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

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

RORY K. LITTLE*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. The Contemporary Desire for Sentencing Reduction Mechanisms

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

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

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

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

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

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

39. *Id.*

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

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

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

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

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

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

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

42. *Id.*

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

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

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

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

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

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

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

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

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

47. *See id.* §§ 305.6, 305.

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

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

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

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

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

A. TIMING

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

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

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

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

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

B. WHO DECIDES

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

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

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

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

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

55. *Id.* at 198–99.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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