Episode 80: Mark Osler Transcript

Hello and welcome to Episode 80 of the decarceration nation podcast, a podcast about radically reimagining America's criminal justice system. I'm Josh HOe, among other things, I'm formerly incarcerated, a freelance writer, criminal justice reform advocate, and the author of the book writing your own best story addiction and living hope.

We'll get to my interview with Mark Osler in just a second, but first the news.

Lots of things going on tomorrow evening, we are hosting a really important webinar called excluding violence from a forum. I will include the flyer and registration link in the show notes. The panel includes john faff, who you might remember from our 50th episode, and Sonia Starr, who was actually the only guest I've ever had for two episodes back to back on this podcast. I think they were episodes 42 and 43. I think this is going to be an excellent panel. Register Now I'll include a registration link in the show notes, and you should be able to check it out. It's totally free and will happen next Tuesday at noon.

In other news, we have just gone three days without a COVID death and Michigan prisons, which is the longest stretch we've had without a death in a long time. Unfortunately, the numbers of infected are still rising dramatically, but it has been great to see deaths starting to scale down. Today we've had the death of 41 incarcerated people in Michigan prisons and to prison staff members with 1997 infected incarcerated people. It's been a really rough last couple of weeks, we can only pray that these deaths have finally ended. Okay, let's get to my interview with Professor Mark Osler.

Mark Osler is a former federal prosecutor in the Robert Marion short professor of law at the St. Thomas School of Law in Minnesota. He's widely

published and kept and consulted on the subject of commutations
Welcome to the decarceration nation podcast Mark Osler

Mark Osler:

Thanks for having me.

1

Joshua Hoe

2:05

So I always ask the same first question, how did you get from where you started to where you were a prosecutor and then how you kind of work start working to the other side. You know, kind of working on criminal justice reform issues like the crack versus cocaine disparity, and broader use of the commutation powers.

2

Mark Osler

2:22

It's, uh, I mean, I started out in law as a process server in Detroit. I actually worked for a little law firm picked up side jobs, serving summons and complaints. And that's how I got into life. went off to law school, and while I was there, I had one of the most influential thinkers in sentencing. In the 20th century, Daniel freed was my professor and a lot of other people who study this study under him at Yale as well. And I, you know, came out of law school in 1990. I went back to Detroit and got the You ended up working as a prosecutor. And the reason I did is that I thought prosecutors had the ability to solve problems. And what I found over time is that well, sometimes that was true. It was also true that sometimes we were causing problems. And nowhere is that more true at that time than with cracks, sensing, you know, as a new prosecutor in the federal system, and did a lot of crack cases, and over time, really came to see that that was problematic. I switched over to teaching, taught for 10 years down at Baylor got tenure down there. And while I was there started to work on the 101 crack powder ratio with a lot of other people. Eventually, that worked out. You know, it

took a lot of pushing, but it got changed, not changed far enough. But if we made a difference in one thing that was a drawback was that it wasn't retroactive. And the suggestion going forward From Doug Berman was okay, let's start thinking about clemency. And I threw myself into that. And it has been a pretty remarkable journey in just brings out the worst stories of what we're doing. You learn the real damage that's done by over-incarceration. And, you know, frankly, get to meet the people were hurt by it.

1

Joshua Hoe

4:25

In one of your most recent articles, you talked about the long history of clemency. Can you quickly get us from where the power started? Two times when clemency was kind of more a more core function of our justice system to where we are today.

2

Mark Osler

4:40

Eric? Yeah, I mean, this is an ancient power. It goes all the way back to the code of Hammurabi. And, you know, I often show people something I carry around in my pocket, which is a Roman coin, that 1700 years old, minted in Antioch, that has the name of the goddess of clemency Clemenza that the Romans even had a goddess to embody that virtue coming up through Western civilization, which is how it got into the American system. We saw it in the British system, it was in the Magna Carta. It was controversial when it was brought in to the United States because there's a power of kings. And of course, this nation was founded with a suspicion of the power of kings and antagonism to that, in the way it could trample on liberty, but clemency was different, and it made it into the Constitution, in part because, as Hamilton put it, it's a benign prerogative, that even when it's used, it's worse, what's produced is mercy. And that's different than the tools of tyrants. tyrants gain power by putting people in jail, not by letting them out. So, in American history, we saw pretty vigorous use of clemency

from George Washington onwards in through most of the 20th century. It was used regularly by presidents. They did hundreds Even Herbert Hoover did 1200 grants of clemency in his one term. But then we started to see that change the same time a lot of other things in criminal law change, which is the early 1980s. And clemency stopped being used in that dead vigorous way. It was because of the process they changed the process in a way that embedded it in the Department of Justice deepen the Department of Justice, created too much bureaucracy in it was basically a review system that was built on hostility to the idea of mercy very often, and that's we're fighting now.

1

Joshua Hoe

6:38

For those who aren't as familiar, could you explain briefly the differences between the different parts of clemency powers reprieves, computations and pardons? And why chief executive seems to use them differently in different situations?

2

Mark Osler

6:51

Yeah, when we talk about clemency, that's the overarching term and it's going to include pardons. It's going to include commutations and reprieves and Pardon affects the conviction itself, it's going to relieve the person who was convicted of some of the effects of that conviction or restore rights. In some places will remove the conviction from legal records. A commutation leaves the conviction in place but changes the sentence usually is going to shorten the period of incarceration. While reprieve is just basically saying a pause button on the sentence, we usually see reprieves in the modern context used in death penalty cases where there's an execution scheduled, and the governor will issue a reprieve saying we're going to wait until we analyze this case some more. But clemency covers all three of those.

1

Joshua Hoe

7:40

Okay, you've suggested that this kind of clemency power is kind of a critical part of living up to some of our deepest held values. I think our consumer Alexander Hamilton said the criminal codes have an almost natural tendency toward over severity. Is this the core of why clemency is so important.

2

Mark Osler

7:59

Yes. It is because it is a necessary balance, that justice and mercy we often say those two things together, but their intention that people think of justice is treating people the same way. Sometimes justice is treating is seen as treating people equally harshly, whereas Mercy is giving people a break, pulling back from that sense of retribution. And you need both to have a principled system of justice.

1

Joshua Hoe

8:33

And we're kind of in a unique moment right now with COVID 19. And it's kind of brought clemency powers into a unique spotlight. Do you have any kind of thoughts about the importance right now

2

Mark Osler

8:45

is there's a deep tragedy because if there ever was a time that clemency would be a great tool for governors in the president to use it's now because it's something that is is readily able to be used in a situation like this one where, you know, we have people whose lives are threatened, we're never sentenced to death, who are living in abject fear. And the way to solve that is by thinning the prison population in clemency should be an ideal way to do that. Crisis often brings to the forefront, the weaknesses, and the strengths of our society. And it's brought to the forefront one of the

weaknesses of our society, which is that we have prepared this mechanism and allowed it to flourish in a way that would make it useful right now.

1

Joshua Hoe

9:39

And yet, unfortunately, there are some exceptions and you can certainly talk about those, but clemency still is not used very often, even in this. This particularly important time politics has seemed to overwhelm the use of clemency. But in some parts of the country, a wrote more reliable and consider And commutation processes or clemency processes developed. Can you talk about what states have better processes and what makes those processes so much better?

2

Mark Osler

10:09

One of the fascinating things about this area is that we don't see a red-blue divide. I think sometimes people assume that you know, more liberal states would have more clemency. And that's just not true. Some of the states that are best at granting clemency regularly in significant numbers are South Carolina. states like Georgia and Arkansas have had strong histories of clemency. Meanwhile, my home state of Minnesota, where I'm sitting right now, is really not very good at clemency. We grant very few and we have an unwieldy process. And it's processed that matters. That what we see in the high functioning states, the ones that grant clemency with regularity in principle, is that they tend to have a process where you have a board system You've got a group of individuals, usually a diverse set of people with different backgrounds, who are going to either make the decisions themselves or make the recommendation to the chief executive. And in those states red and blue where it works, that tends to be the process that's used. And in the states where it doesn't work like my own. We've had, we've got some other process that's gumming up the works. And probably the worst process in the country right now. Is the federal system that obviously has poorly served not only this president but previous presidents.

1

Joshua Hoe

11:40

One thing that, you know, I think I was even talking about earlier today is this kind of, we kind of seem to have this idea that sentencing logic is sacrosanct. And so sometimes I think a lot of the resistance might come from that, do you feel like there is actually a logic to the kind of sentence lengths that we give people and the idea That changing those sentences is somehow violating principles of justice.

2

Mark Osler

12:06

Oh, I mean, cuz since links are just made up, there's no science behind it. It's kind of funny you think about, for example, that hundred to one crack powder ratio that was in the federal law for so long. I mean, people acted like that was something that a group of scientists in the lab had determined after years of study there is made up it's they just picked a big number and that became normative. And that’s a fascinating process the way that they can pick that number and then that's the number and then that's what everyone defends. When I talk about this sometimes in school, have a bring a fashion magazine in a fashion magazine will often have on the cover. It's interesting the design will have a big number, you know, 88 great looks for spring and you're looking at it. Well, how many great looks for spring are there? Well, there's 88 it says it right there on the cover. vote on. And that's about as scientific as you know, 100 100 to one, or frankly, almost any of the other terms that are plucked out of the air is the proper punishment. But here's something Josh is is is crucial in the dynamic as a whole, is that once you have that, you have a prosecutor who goes in, stands just a few feet away from the defendant and says, this is the right number. This is how many years of that person's freedom they should lose. Here's how much of their life they should miss while they're locked away and be separated from the people that they love. And that is something that thinks about that from the perspective of the prosecutor, that that person

has a great commitment to that number once they've thrown it out there because what if they're wrong? What if they're wrong? What if it turns out that they deprive someone of their liberty without that being justified? I don't think people can deal with that. And that's why we see prosecutors clinging to those sentences, defending them, fighting back against reforms over and over and over. And in the clemency field. You know, as long as we have clemency ensconced in the Department of Justice, those prosecutors aren't going to say no. Because of it the moral cost of being wrong is so high. But here's the truth. They are wrong. I was wrong when I was one of those prosecutors, and as a society, we have to confront that.

1

Joshua Hoe

14:42

So are there other ways that you would suggest that we might be able to change the process in order to get a better practice of clemency?

2

Mark Osler

14:50

Absolutely. I mean, one thing that we need to do is changed the process. You know, in a lot of the states I've I've pushed The governor and others here to change the process in Minnesota. We've, I think that the critique that we focus too much on the federal system is correct. We have a bill in the legislature right now that's being considered, you know, but in the federal system, which is a bellwether and deeply symbolic, I think that we do have to really push to change that system. I work with Rachel Barco, who we've had on the show, we've looked at this pretty extensively and have pushed for a new federal system that would have a board that would make do the analysis, make the recommendations, keep data and does the analysis before reporting to the President of the United States. And I'm really hopeful that in 2021, whoever's the President is going to adopt that. That method, whether it's President Trump or whether it's Joe Biden,

1

Joshua Hoe

15:57

were you excited during the campaign? To see so many of the candidates endorse you and Rachel's idea.

2

Mark Osler

16:05

Yeah, it was, you know, we had six of the major candidates explicitly say, this is what we would do, we would take it out of DOJ. And we'd pick a commission, which was great. Unfortunately, Joe Biden wasn't one of those. And so this is an excellent point. Yeah. That's where the rubber meets the road right now. But this is one of the things we have to do is we have to convince the Biden campaign to commit to this. My fear is that for Biden, you know, hey, what Obama did is good enough. in this field. It's not. It's true that President Obama released over 1700 people on commutations, but left way too much on the table. There should have been thousands more. And the timidity of that program is something that haunts us now. It's kind of beyond that. It's kind of interesting that probably the most liberal grant we've had in a long time when you look at the total number of people who applied is still a pretty small number. Yeah, it is and there's a historical precedent that people forget about, but I think is important to remember that, you know, Gerald Ford, a Republican, he had a special project to grant clemency conditional pardons to people who had deserted the Army or not recorded for the draft in the Vietnam era. And what he did was exactly what Rachel's urging he formed a clemency board, and that clemency board reported directly to him, and they recommended over 13,000 conditional pardons in one year of work. And so that's a pretty good model.

1

Joshua Hoe

17:49

We see people push back against clemency and commutations from the other side. For instance, when a governor uses clemency can often be controversial. Like what we've seen in the past Have Matt Bevin in

Kentucky, or even some of the pushback after commutations during this COVID crisis right now? How should we protect the spouse?

2

Mark Osler

18:13

The things that are really going to be essential going forward is to have the right metric of success. Right now, the metric of success that the media seems to hold clemency to or any program that releases people early is 100% success, you know, that is that if somebody recidivates then the media jumps on that and says, look what happened, you know, you let 3000 people out and this guy did something. Well, the truth is that the proper metric of success is to compare those people to those who did a full term. And every time we compare those groups, people get out early versus those who have fulfilled their term in the sentence. Commission has done this with one of their earlier amendments to the crack laws, we find out that it's about the same. And that's what success looks like because we're increasing freedom without increasing crime. So we need to move away from that anecdotal style of analysis and move to one that looks more comprehensively. What happens because there is value in that freedom as well.

1

Joshua Hoe

19:28

And we've talked a lot about the process. But I think we're just starting to get into this notion that it's also a political problem in states where practices have been implemented, how did that change happen? And how were people kind of able to navigate the shoals and get past those kinds of entrenched interests and actually change the process?

2

Mark Osler

19:48

We haven't seen a lot of places change their process. You know, that's what we're we're looking for here in Minnesota obviously. But in the states

where you do have successful claims NC systems. One of the things that that that matters is that there's some kind of political cover for the executive, frankly, that there's this Commissioner board that's making the recommendations. That's doing the analysis. And it doesn't seem like it's just the governor plucking people out. I mean, that's one of the things that that hurt Governor Bevin was that you know, these were people that it appeared that he kind of hand-picked and the accusation was there that some it was for political purposes. You know you don't have that when you've got that Dec commission in place. And I think that addresses the political issue as well. You know, one of the things that interest me is that I'm here and reliably blue state Minnesota next door, we've got South Dakota, which is a red state, they've got much more clemency than we do. And in part, because it's just a regular part of their justice system, that they've got a clemency board that makes the decisions and you know, it's not a Big deal. People get pardons in. That's even in a state where you'd expect that to be perhaps more harshly criticized, it's not.

1

Joshua Hoe

21:11

We've seen a lot of you talked a little bit about the federal system. We've seen a lot of commutations of supporters and friends of the President. But what seems to me to have gotten missed, at least in the last few batches, as some other folks got tweeted to, that weren't friends, the President, we both know a lot of people who are involved in what might have been a bit of an ad hoc process, but one that seemed to start to move in a direction that we both, I think would support Do you have hope for this process going forward? I

2

Mark Osler

21:43

think there's the chance that it could evolve into something worthwhile. The problem is that, you know, there's Alice Johnson, who was granted clemency and should have been granted clemency by President Obama.

And then in the last batch, we had three more people who were morally like Alice Johnson, then like Sheriff, Joe Arpaio. And so we're really looking at a sample size of four.o let's get started it's not a large sample size.

Let's not get excited here. But I do hope that part of what we can see in that is that there are voices within this White House who advocate for clemency for people who aren't famous and who aren't political and are connected. I just hope that those voices can come to predominate and that at some point, it can develop into a process that can also reach the I think it's over 11,000 people who are whose cases are buried somewhere in the Department of Justice right now.

We will see about that.

1

Joshua Hoe

22:50

Well, we've talked a lot about one aspect of your work, but let's turn to a piece of forthcoming work that you're doing on kind of the pace of criminal justice reform. And in general, we seem to have in the last several years kind of built an unprecedented bipartisan coalition, working together for reform at local, state and federal levels. But still, I think all of us would concede that the pace of change is, as you put it, like being in line at the DMV. Do we have a case of the SLOs? And why do we have a case of this?

2

Mark Osler

23:29

We do. And it's really unfortunate. I mean, you look at that success. I mean, probably the most success we've had in criminal law reform is with the crack powder problem. But that took three decades. And even at that, we're not to treating the crack and powder equally. I mean, they're still and even sentences that don't make sense. 30 years that's pretty,terrible. And just to pick out one other example, the family Marijuana is still listed in as a

schedule one narcotic, you know, right up there with heroin. That is, that is just pretty crazy. And yet it doesn't change. And the problem is that we've got a one-way ratchet that we reward this sense of retribution. But we don't allow the gears to turn easily The other way to right-size sentences to make them be based on something other than just pure retribution and the guesswork that goes with that. Part of it a lot of what, you know, I think I'm this is shaped by Rachel Barkow's book to prisoners of politics, which I'd recommend to anybody. And, you know, in it, she talks about, for example, the press dynamic that we see, which relies on an anecdote that if there is a crime that's committed, that's news, and, but if there's a crime that's not committed, if we're relatively safe, that's not news and we don't read about it next. One reason that people consistently think that crime is going up and it's getting worse, even when it's not, it's been actually going way down for a while now. But it's fear that draws clicks in, makes people buy newspapers and watch television. So I think that's part of the dynamic.

1

Joshua Hoe

25:22

I think I earlier today or maybe it was last night, I put out a somewhat sarcastic tweet that said if 100,000 people were freed, and one of them is sedated, the press would have that person's face on every paper across the country, but they wouldn't talk about the other 99 999 you know, at all. I was kind of kidding, but kind of not.

2

Mark Osler

25:50

You know, in this. The sad thing about it is that some of those people are great stories, the ones who have come out and aren't coming in one of the people that I did the class petition for it's a guy named Rudy Martinez and he was doing life. At the end of the Obama term, he was released with a commutation. And I, you know, I keep track of them. And right now what he's doing, you know, it's nothing that is showy. It's nothing that he's, you

know, hanging around with Kim Kardashian. what he's doing is driving a truck. He's driving a truck that right now we all need. And he's working really hard. And he's been doing that for a couple of years. He's on the road, he's, you know, seems to really thrive in freedom and is doing something that benefits us all. And I just wish that was a story in the same way that some of the negative ones were.

1

Joshua Hoe

26:48

I couldn't agree more. And so we've got this situation that you just described. I know both of us at different points. work to help on the first step back And it's been over a year and we still haven't moved the to the second step act very much. Oh, there have been some things that have happened since then. How would you start to address these problems? How would you accelerate the process?

2

Mark Osler

27:14

I think I think one of the big things, in terms of accelerating the process, is to keep the narrative at the forefront that unfortunately, you know, other things gain focus, and then we forget about this. And that's especially important right now because everything right now is about the pandemic. But part of what we should care about in this pandemic, is this what we need to learn about, you know, what's going on in prisons, that you have this terrible situation, we need to pay attention to that too. And importantly, we have to learn from it. You know, in those places where people are getting out early, let's watch how they do. If they come out and there, you know, productive and don't recidivate largely, let's stop Appreciate that. And let's tell those stories. We can't just expect the press to jump in and find someone who has succeeded in freedom as a returning citizen. I think part of what we have to do as advocates to advance the ball to change this narrative is for us to tell those stories. I know that you do that. And that's a

great thing. And I'm glad there are people like you that that do it. We just have to, we have to make it a bigger crowd and a louder voice.

1

Joshua Hoe

28:32

I know we've already talked about sort of several means of decarceration. But this is the decarceration nation podcast. So I've been asking people this season if they have any other innovative or great ideas for how we could successfully D cursory or country. Do you have any thoughts here?

2

Mark Osler

28:47

I mean, a couple of broader things. I mean, of course, clemency, you know, is one way and I talked about that already, but I want to talk about a couple of years. We need to put fewer people in jail, in prison and one way to do that is To make fewer things illegal, it's fascinating. If you go back historically and you track Finland in the United States, we had an increase in crime at the same time in the 1980s. But then we made opposite choices. And in the United States, we decided to make more things illegal and lock more people up. Finland did the opposite. They made some things that previously were, you know, punishable, not a crime or not as a high-level crime anymore. And we went the opposite way in crime went down both ways. So I think one thing we need to look at is to make the Penal Code smaller. The other thing is that I think in terms of narcotics cases, and there's a lot of cases besides narcotics cases, and there are other things we could do. But I think that if we want to reduce narcotics use in the United States. There are much better ways to do it, then sweeping up low wage labor. If you want to close down a business If you talk to people who are in business, they'll tell you the worst way to do that is to sweep up low wage labor, because there's always more of that. Instead, if what we really care about is interdicting narcotics and making the street price greater, which is the most you can do some interdiction, probably interfering with cash flow and credit would be a better way to do it. You get

the glory of doing a lot of bus and season coke and all that. It makes a much bigger difference, and we'd have far fewer people incarcerated.

1

Joshua Hoe

30:31

So I have asked about a lot of your recent work. Is there anything else you'd like to talk about? You've been working on?

2

Mark Osler

30:38

Oh, you know right now, I am going to I've been working on clemency. And today what I've been doing is working with the other two law schools here in Minnesota and we're working with the Commissioner of corrections project to release people from prison to thin the population 100 with COVID coming through medical releases in, we're hoping to get a significant number of people out that way. And the one thing I love about that is I can swing into action with my students that we can show them that a difference can be made in a really active engaged way. I love being a professor, I love being a teacher. And it's especially in moments like this, that, that, that I like doing that. Were those of us that have that opportunity. We have a duty that goes with that, and that is that we have to model principled engagement and this is one of those times

Joshua Hoe:

I always ask the same last question. What did I mess up? What questions should I have asked but did not?

Mark Osler:

I don't think you messed up anything?

Joshua Hoe:

Well, I appreciate that. I love it. Yeah, no, I think you've covered what we need to talk about.

2

Mark Osler

31:59

You know, I just look back at the people you've had on this podcast in the past. And it's a remarkable group of people. And many of them are those who have inspired me over the years. So I'm just happy to be among their number.

1

Joshua Hoe

32:14

Really, really nice to be to come on, and thanks so much for doing this.

And now my take. Earlier I discussed a large number of COVID deaths and infections and Michigan's prison, actually 41 deaths In other states, the problem is getting worse. According to the Marshall project as of April 29, at least 14,513 people have tested positive in our nation's prisons, and at least 218 people have died. Our best guess is that this number of infections is a serious undercount. since not all states have been aggressively testing and in the states where testing is on way, they have not gotten to all the prison facilities yet. When all of this started, activists like myself from all over the country suggested often directly to elected officials, that this virus was likely to spread in prisons, and begging our elected officials to act as quickly as possible to release folks who are in at-risk populations. Unfortunately, while county jails have done a ton of decarceration states have still done almost none, as the prison policy initiative put it in a recent article. In recent weeks, local governments across the United States have drastically reduced their jail populations to slow the spread of Coronavirus. Many have reduced the number of people in jail by 25% or more, recognizing that the constant churn of people and the impossibility of social distancing in jails made them inevitable hotbeds of viral transmission, but

state prisons where social distancing is just as impossible and costly. staffs still moving in and out every day have been much slower to release incarcerated people. My point here is simple. governors were given all the information they needed well in advance and have still done next to nothing. We will likely find out later that most of these 218 people who have passed away were in high-risk groups and could have been in essence saved by early intervention from our governors. These deaths were preventable. So is this just on the governors? Why is it the governors are so petrified to act? Sadly, the reason governors don't act is that they know that the public would largely backlash against them, even if they were to come here, even one high-risk person over the age of 60, who had, for instance, had a violent charge previously Previous to that. Recent research suggests that people over 50 have less than a 1% chance to Answer violent recidivism. But our elected officials are so terrified by this tiny risk of recidivism that they still will not act help even one person. This irrational fear is about us, not about our elected officials. We have allowed ourselves to become so infected by a sensationalist press that is turned us into irrational fear machines. And this fear, not facts that drive our politics and drives our politicians. With or without reforms. Approximately 600,000 people are released from prisons or jails. Every year, almost everyday people are released on parole or because they've completed their sentence. recidivism happens every single day too. But this context is never reported by the press or demanded from the people. And that is why we still live in this never-ending willie Horton new cycle. This is on us not On our governors and until we change our politics, they will not change how they govern.

As always, you can find the show notes or leave us a comment at the decarceration Nation calm. If you want to support the podcast directly you can do so from patreon.com slash decarceration Nation. Thanks to Rosalyn major for becoming our newest supporter on Patreon. You can also support us by leaving a five-star review from iTunes or like us on Stitcher Spotify. Special thanks to Andrew Steiner does the editing and post-production for

me to Robert Alvarez who helps with the website and to Kate summers who is helping weather Instagram and Facebook pages. Make sure and add us on Twitter, Instagram, and Facebook and share our posts across your networks. Again. Also, thanks to my employer safe and just Michigan for helping to support the decarceration nation podcast. Thank you so much for listening to the decarceration nation podcast. See you next time.