of every two breaths that I have taken on this planet has been inside federal prison boundaries, and those experiences shape my unorthodox perspective.

#### X. EARNING FREEDOM

Although the concept of incentivizing excellence does not exist in the federal sentencing system, the concept is not without precedent. In the 1800s, Alexander Maconochie introduced a system known as the “marks” system at a prison he oversaw on Norfolk Island, a penal colony that confined prisoners in brutal conditions off the coast of Australia.<sup>42</sup> Maconochie aspired to reform those conditions.

Like any innovative leader, Maconochie began his reform by conceptualizing the best possible outcome.<sup>43</sup> He wanted to create a system where people would learn to live in accordance with the values and laws of society.<sup>44</sup> Accordingly, he replaced the brutal system that extinguished hope with a system through which the prisoners of Norfolk Island could earn “marks” through merit.<sup>45</sup> Prisoners who earned a sufficient number of marks could use them to earn gradual increases in liberty, including a “ticket of leave,” or even parole.<sup>46</sup> This system allowed prisoners to hope that they could improve the conditions of their lives.

Like many innovative reformers, Maconochie faced enormous resistance.<sup>47</sup> Many in his society, as in ours, firmly believed that a criminal justice system should remove rather than restore hope.<sup>48</sup> From that perspective, systems of sentencing and corrections should be for societal revenge rather than rehabilitation or redemption. Despite reports showing the promise that Maconochie’s merit-based system could offer, authorities removed Maconochie from his position and Norfolk Island reverted to its former brutality.<sup>49</sup>

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42. Michal Bosworth, *Maconochie, Alexander (1787–1860)*, in *ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES* 563–65 (Mary Bosworth ed., 2005), available at <http://www.sagepub.com/hanserinro/study/materials/reference/ref9.1.pdf>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. NORVAL MORRIS, *MACONOCHIE’S GENTLEMEN: THE STORY OF NORFOLK ISLAND & THE ROOTS OF MODERN PRISON REFORM* (2003).

48. *Id.*

49. *Id.*

During my tenure as a long-term prisoner, I knew some wardens and prison administrators who wanted to implement reforms. But as Mr. Maconochie found, they too encountered resistance that proved too entrenched to overcome.

#### XI. SENTENCING REFORM

More than eleven years ago, on August 9, 2003, Justice Anthony Kennedy delivered the keynote address to the American Bar Association's annual meeting in San Francisco.<sup>50</sup> Justice Kennedy challenged attorneys to tackle the issue of sentencing and prison reform.<sup>51</sup> He said the subject of reform "is the concern and responsibility of every member of our profession and of every citizen . . . . And [that] the energies and diverse talents of the entire Bar are needed to address this matter."<sup>52</sup>

I had been imprisoned for sixteen years when Carole, my wife, sent me Justice Kennedy's speech. I hoped, albeit naively, that his "call to arms" before that August gathering would result in an examination of an incredibly rigid and change-resistant penal system.

I hoped that his "disruptive" address would rattle enough cages that some among our nation's jurists and attorneys would begin a systematic challenge of our nation's draconian sentencing laws. I hoped that his reminder that "[a] people confident in its laws and institutions should not be ashamed of mercy"<sup>53</sup> would resonate with enough jurists and lawyers that, through them, we would move toward a more just nation and away from a complacent mindset of immediate and long-term incarceration as the answer to all corrections.

And yet, ten years later, on August 12, 2013 (ironically, the day that I concluded twenty-six years behind bars), then-Attorney General Eric Holder appealed to this *same* group in this *same* city on this *same* issue.<sup>54</sup> Once again, one of our nation's leaders was attempting to disrupt legal complacency. The then-Attorney General reminded the nation's lawyers that "too many Americans go to too many prisons for far too long, and for no good law enforcement reason" and once again, challenged them to move the moral arc of our nation closer to justice.<sup>55</sup>

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50. Associate Justice Anthony Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003).

51. *Id.*

52. *Id.*

53. *Id.*

54. U.S. Attorney General Eric Holder, Address at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013).

55. *Id.*

## XII. MEANINGFUL REFORM

When San Francisco State University invited me to join the faculty as a lecturer, I saw a huge opportunity to contribute to reform. As with public speaking and writing, teaching can influence the way others think about societal problems.

The title of the course I taught was *The Architecture of Incarceration*.<sup>56</sup> Rather than discussing building designs and materials, I wrote lessons to teach students about the evolution of societal sanctions in Western civilization. At the conclusion of the course, I wanted my students to understand the influences that the sentencing and corrections systems have had on our society.

To begin the course, I lectured on Plato's famous Allegory of the Cave.<sup>57</sup> In using that analogy, I wanted to illustrate the difference between perceptions and reality. I asked for several students to participate in the exercise by volunteering to stand at the front of the room. I had them face the wall in front of them, and used a projector light from behind to cast shadows on the wall, just as Plato described.

For the purpose of our dramatic exercise, I explained to the class that our student volunteers had been chained to a post inside of a cave for their entire lives. They lacked an ability to see anything but the wall directly in front of them and the shadows on the wall. Because they had never known anything besides those shadows on the wall, the "prisoners of the cave" reasonably believed that the shadows on the wall were real objects rather than shadows.

After the exercise, students in my class understood Plato's analogy. When it came to our nation's sentencing system or our nation's prison system, I explained, many people in America were equally blind—particularly if they were young. They were like Plato's prisoners of the cave.

I explained to the students that since the early 1970s, our nation began advancing its commitment to incarceration at an unprecedented rate.<sup>58</sup> So for the entire duration of my students' lives, the only response to crime they knew was incarceration. Prior to the 1970s, I showed, through statistics, that we incarcerated people at roughly the same rates as other developed countries. In 1970, we incarcerated people at a rate of 166 individuals for every 100,000 people in the population. At that time, we understood and accepted that prison was not an appropriate response for every transgression of the law. But those times have changed. Today,

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

57. See PLATO, *THE REPUBLIC* bk. VII, 514a–518e, at 273–79 (Benjamin Jowett trans., Charles Scribner's Sons 1928) (c. 360 B.C.E.).

58. See JUSTICE POLICY INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM* (2000), [http://www.justicepolicy.org/images/upload/00-05\\_rep\\_punishingdecade\\_ac.pdf](http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf).

we incarcerate at a rate of more than 700 people for every 100,000 people in the population.<sup>59</sup> We lead the world in the number of incarcerated citizens both per capita and in total.

Since the students who enrolled in my class were not born prior to 1980, our nation's commitment to mass incarceration shaped their knowledge of sentencing and corrections. Like my students, many people in our society wholeheartedly believe that we should sentence for the exclusive purpose of punishing those who break society's laws. These people do not consider costs, ancillary consequences, or alternatives that could lead to better outcomes than unacceptably high recidivism rates.

In my second class on *The Architecture of Incarceration*, I lectured on the ways Western civilization responded to lawbreakers prior to the 1700s. I began with an excerpt from Michel Foucault's book *Discipline and Punish: The Birth of the Prison*.<sup>60</sup> We discussed the societal value of responding to crime by decapitating people and placing heads on stakes, burning people alive, or pouring molten steel into holes drilled into their bodies. They enjoyed talking about the gruesomeness of such corporal punishment. After all, my students were criminal justice majors. They accepted that tough punishments were the appropriate response.

In the following class, we discussed reforms spawned by the Enlightenment era that began in the 1700s. Prior to that era, Western civilization reserved its use of jails as holding places until a finding of guilt. Once guilt was determined, authorities would carry out the sentence of corporal punishment. Yet leaders of the Enlightenment movement believed that we could do better. The result, I explained, birthed the expansion of the prison movement. Judges began sentencing people to confinement rather than to sentences of corporal punishment. By the end of the class, my students understood prisons to be a significant change, or reform, from inflicting pain or death.

As our class transitioned to the study of sentencing and corrections in the modern era, I took a poll. On a scale of one to ten, I invited the students to rate the level of sentencing reform that Western civilization experienced during pre- and post-Enlightenment eras. I received unanimous feedback that when societies transformed their sentences from corporal punishments to confinement, it was a transformation of the highest order—a ten. Certainly, my students claimed, prisons were a much more humane punishment for criminal behavior than corporal punishment.

But there was more. I asked my students to use that same scale of one to ten to describe the level of sentencing and corrections reform that has taken place over the past 200 years. Their answer helped me to

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59. *Section IV: Global Comparisons*, PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/prisonindex/globalincarceration.html> (last visited Aug. 5, 2015).

60. MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1978).



illustrate the dearth of meaningful reform that has taken place since we began relying on the prison system. The students finally understood what I meant by using the analogy of Plato's cave. People struggle to accept alternative views or reforms if they've been conditioned for too long. I challenged my students "to emerge from the cave" and help advance the cause for meaningful sentence and prison reform.

To paraphrase Abraham Maslow, when the only tool we have is a hammer, we see every problem as a nail. We still measure justice by sentencing many of the people who break laws to time in a cage. Rather than considering the best possible outcome that our system of sentencing and corrections could produce, we only consider the length of time that a person serves. Meaningful reforms would lead to a better outcome. Rather than focusing exclusively on the bad acts that an individual was found to have committed, effective reforms would also place some emphasis on incentivizing the offender to work toward reconciliation and earning liberty through merit.

Despite calls to action for prison reform and sentence reform from luminaries like Justice Kennedy and former Attorney General Holder, I am not optimistic. The vested interests in holding to the status quo are vast and extend beyond politics. A massive economy has been built around locking people in cages and perpetuating intergenerational cycles of failure; many businesses profit from maintaining this system that incarcerates millions. To keep it growing, our system now brings white-collar offenders to prison for multiple decades.

This must change. We must begin to disrupt the status quo. We should disrupt the current system that measures justice by the turning of calendar pages. Instead, we should incentivize excellence with the types of merit-based programs that Maconochie implemented on Norfolk Island. Realistic, concrete change would include opening opportunities for people in prison to work toward earning increasing levels of liberty through merit, as in the following examples:

- Earning academic or vocational credentials could open objective pathways to increasing levels of liberty;
- Contributing to society in meaningful, measurable ways could lead to increasing levels of liberty; and
- Building support networks of mentors could lead to increasing levels of liberty.

Since I do not have much hope in government officials following through with reform, I have launched my own initiative. To bring reforms, we need to unite the voters. I am expanding my base, speaking to any audience that will listen. I speak in schools and universities. I speak to business organizations and government groups. I speak with media representatives and on social networks. Now, I can say that I even speak in law symposiums, with my own call to action.

Like Justice Kennedy and Mr. Holder, I am convinced that we must work together to end mass incarceration. Our massive prison system is a wicked and toxic influence on the life of every American citizen. As Senator Jim Webb once said, “America’s criminal justice system has deteriorated to the point that it is a national disgrace.”<sup>61</sup>

I may have only recently concluded twenty-six years as a prisoner, but I will be heard through my grassroots effort to improve outcomes of our nation’s criminal justice system. Because change in this system will not begin until concerned citizens express their disgust.

I am only one voice, but I am disgusted and I will be heard. Will you join me?

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61. Sen. Jim Webb, *Why We Must Fix Our Prisons*, PARADE MAG. (Mar. 29, 2009, 12:00 AM), <http://parade.com/104227/senatorjimwebb/why-we-must-fix-our-prisons/>.