

REVITALIZING THE CLEMENCY PROCESS

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INTRODUCTION: PROBLEMS IN THE CRIMINAL JUSTICE SYSTEM

A trope heard throughout criminal justice circles today is that the system is a dystopia. The only difference is the stage of the criminal justice system being attacked. The allegations ordinarily go as follows:

Legislatures and regulatory agencies have adopted too many criminal laws, so many that the average person cannot know what is and is not a crime.¹ The police are motivated by racist attitudes and act like Rambo wannabes decked out in full military gear.² Traditional forms of proof, such as eyewitness identification,³ fingerprints,⁴ and confessions,⁵ which the public as-

1. See generally, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–4 (2007); ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Paul Rosenzweig & Brian W. Walsh eds., 2010); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE* 65 (Michael Klarman et al. eds., 2012).

2. See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2014); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

3. See generally, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1996); Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059 (2001); Laura Engelhardt, *The Problem with Eyewitness Testimony*, 1 STAN. J. LEGAL STUD. 25 (1999); Roger Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013 (1995); Sheri Lynn Johnson, *Cross-Racial Identification Errors in*

sumes are foolproof are, in fact, anything but—to say nothing about the more exotic forms of proof such as “bite-mark” or “blood-spatter” analysis.⁶ Allegedly scientific test results and supporting expert testimony offered by law enforcement laboratory technicians are sometimes so riddled with errors as to be little more useful than guesswork.⁷ Prosecutors charge offend-

Criminal Cases, 69 CORNELL L. REV. 934 (1984); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identification*, 28 AM. J. CRIM. L. 207 (2001).

4. See, e.g., BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003); Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985 (2005); Tamara F. Lawson, *Can Fingerprints Lie? Re-Weighing Fingerprint Evidence in Criminal Jury Trials*, 31 AM. J. CRIM. L. 1 (2003); Robert B. Stacey, *A Report on the Erroneous Fingerprint Identification in the Madrid Train Bombing Case*, 54 J. FORENSIC IDENTIFICATION 706 (2004).

5. See, e.g., RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE (2008); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014); Brandon Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Adam Cohen, *Why Innocent Men Make False Confessions*, TIME (Feb. 11, 2013), <http://ideas.time.com/2013/02/11/why-innocent-men-make-false-confessions> [<https://perma.cc/33CB-LES2>]; Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty> [<https://perma.cc/JE99-S87P>].

6. See, e.g., TERRY LABER ET AL., NAT'L INST. OF JUSTICE, RELIABILITY ASSESSMENT OF CURRENT METHODS IN BLOODSTAIN PATTERN ANALYSIS: FINAL REPORT FOR THE NAT'L INST. OF JUSTICE (2014); Radley Balko, *How the Flawed “Science” of Bite Mark Analysis Has Sent Innocent People to Prison*, WASH. POST (Feb. 13, 2015), <http://www.washingtonpost.com/news/the-watch/wp/2015/02/13/how-the-flawed-science-of-bite-mark-analysis-has-sent-innocent-people-to-jail> [<https://perma.cc/B8UK-KSB3>]; David Grann, *Trial by Fire*, NEW YORKER (Sept. 7, 2009), <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire> [<https://perma.cc/J8X4-5XGR>].

7. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AN ASSESSMENT OF THE 1996 DEPARTMENT OF JUSTICE TASK FORCE REVIEW OF THE FBI LABORATORY (July 2014); THE MARSHALL PROJECT, THE SURPRISINGLY IMPERFECT SCIENCE OF DNA TESTING (June 24, 2015); NAT'L ACAD. OF SCI., COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009); Editorial, *Junk Science at the F.B.I.*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/27/opinion/junk-science-at-the-fbi.html> [<https://perma.cc/HY3M-F37S>]; Spenser S. Hsu, *FBI admits flaws in hair analysis over decades*, WASH. POST (Apr. 18, 2015), http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html [<https://perma.cc/5ELB-9RWF>]; Spenser S. Hsu, *Forensic techniques are subject to human bias, lack standards, panel found*, WASH. POST (Apr. 17, 2012), <http://www.washingtonpost.com/pb/local/>

ers with crimes that have maximum publicity value⁸ or can easily be proven in order to enhance their resumes,⁹ all while withholding exculpatory evidence from the defense to maximize the likelihood of conviction.¹⁰ Public defenders are so

crime/forensic-techniques-are-subject-to-human-bias-lack-standards-panel-found/2012/04/17/gIQADCoMPT_story.html [https://perma.cc/6UWE-D4D8].

8. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006) (upholding the conviction of Martha Stewart); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/> [https://perma.cc/M5DC-R7HY] (“In my experience, most federal prosecutors, at every level, are seeking to make a name for themselves, and the best way to do that is by prosecuting some high-level person. While companies that are indicted almost always settle, individual defendants whose careers are at stake will often go to trial. And if the government wins such a trial, as it usually does, the prosecutor’s reputation is made.”).

9. See Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to “Help” Localities Fight Gun Crime*, in *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* 93, 105–06 (Gene Healy ed., 2004) (“Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical ‘bottom line.’ Statistics on arrests and convictions are the Justice Department’s bread and butter. They are submitted to the department’s outside auditors, are instrumental in assessing the ‘performance’ of the U.S. Attorneys’ Offices, and are the focus of the department’s annual report. As George Washington University Law School Professor Jonathan Turley puts it, ‘In some ways, the Justice Department continues to operate under the body count approach in Vietnam They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.’” (citation omitted)); Rakoff, *supra* note 8 (“[T]he SEC has been hard hit by budget limitations, and this has not only made it more difficult to assign the kind of manpower the kinds of frauds we are talking about require, but also has led the SEC enforcement staff to focus on the smaller, easily resolved cases that will beef up their statistics when they go to Congress begging for money Which do you think an [Assistant U.S. Attorney] would devote most of her attention to: an insider-trading case that was already nearly ready to go to indictment and that might lead to a high-visibility trial, or a financial crisis case that was just getting started, would take years to complete, and had no guarantee of even leading to an indictment? Of course, she would put her energy into the insider-trading case, and if she was lucky, it would go to trial, she would win, and, in some cases, she would then take a job with a large law firm. And in the process, the financial fraud case would get lost in the shuffle.”).

10. See, e.g., *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *Cone v. Bell*, 556 U.S. 449, 452 (2009); *Banks v. Dretke*, 540 U.S. 668, 675 (2004); *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc); Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order, *In Re* Special Proceedings, 842 F. Supp. 2d 232 (2012) (No. 09-0198 (EGS)), 2012 WL 858523; CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTORIAL MISCONDUCT 3 (2013), <http://www.prosecutorintegrity.org/wpcontent/uploads/EpidemicofProsecutorMisconduct.pdf> [https://perma.cc/

swamped with cases and starved for resources—investigators, assistants, and even office supplies—that they wind up being collaborators rather than effective independent advocates for their clients.¹¹ Judges find themselves crushed by caseloads, forcing them to treat cases in the same way as tollbooth operators treat vehicles—make everyone pay the fee before moving on. They are also hog-tied by mandatory minimum sentencing laws, which force them to impose lengthy and unjust terms of imprisonment.¹² All told, the system treats defendants like widgets wending their way down the assembly line, where no actor in the process believes in their innocence and where all must be processed quickly to keep the line from backing up.¹³ The result is not a pretty sight.

The picture would be slightly less ugly if there were an effective post-conviction filter to ensure that any innocent parties not exonerated by the jury or trial judge are freed at a later stage of the case. The judiciary sometimes performs that role by setting aside erroneous convictions—which include the classic erroneous conviction of an innocent defendant—when a court reviews a case on appeal or in habeas corpus proceedings. Appellate and post-conviction review, however, does not guarantee success. An appellate court cannot reweigh the evidence or second-guess the jury’s credibility judgments. The court can only ask whether “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

3X6Q-4ELS]; BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 168 (2011).

11. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994); Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 443 (2010); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 285 (2008).

12. See, e.g., Nancy Gertner, *How to Talk About Sentencing Policy—And Not Disparity*, 46 LOY. U. CHI. L.J. 313, 313 (2014); Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), <http://www.nybooks.com/articles/archives/2015/may/21/mass-incarceration-silence-judges/> [https://perma.cc/JW37-E977]; Jed S. Rakoff, *The Fourth Principle*, Speech to a Harvard Law School Conference (Apr. 13, 2015), <https://bol.bna.com/judge-rakoff-speaks-out-at-harvard-conference-full-speech/> [https://perma.cc/UP6C-AB27].

13. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

doubt.”¹⁴ In addition, an appellate court may uphold a conviction or sentence even if it concludes that an error occurred before or during trial so long as it believes that the error was harmless. Some mistakes cannot be overlooked, regardless of the strength of the government’s proof,¹⁵ but most errors can.¹⁶ Even a constitutional error occurring at trial can be harmless depending on the nature of the error, its likely effect on the trial, and the strength of the government’s independent proof.¹⁷

14. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also, e.g., Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012).

15. *See Sullivan v. Louisiana*, 508 U.S. 275, 279–82 (1993) (a constitutionally deficient jury instruction on the “reasonable doubt” standard of proof); *id.* at 279 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Tumey v. Ohio*, 273 U.S. 510 (1927)) (identifying as non-harmless errors total deprivation of representation by defense counsel at trial and trial before a biased judge); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (district court’s unauthorized delegation of jury selection to a magistrate); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of grand jurors); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (right to self-representation at trial); *cf. Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (suggesting that the denial of the right to a public trial cannot be harmless). Those errors—mistakes that the Court has termed “structural,” *Washington v. Recuenco*, 548 U.S. 212, 218 (2006)—defy harmless-error analysis for one of three reasons: (1) they are so egregious as to render a trial a nullity; (2) they so alter the trial record that appellate review of their effect is impossible; or (3) they would be harmless as a matter of law in every case, making appellate review vacuous. *See United States v. Marcus*, 560 U.S. 258, 265 (2010); *Arizona v. Fulminante*, 499 U.S. 279, 306–12 (1991). There is a fourth category of errors where harmless-error analysis is unavailable: claims that require a defendant to establish prejudice in order to make out a violation. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of counsel).

16. *See, e.g., Glebe v. Frost*, 135 S. Ct. 429, 430–31 (2014) (“Most constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness Only the rare type of error—in general, one that infects the entire trial process and necessarily renders [it] fundamentally unfair—requires automatic reversal.” (internal punctuation omitted)); *Neder v. United States*, 527 U.S. 1, 8 (1999); *Fulminante*, 499 U.S. at 309; *Rose v. Clark*, 478 U.S. 570, 579 (1986).

17. *See, e.g., Davis v. Ayala*, 135 S. Ct. 2187 (2015) (exclusion of defense counsel from a portion of a *Batson* hearing); *Marcus*, 560 U.S. 258 (jury instruction that allowed defendant to be convicted for conduct predating enactment of the relevant statute, in violation of the Ex Post Facto Clause); *Rivera v. Illinois*, 556 U.S. 148 (2009) (denial of defense right to exercise a peremptory challenge to a potential juror); *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (one invalid alternative theory of guilt is unconstitutional); *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (exclusion of potentially exculpatory defense evidence); *Recuenco*, 548 U.S. 212 (failure to submit a sentencing factor to the jury in violation of the Sixth Amendment Jury Trial Clause); *Mitchell v. Esparza*, 540 U.S. 12, 16–19 (2003) (trial court’s failure to instruct the jury on the meaning of a “principal” offender under state law); *Neder*, 527 U.S. 1 (trial judge found that a false statement was “material,” instead of sub-

The prospect for a defendant is even worse on collateral attack because the harmless error standard applied on habeas corpus is even more generous to the prosecution.¹⁸ Neither an innocent

mitting the issue to the jury); *California v. Roy*, 519 U.S. 2, 5–6 (1996) (omission of an essential element of an offense); *Brecht*, 507 U.S. at 627–31 (improper use for impeachment purposes of defendant’s silence after being given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Fulminante*, 499 U.S. at 306–12 (erroneous admission of a confession coerced from the defendant); *Clemons v. Mississippi*, 494 U.S. 738, 752–54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Pope v. Illinois*, 481 U.S. 497, 501–04 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (erroneous restriction on a defendant’s right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant’s testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (erroneous restrictions on defense cross-examination, in violation of the Sixth Amendment Confrontation Clause); *United States v. Mechanik*, 475 U.S. 66 (1986) (violation of FED. R. CRIM. P. 6(d), which restricts who may be present before the grand jury); *Rushen v. Spain*, 464 U.S. 114 (1983) (right to be present at trial); *United States v. Hasting*, 461 U.S. 499, 503–04 (1983) (improper comment on defendant’s silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v. Evans*, 456 U.S. 605, 613–14 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of the Fourteenth Amendment Due Process Clause); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification in violation of the Sixth Amendment Counsel Clause); *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (admission of out-of-court statement in violation of the Sixth Amendment Confrontation Clause); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of the Sixth Amendment Counsel Clause); *Chambers v. Maroney*, 399 U.S. 42, 52–53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause); *Chapman v. California*, 386 U.S. 18 (1967) (improper comment on defendant’s silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause).

18. On direct appeal, a court cannot excuse a federal constitutional error unless the error was “harmless beyond a reasonable doubt.” *Chapman*, 386 U.S. at 18. By contrast, a habeas petitioner cannot obtain relief for a constitutional error unless he can establish that the error resulted in “actual prejudice.” *Brecht*, 507 U.S. at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)); see also, e.g., *Ayala*, 135 S. Ct. at 2197–98; *Pliler*, 551 U.S. at 116 (describing the *Brecht* standard as “more forgiving” for the state than the *Chapman* standard); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998).

defendant nor one convicted after an error-filled trial can be certain of success on appeal.

Many commentators willingly identify flaws in the criminal justice system and recommend improvements. Few government officials, however, will undertake that exercise while in office. They prefer to wait until returning to the private sector before suggesting how the government has gone wrong and how it should be corrected.¹⁹

Recently, however, an exception to that rule has emerged. Alex Kozinski, a judge on the United States Court of Appeals for the Ninth Circuit, has written a scathing review of the criminal process and has offered a fistful of various potential reforms.²⁰ Among others, he suggests requiring open-file discovery; videotaping suspect interviews; limiting the use of jailhouse informants; directing internal affairs units to vigorously investigate and prosecute constitutional violations, such as withholding exculpatory evidence; publicly identifying misbehaving government officials; eliminating prosecutorial immunity for misconduct at trial; and ending judicial elections.²¹ Judge Kozinski's recommendations range from the sound and long overdue to the imaginative and whimsical, but one matter is clear: He sincerely believes that the criminal justice system is in need of major repair.

Interestingly, Judge Kozinski does not address clemency. He does not examine whether that process currently provides a last-chance remedy for some flaws, nor does he call on the President and governors to grasp their clemency power, step up to the plate, and immediately use it to remedy wrongful convictions and unjust sentences until the Congress and state legislatures can consider his numerous, broad-scale suggested reforms. Perhaps he remains silent because Presidents and governors have recently abandoned any serious use of their

19. See, e.g., Edwin Meese, III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIRCUIT REV. 505 (2012); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007).

20. See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii (2015).

21. *Id.* at xx–xliv.

clemency powers to rectify mistakes made before or at trial, likely because they fear the political backlash that would inevitably follow should a recipient of clemency commit a violent crime.²² Judge Kozinski does not explain why he foregoes entreating the nation's chief executives to fix injustices on a case-by-case basis until systematic reform is accomplished. So we can only guess what his reasons may be for skipping over this option. It could be that he believes that executive clemency has largely disappeared from the criminal justice system, or it could be something else.

Most of the twenty-first century criminal justice public policy discussion has centered on two other stages of the corrections process: sentencing, when that process begins, and release, when the most coercive aspect of the custodial process ends. There are also several bills with bipartisan support pending before Congress that would reform the front or back end of the correctional process by modifying some of the federal laws imposing mandatory minimum sentences or by augmenting the power of the Federal Bureau of Prisons to grant inmates an early release.²³ This Article, however, will focus on an aspect of the criminal justice system that has received less attention: clemency.

Theoretically and practically, clemency marks the last stage in the correctional process. "Executive clemency," the Supreme Court has noted (tongue-in-cheek, some would say), provides "the 'fail safe' in our criminal justice system."²⁴ Presidents and governors generally avoid extending an offender mercy until after he has been out of prison for several years, in order to learn whether he has truly turned his life around. By then, of course, the offender may have been reincarcerated for a violation of his conditions of release or for a new crime, he may have died, or the chief executive may have left office, possibly leaving the question whether to extend mercy to an offender to

22. See *infra* notes 72–73.

23. See, e.g., Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015); Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers In Our National System Act of 2015, S. 467, 114th Cong. (2015); Smarter Sentencing Act of 2015, H.R. 920, 114th Cong. (2015); Sensenbrenner-Scott Safe, Accountable, Fair, Effective Justice Act of 2015, H.R. 2944, 114th Cong. (2015).

24. *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

a successor official less interested in this practice. Whatever the reason, the delay between an offender's release from custody and his consideration for a pardon may be considerable and may weaken his chances for clemency.

Today, clemency has become a controversial issue, principally because presidents have rarely exercised it or have done so for ignoble reasons. The former withers the clemency power; the latter besmirches it. Given the importance that Anglo-American law and culture have attributed to mercy, neither development is a salutary one. We can and should do better.

The discussion below focuses on the federal clemency process and proceeds as follows: Part I traces the history of the clemency process, focusing on the President's Article II power to grant an offender mercy. Part II will ask why the clemency power has fallen into desuetude or disdain over the last few decades, and Part III will discuss whether clemency is likely to be reborn in the near future. Part IV will conclude by suggesting that the problem lies not in the power itself, but in the process by which cases are brought to the President for his review and maybe in the people we have elected to make those decisions.

I. THE BIRTH AND LIFE OF EXECUTIVE CLEMENCY

The tempering of justice with mercy has likely existed since families began to organize into societies and has always been a cherished tradition of Western civilization.²⁵ The Old Testament teaches that divine clemency has existed for as long as

25. See, e.g., John Milton, *Paradise Lost*, Book X, in 2 THE WORKS OF JOHN MILTON 307 (F. Patterson ed., 1931) ("temper . . . Justice with Mercie"); WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1 ("The quality of mercy is not strained. / It droppeth as the gentle rain from heaven / Upon the place beneath: it is twice blest; / It blesseth him that gives and him that takes: / It is an attribute to God himself; / And earthly power doth then show likest God's / When mercy seasons justice."); WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2 ("Why all the souls that were forfeit once, / And He that might the vantage best have took / Found out the remedy. How would you be / If He, which is the top of judgment should / But judge you as you are? O, think on that, / And mercy then will breathe within your lips / Like man new-made."). Of course, not everyone has embraced this virtue, and some have deemed mercy a rival of justice. See, e.g., HENRY FIELDING, *THE HISTORY OF TOM JONES, A FOUNDLING* 98 (1749) ("[T]hough they would both make frequent use of the word mercy, yet it was plain that in reality Square held it to be inconsistent with the rule of right; and Thwackum was for doing justice, and leaving mercy to Heaven.").

men and women themselves.²⁶ The human version of mercy, known as clemency, has existed for almost as long as records exist. The Code of Hammurabi, for example, contained a clemency provision.²⁷ Greek and Roman rulers exercised that power.²⁸ Clemency has also been a longstanding part of the English legal system. The early English, Scottish, and Irish kings granted clemency.²⁹ The English Crown granted clemency long be-

26. See, e.g., *Genesis* 4:13–16 (“Cain said to the Lord, ‘My punishment is greater than I can bear! Today you have driven me away from the soil, and I shall be hidden from your face; I shall be a fugitive and a wanderer on the earth, and anyone who meets me may kill me.’ Then the Lord said to him, ‘Not so! Whoever kills Cain will suffer a sevenfold vengeance.’ And the Lord put a mark on Cain, so that no one who came upon him would kill him. Then Cain went away from the presence of the Lord, and settled in the land of Nod, east of Eden.”). The New Testament teaches that we should not rely on God for forgiveness, but should forgive each other’s sins. See, e.g., *John* 8:2–11 (“Early in the morning [Jesus] came again to the temple. All the people came to him and he sat down and began to teach them. The scribes and the Pharisees brought a woman who had been caught in adultery; and making her stand before all of them, they said to him, ‘Teacher, this woman was caught in the very act of committing adultery. Now in the law Moses commanded us to stone such women. Now what do you say?’ They said this to test him, so that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. When they kept on questioning him, he straightened up and said to them, ‘Let anyone among you who is without sin be the first to throw a stone at her.’ And once again he bent down and wrote on the ground. When they heard it, they went away, one by one, beginning with the elders; and Jesus was left alone with the woman standing before him. Jesus straightened up and said to her, ‘Woman, where are they? Has no one condemned you?’ She said, ‘No one, sir.’ And Jesus said, ‘Neither do I condemn you. Go your way, and from now on do not sin again.’”). In fact, the Bible is replete with praise for the merciful. See, e.g., *Psalms* 103:8 (“The Lord is merciful and gracious, slow to anger and abounding in steadfast love.”); *Matthew* 5:7 (“Blessed are the merciful, for they will receive mercy.”); *Luke* 6:36 (“Be merciful, just as your Father is merciful.”).

27. See, e.g., JEFFREY P. CROUCH, *THE PRESIDENTIAL PARDON POWER* 10–11 (2009); Samuel T. Morrison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 *BUFF. CRIM. L. REV.* 1, 1 (2005).

28. See CROUCH, *supra* note 27, at 10–11; *Matthew* 27:15–23 (describing how Pontius Pilate released Barabbas as an exercise in clemency during Passover). Most foreign nations empower some government official or council to grant clemency. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 *HARV. L. & POL’Y REV.* 447, 448 & n.6 (2009); Leslie Sebba, *The Pardoning Power—A World Survey*, 68 *J. CRIM. L. & CRIMINOLOGY* 83 (1977).

29. See, e.g., 3 *U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PARDONS* 1–53 (1939); CROUCH, *supra* note 27, at 10–11; James P. Goodrich, *Use and Abuse of the Power to Pardon*, 11 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 334, 335 (1921).

fore the Norman Invasion³⁰ and continued to do so long afterwards.³¹

America has always shared that view.³² The colonists brought the common law with them to the New World,³³ and clemency was a part of that legacy.³⁴ Colonial governors fre-

30. See 4 WILLIAM BLACKSTONE, COMMENTARIES *397; NAOMI D. HURNAND, THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307 (1969).

31. See, e.g., Hoffa v. Saxbe, 378 F. Supp. 1221, 1226–33 (D.D.C. 1974); Douglas Hay, *Property, Authority and the Criminal Law*, in DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN 18TH CENTURY ENGLAND 17, 44 (1975). Aside from rectifying injustices, English kings granted clemency "to reward their friends and undermine their enemies, to populate their colonies, to man their navies, to raise money and to quell rebellions." CROUCH, *supra* note 27, at 11 (citation and internal punctuation omitted). In the seventeenth and eighteenth centuries the pardon power was a prerogative of the Crown, which wrested it from rivals. Before then, the Pope and local barons claimed the same authority. The crown ultimately won out. See WILLIAM WEST SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 1–10 (1909). Parliament, however, granted itself clemency power in the General Pardon Act of 1720, 7 Geo. 1, c. 29.

32. For historical, legal, policy, and philosophical discussions of the past and proper use of clemency in America, see, for example, CROUCH, *supra* note 27; FORGIVENESS, MERCY, AND CLEMENCY (Austin Sarat & Nasser Hussain eds., 2007); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Daniel Kobil, *The Quality of Mercy Strained: Wresting the Pardon Power from the King*, 69 TEX. L. REV. 569–90 (1991); Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647 (1915).

33. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31 (1967); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 128 (1968); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 25 (5th ed. 1956).

34. See, e.g., Schick v. Reed, 419 U.S. 256, 262 (1974) ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice."); *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855) ("At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment."); *United States v. Wilson*, 32 U.S. 150, 160 (1833) ("As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the

quently exercised the crown's delegated clemency authority.³⁵ After the Revolution, state governors and legislatures jointly exercised clemency³⁶ or the legislature, fearing misuse by the executive, did so alone.³⁷ Today, the federal and state constitutions generally lodge the clemency power in the hands of the chief executive,³⁸ whether our president³⁹ or a governor,⁴⁰ and make that power an unchecked prerogative of its recipient.⁴¹

manner in which it is to be used by the person who would avail himself of it."); W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 9–20 (1942).

35. See, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 54 (2002) (in eighteenth-century New York, more than half of the condemned prisoners received clemency); Menitove, *supra* note 28, at 449.

36. The principal modern-day variant of clemency—parole—did not exist in the states until late in the nineteenth century. The first federal parole statute went on the books in 1910. See Federal Parole Act of 1910, ch. 387, 36 Stat. 819 (1910); Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 307–09 (2013); L.C. White, *The Federal Parole Law*, 12 A.B.A. J. 51 (1926).

37. See, e.g., CROUCH, *supra* note 27, at 14; Kobil, *supra* note 32, at 589–90; Menitove, *supra* note 28, at 449. Part of the reason for the change was due to "America's shift from a republic of virtue to a stable social contract governed by rules, reason, and self-interest." BIBAS, *supra* note 13, at 15. Under the new theory of government, punishment should be used to deter and incapacitate offenders, not to administer their just deserts. Mercy undercut deterrence and introduced irrationality into the process by treating similar crimes dissimilarly. *Id.* at 14, 23–24. Ironically, much the same concern has been expressed today. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008) [hereinafter Barkow, *Demise of Mercy*].

38. See 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1496, at 320 (Thomas M. Cooley ed., 4th ed. 1873); Kobil, *supra* note 32, at 588. For a discussion of whether Congress also has a clemency power, see CROUCH, *supra* note 27, at 49–51. In the alternative, Congress always could repeal a criminal law and apply the repeal retroactively. See, e.g., *Dorsey v. United States*, 132 S. Ct. 2321 (2012); cf. *Chambers v. United States*, 291 U.S. 217 (1934). That action would be tantamount to an exercise of legislative clemency.

39. The Pardon Clause, U.S. CONST. art. II, § 2, cl. 1, provides as follows: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." In the federal system, clemency applications are first reviewed by the Office of the Pardon Attorney at the Department of Justice, which forwards recommendations to the White House. See 28 C.F.R. §§ 0.35, 1.1–1.11 (2011); *Office of the Pardon Attorney*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/> [<https://perma.cc/2HY5-8RDU>]. Apparently, clemency was not an issue of concern to the Framers. The Articles of Confederation did not contain a clemency power, and the issue was the subject of only scant discussion at the Constitutional Convention of 1787. The only restriction the Framers adopted was to exclude cases of impeachment from the pardon power. The Framers rejected two proposed restrictions on the pardon power. One would have required the Senate's approval; the other would have exempted treason from the category of pardonable offenses. See CROUCH, *supra* note 27, at 14; Bar-

Clemency comes in several forms—pardon of a crime, commutation of a sentence, remission of a fine or forfeiture, delay in the execution of a sentence via a reprieve, or amnesty⁴²—

kow, *Demise of Mercy*, *supra* note 37, at 1345 n.55; Menitove, *supra* note 28, at 450; Todd David Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1228–35 (2003).

40. See CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922). For links to state clemency policies, see CRIMINAL JUSTICE POLICY FOUNDATION, *State Clemency Guide*, <http://www.cjpf.org/state-clemency/> [<https://perma.cc/TJE9-6ZTM>] (last visited May 9, 2016). Most states grant their governors the same power as the Pardon Clause grants the President. See Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1505–06 (2000). Some states, such as Texas, condition the governor's action on an affirmative recommendation from an administrative body. See TEX. CONST. art. IV, § 11. Limitations like those are designed to eliminate the potential for corruption in the issuance of clemency. See Kobil, *supra* note 32, at 573; Rapaport, *supra*, at 1517 (both noting that governors have sold pardons or granted them to satisfy campaign promises). The federal and state courts have upheld those restrictions against due process challenges by condemned prisoners. See *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343 (5th Cir. 1999); *Graham v. Texas Bd. of Pardons & Paroles*, 913 S.W.2d 747 (Tex. Ct. Crim. App. 1996). For the views on clemency of former governors, see EDMUND G. (PAT) BROWN, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (1989); Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAP. U. L. REV. 139 (2003); Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971).

41. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (“This power of the President is not subject to legislative control.”); STORY, *supra* note 38, § 1504, at 324 n.4 (“Congress cannot limit or impose restrictions on the President's power to pardon.”). In this regard, the Article II Pardon Clause is similar to the Article I Impeachment Trial Clause, U.S. CONST. art. I, § 3, cl. 6. Each one vests plenary decision-making authority in a branch of government other than the Article III judiciary. See *Nixon v. United States*, 506 U.S. 224 (1993) (discussing the Impeachment Trial Clause); *Ex parte Garland*, 71 U.S. at 380 (discussing the Pardon Clause); SMITHERS, *supra* note 31, at 549–50.

42. See, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (state clemency); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (same); *Biddle v. Perovich*, 274 U.S. 480, 486 (1926) (President's pardon power); CROUCH, *supra* note 27; MOORE, *supra* note 32. The clemency power includes the authority to grant a commutation, remission, or reprieve, even if those powers are not specifically identified, as a lesser included authority under the power to pardon. See *Solesbee v. Balkcom*, 339 U.S. 9, 11–12 (1950) (“The power to reprieve has usually sprung from the same source as the power to pardon.”), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986); RONALD L. GOLDFARB & LINDA R. SINGER, *AFTER CONVICTION* 343 (1973) (“[P]resumably the [commutation] power is simply a lesser form of pardon. The power to commute sentences has been held to be implicit in the general grant of the pardoning power in the states whose constitutions do not mention commutation and in the federal system Mostly,

each with a different effect. A pardon can erase the legal effect of an individual's conviction, while a reprieve merely delays the execution of the sentence. Coke described a pardon as "a work of mercy, whereby the King either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, Temporal or Ecclesiastical."⁴³ In the words of Justice Stephen Field, a pardon makes the recipient, "as it were, a new man, and gives him a new credit and capacity."⁴⁴

Under American law, the pardon power is a prerogative⁴⁵ that the President can exercise for any reason that he deems just.⁴⁶ In particular, the President's clemency decisions are not subject to

[commutation] is used to allow prisoners with terminal illnesses to die out of prison, to make prisoners eligible for parole and to avoid capital punishment.") (footnote omitted). Presidents also can extend clemency at the wholesale level, by pardoning a category of offenders, rather than just one, an act known as "amnesty." See *Knote v. United States*, 95 U.S. 149, 152–53 (1877) ("The Constitution does not use the word 'amnesty;' and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance."); Kobil, *supra* note 32, at 577.

43. See EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND* 233 (Lawbook Exchange, Ltd. 2002) (1817).

44. See *Ex parte Garland*, 71 U.S. (4 Wall.) at 380–81 ("A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."). Garland later became Attorney General under President Grover Cleveland. See Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1180 (2010).

45. See, e.g., Menitove, *supra* note 28, at 450–51.

46. In Blackstone's words, "[T]he king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law." 4 BLACKSTONE, *COMMENTARIES* *401; see also, e.g., THE FEDERALIST No. 74, at 473 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."); Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 133 (2010) ("Executive clemency[']s . . . flexible and broad nature allows the president and state governors to pardon or commute sentences at will . . ."); Menitove, *supra* note 28, at 450–51.

judicial review.⁴⁷ The Framers assumed that the President would exercise his authority with “scrupulousness and caution.”⁴⁸ As Chief Justice and former-President Taft wrote for the Court, “Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.”⁴⁹

Executive clemency is a valuable tool, one that Presidents have used throughout our history. Presidents have extended of-

47. Certainly not in the sense that a court can undo a grant of clemency. The Supreme Court has endorsed that principle on several occasions. *See, e.g., Woodard*, 523 U.S. at 280 (“[P]ardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”) (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (“The plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to ‘forgive’ the convicted person in part entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.”); *Ex parte Garland*, 71 U.S. (4 Wall.) at 380 (“The [clemency] power thus conferred is unlimited, with the exception [in cases of impeachment] It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”); *Ex parte Wells*, 59 U.S. (18 How.) at 311–12; *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833); *cf. Solesbee v. Balkcom*, 339 U.S. 9 (1950) (rejecting due process challenge to Georgia clemency procedures and stating that clemency is not subject to judicial review), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986). Any limitations would exist only in extraordinary cases, such as where the Constitution imposes independent limitations on the clemency power. *See supra* note 28 (the Pardon Clause power does not extend to “Cases of Impeachment”); *Hart v. United States*, 118 U.S. 62, 67 (1886) (stating in dicta that the President cannot use the pardon power to require payment of funds from the U.S. Treasury in violation of the Spending Clause); *Ex parte Wells*, 59 U.S. (18 How.) at 312 (noting that the King could not use his clemency authority to repeal the common law crimes deemed *malum in se*, such as murder, rape, and robbery, because such an action “would be against reason and the common good, and therefore void,” and cannot disturb the vested property rights of third parties); *cf. 4 BLACKSTONE, COMMENTARIES* *399–400. Parliament restrained the crown’s clemency power in certain statutes. *See, e.g., Act of Settlement 1700*, 12 & 13 Will. 3 c. 2, § 3 (Eng.) (prohibiting the king from using his pardon power to prevent the House of Commons from impeaching a crown official); Habeas Corpus Act of 1679, 31 Cha. 2 c. 2, §12 (Eng.) (making it a crime to transfer a prisoner “beyond the Seas” in order to prevent him from petitioning for relief and also making that offense unpardonable); *Ex parte Wells*, 59 U.S. (18 How.) at 313; *4 BLACKSTONE, COMMENTARIES* *399–400; Kobil, *supra* note 32, at 585–89.

48. THE FEDERALIST No. 74, *supra* note 46, at 474.

49. *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

fenders “forgiveness, release, [and] remission”⁵⁰ from a conviction or punishment for a host of reasons: as a correction for an errant conviction or unduly severe punishment,⁵¹ as a decision

50. *Ex parte Wells*, 59 U.S. (18 How.) at 309 (“But such is not the sense or meaning of the word, either in common parlance or in law. In the first, it is forgiveness, release, remission. Forgiveness for an offence, whether it be one for which the person committing it is liable in law or otherwise.”).

51. See, e.g., *Ex parte Grossman*, 267 U.S. at 120 (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”); *In re Flournoy*, 1 Ga. (1 Kelly) 606, 607 (1846) (“[A pardon] proceeds upon the idea of innocence. The power is given to the Executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction. And as all good governments are founded upon essential equity, the sovereign authority will not permit, so far as it can be prevented consistently with the maintenance of general laws, injustice to be done.”); *State v. Alexander*, 76 N.C. 231, 231 (1877) (“The pardoning power is a useful one. It answers about the same purpose in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the law by reason of its universality is deficient, and pardons supply that wherein the criminal law by reason of its universality is deficient.”); *Diehl v. Rodgers*, 32 A. 424, 426 (Pa. 1895) (“The constitution deals with the pardoning power, not as a prerogative claimed by Divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary, by reason of the fallibility of human laws and human tribunals.”); THE FEDERALIST No. 74, *supra* note 46, at 446 (“Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 421–22 (Peter Laslett ed., 1960) (1690); James D. Barnett, *The Grounds of Pardon in the Courts*, 20 YALE L.J. 131, 133 (1910); Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHILOSOPHY 109, 116 (1991) (“To eliminate the concept of legal mercy (whether judicial discretion or executive pardon) because it is in most cases a means of doing justice is to ignore the message of history. Elimination of mercy in the name of justice seems to suggest that our system of justice, unlike those of the past, is or could be perfectly sufficient to effect full justice.” (footnote omitted)); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43 (1998); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89 (2002) (“[P]ardons may be issued when justice would otherwise not be served either because the sentence was too harsh or because the person was wrongly convicted.”). At one time, acceptance of clemency was deemed an admission of guilt. See *Roberts v. State*, 54 N.E. 678, 679 (N.Y. 1899) (“A pardon proceeds, not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon.”). That attitude no longer holds true. See William W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 549, 553 (1911) (“Victims of judicial errors no longer have to accept liberty under false colors. A pardon no longer necessarily implies guilt for it may flow from clearly established innocence.”).

that a lesser punishment better serves the nation's interests,⁵² as a means of demonstrating that he oversees the operation of the criminal law,⁵³ or simply as an act of grace.⁵⁴ Anglo-American law has always believed that, given the fallibility of humans and the criminal justice system, the need for mercy is always present and someone should have the power to grant it as an indispensable component of a humane criminal justice system.⁵⁵ Some

52. See, e.g., *Biddle v. Perovich*, 274 U.S. at 480, 486 (1926) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."). See generally *Smithers*, *supra* note 51 (surveying the justifications for clemency).

53. Julius Caesar granted clemency to some nations that he conquered. CHARLES L. GRISWOLD, *FORGIVENESS: A PHILOSOPHICAL EXPLORATION* xviii n.10 (2007). Blackstone noted that clemency can "endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince." 4 BLACKSTONE, *COMMENTARIES* *398; see also COKE, *supra* note 43, at 233 ("Mercy and truth preserve the king, and by clemency is his throne strengthened."). Clemency can still serve that role today. There are more than ninety U.S. Attorneys nationwide, and thousands of attorneys in those offices, with even more at the Justice Department headquarters in Washington, D.C. See *United States Attorneys' Mission Statement*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/usao/about/mission.html> [<https://perma.cc/NFL5-4SGH>] (last updated Nov. 18, 2014). By law, the Attorney General has the legal authority to supervise criminal litigation in the federal courts, but that is an impossible task. Even aided by his lieutenants at the Justice Department, he cannot oversee every investigation of charge that the government pursues. Some U.S. Attorneys or Justice Department Divisions will inevitably pursue a case that the Attorney General never would prosecute because some targets will prove just too tempting for a prosecutor to pass up. See *Larkin*, *supra* note 1, at 761 n.202, 775. Clemency allows the President to instruct the Justice Department what types of prosecutions should not be brought.

54. See, e.g., *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) ("A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."); see also *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1226-33 (D.D.C. 1974); SMITHERS, *supra* note 31, at 1-17. John Marshall's opinion in *Wilson* provides an interesting contrast with the Supreme Court's later decision in *California v. Brown*, 479 U.S. 538 (1987). *Brown* upheld the constitutionality of an instruction directing the jury not to be swayed by "mere sympathy" for the offender, even though a convicted murderer in a capital case may offer virtually any mitigating evidence to justify a lesser punishment. The two decisions make clear that a defendant has no right to the receipt of mercy (*Brown*), but the people may give the government the prerogative to bestow it as the clemency authority sees fit (*Wilson*).

55. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for

clemency recipients—for example, Jefferson Davis; Robert Stroud, better known as the “Birdman of Alcatraz”; and Richard Nixon—are well-known public figures. But most are not. Presidents generally have exercised executive clemency to give average, anonymous Americans a second chance.⁵⁶

II. THE DISAPPEARANCE OF EXECUTIVE CLEMENCY

A. *The Contemporary Decline in the Issuance of Presidential Clemency Grants*

Clemency has long been an integral feature of criminal justice. It was recognized in the English common law and the ear-

preventing miscarriages of justice where judicial process has been exhausted.”); *Ex parte Grossman*, 267 U.S. at 120–21; *Ex parte Wells*, 59 U.S. at 310; SMITHERS, *supra* note 31, at 61–62 (“[E]xecutive clemency in Pennsylvania is in its nature an exceptional governmental power bestowed for the correction of unjust and erroneous particular results arising from imperfect legislation and the inherent limitations of tribunals charged with the trial of criminal cases It represents the sense of human weakness, the recognition of human fallibility, the cry of human compassion. It is a confession of imperfect wisdom and voices mankind’s universal repugnance to the irretrievable and irrevocable. It is the protest of the multitude against unanticipated and cruel consequences of governmental deficiencies.” (footnote omitted)).

Presidents have also granted clemency at the wholesale level as an exercise in “statecraft,” often in the form of amnesty. George Washington granted amnesty to participants in the Whiskey Rebellion. John Adams pardoned the individuals who engaged in a rebellion in Pennsylvania. Thomas Jefferson pardoned people convicted under the Alien and Sedition Act. Abraham Lincoln commuted the death sentences of 265 Sioux tribesmen involved in an uprising and granted amnesty to Southerners who rebelled against the Union. Andrew Johnson pardoned Jefferson Davis along with other Confederate soldiers. Gerald Ford pardoned Richard Nixon for any crime he might have committed in connection with Watergate. Jimmy Carter granted amnesty to Vietnam War draft evaders. See Kobil, *supra* note 32, at 592–93; Love, *supra* note 44, at 1173 n.15; Menitove, *supra* note 28, at 452–53; Ridolfi, *supra* note 51, at 50 (“[A]n executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security.”); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 598 (2013). Amnesty has the same legal effect as a pardon. See *Knote v. United States*, 95 U.S. 149, 152–53 (1877) (quoted *supra* note 42); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871).

56. See, e.g., Love, *supra* note 44, at 1178; see also HANNAH ARENDT, *THE HUMAN CONDITION* 237 (1958) (“Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever, not unlike the sorcerer’s apprentice who lacked the magic formula to break the spell.”).

ly days of our republic. It was used regularly during the nineteenth century and for most of the twentieth.⁵⁷ Presidents and governors used the power to correct miscarriages of justice, restore an offender's civil rights, express their own policy regarding the severity of the criminal law, and manage the prison population.⁵⁸

Yet, despite its hallowed place in the Anglo-American legal tradition, mercy has almost disappeared from the contemporary federal criminal justice system.⁵⁹ At one time, Presidents

57. See, e.g., BANNER, *supra* note 35, at 54–55 (“A death sentence did not necessarily result in an execution. It merely shifted the case from the judiciary to the executive, from the question of guilt to the question of mercy. There was no expectation that all or even nearly all condemned criminals would be executed. In eighteenth-century New York, for instance, just over half received pardons. In a sample of death sentences from eighteenth-century Virginia, between one-quarter and one-third were never carried out.” (footnote omitted)); HARRY ELMER BARNES, *THE STORY OF PUNISHMENT* 133 (2d ed. 1972) (“The demoralizing practice arose of pardoning each year nearly as many convicts as were admitted, in order to keep the prison population down to a number which it was possible to house even under crowded conditions.”); ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939*, at 31, 77 (2011); JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 227 n.17, 757–59 (1970) (“In general, the pardon power seems to have been exercised not ungenerously”); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 186 (2015); DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776*, at 130–31 (1974); HUGH F. RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 105–10, 121–22, 171 (1965).

58. See, e.g., GOTTSCHALK, *supra* note 57, at 186; JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). In addition, most condemned offenders could also seek “benefit of clergy,” an ancient privilege from punishment originally designed to separate the civil and canonical justice systems. Rather than execution, an offender would be branded on the left thumb, in theory to allow only one such escape from execution. See, e.g., BANNER, *supra* note 35, at 62–65; RANKIN, *supra* note 57, at 105–08.

59. See, e.g., GOTTSCHALK, *supra* note 57, at 189 (“Governor Deval Patrick (D-MA) . . . after seven years in office had yet to grant a single pardon or commutation for any offender, let alone a lifer. At the end of his first three years in office, Governor Andrew Cuomo (D-NY) finally used his clemency powers to grant his first three pardons—all to people who were no longer serving time. Governor Rick Perry (R-TX) has rejected about two-thirds of the clemency recommendations from the Texas Board of Pardon and Parole.” (footnotes omitted)). For an especially pessimistic (albeit somewhat dated) view of the current status of presidential clemency, see Kobil, *supra* note 32, at 604 (“Thus, presidential clemency has been so trivialized that it is now used almost exclusively to cleanse the records of federal criminals after they have managed to stay out of trouble for the requisite five or seven years. The clemency power has become little more than a certification

regularly granted clemency.⁶⁰ George Washington and John Adams did not use their power vigorously, but Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams did.⁶¹ “Lincoln’s military pardons are the stuff of legend,” but “he also issued 331 clemency warrants to people convicted in the civilian courts.”⁶² President Theodore Roosevelt issued 134

that, ‘with the advantage of FBI information and extensive study, the President has judged that the petitioner is clean.’” (footnote omitted). See also, e.g., Rapaport, *supra* note 40, at 1506–07; Rosenzweig, *supra* note 55, at 602–03. The demise of commutation in capital cases is even more marked. See Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 224–25 (2003); Rapaport, *supra* note 40, at 1508, 1517. Former Pardon Attorney Margaret Love described the change as follows:

After 1980, presidential pardoning went into a decline. In part this was because the retributivist theory of ‘just deserts’ and the politics of the ‘war on crime’ together made pardon seem at the same time useless and dangerous. . . . But perhaps the most important negative influence on presidential pardoning was the hostility of federal prosecutors and a change in the administration of the pardon program at the Justice Department that allowed prosecutors to control clemency recommendations. . . . Historically, the attorney general’s clemency recommendations had reflected his dual role as political counselor and chief law enforcement officer. Attorney General Griffin Bell’s decision in the late 1970s to delegate responsibility for making clemency recommendations to officials responsible for prosecution policy eliminated this institutional ambivalence, transforming the general tenor of the advice the president would receive from the Justice Department from the 1980s onwards. No longer did the Justice Department feel its old obligation ‘to accord to the convict all that he may be fairly entitled to have said in his favor.’ Instead, it treated every clemency petition as a potential challenge to the law enforcement policies underlying the conviction. Once pardon policy became part and parcel of a tough-on-crime agenda, pardon practice served primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them. With very little independent interest at the White House in the routine work of pardoning, it was inevitable that the number and frequency of clemency grants would steadily decline through the 1980s.

Love, *supra* note 44, at 1193–95 (footnotes omitted); see also Rosenzweig, *supra* note 55, at 606.

60. See Love, *supra* note 44, at 185–86 (“The Annual Reports of the Attorney General for the years between 1885 and 1930 reveal that the presidents issued more than 10,000 grants of clemency during this forty-five-year period, frequently more than 300 per year.”).

61. See Rosenzweig, *supra* note 55, at 602.

62. Love, *supra* note 44, at 1177–78 (“During the Civil War, President Lincoln’s inclination to be merciful and his sensitivity to the pardon’s political usefulness were the source of some frustration to his generals—though his pardoning apparently inspired the troops. He once spared the lives of sixty-two deserters in a sin-

clemency grants in the first year of his presidency, while his fifth cousin President Franklin Roosevelt issued 204 in the same period.⁶³

Things have changed over the last three decades. From President Reagan through President Obama, the pardon power has fallen into desuetude.⁶⁴ In fact, through his first term,

gle order and wrote to General George Meade that he was 'unwilling for any boy under eighteen to be shot.' General William T. Sherman complained to the Judge Advocate General that Lincoln found it 'very hard . . . to hang spies,' reporting that he intended 'to execute a good many spies and guerrillas—without . . . bothering the President.' President Lincoln spent long hours reviewing clemency requests from soldiers and their families, and famously entertained pardon petitioners at the White House." (footnotes omitted)); CARL SANDBURG, 3 ABRAHAM LINCOLN: THE WAR YEARS 512 (1939) (noting that Lincoln had a reputation as "a pardoner, softhearted rather than hardhearted").

63. See Love, *supra* note 44, at 1170, 1190.

64. See, e.g., MARY BOSWORTH, THE U.S. FEDERAL PRISON SYSTEM 97 (2002) ("[T]his power is hardly ever used."); Barkow & Osler, *supra* note 32, at 8–9; Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 290 (2013) ("Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House." (footnote omitted)) [hereinafter Barkow, *Prosecutor Bias*]. Former Justice Department Pardon Attorney Margaret C. Love has made that point with a tone of regret:

For most of our nation's history, the president's constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive's policy goals. Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of making a mistake, and subverted by unfairness in the way pardons are granted.

Love, *supra* note 44, at 1169. Others have noticed the drop-off, too. See, e.g., Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03 [<https://perma.cc/6EJN-ZWBE>] ("The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy."); Editorial, *Pardon Rates Remain Low*, N.Y. TIMES (Aug. 21, 2013), http://www.nytimes.com/2013/08/22/opinion/what-happened-to-clemency.html?_r=0 [<https://perma.cc/54TC-SGNB>].

When parole was an early release option, parole boards took some of that heat off the governor. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 162 (1993); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 61 (2003). The repeal of the parole laws in many jurisdictions has eliminated that option. See Love, *supra* note 44, at 1190–91 ("[A]fter 1931, the existence of an independent paroling authority and indeterminate sentencing limited the role of clemency as a prison release mechanism, and post-sentence pardons became by far the most frequent form of clemency. Franklin Roosevelt granted more than 3,000 post-sentence pardons during his thirteen

President Obama granted fewer clemency applications than any full-term President since George Washington.⁶⁵ It could be said that the grant of executive clemency today has become as rare as a blue moon.

Consider that drop-off with grant rates in different periods. From 1860 to 1900, the rate of presidential clemency grants was forty-nine percent.⁶⁶ Congress enacted the first federal parole law in 1910. Over the next seventy years clemency gradually receded into the background as parole became the principal mechanism for the early release of prisoners.⁶⁷ Nonetheless, some presidents continued to grant a goodly number of clemency petitions during that span. President Warren Harding held office for only two years, but he issued 474 pardons and 733 commutations. FDR issued approximately 3,000 pardons and hundreds of commutations during his four terms.⁶⁸ Presidents from Kennedy to Carter issued an average of 150 pardons per year.⁶⁹ Beginning in 1980, however, the drop-off was dramatic. The clemency grant rate dropped by almost half from President Carter (twenty-two percent) to President Reagan (twelve percent), and by more than half again from President Reagan to President George H.W. Bush (five percent).⁷⁰ The clemency grant rate has not materially increased since then, even though the number of federal prisoners has continued to grow.⁷¹

That trend is important. In order to determine whether the clemency process needs correction, we need to know why it has virtually disappeared. Otherwise, we risk changing the engine when it is the transmission that is broken.

years in office, but only 488 commutations; Truman granted more than 1,900 pardons (including 141 'to avert deportation') but only 118 commutations; Eisenhower granted 1,100 pardons and 47 commutations. Later presidents also commuted few sentences." (footnotes omitted)).

65. See Barkow & Osler, *supra* note 32, at 3, 8–9; P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 446–47 (2016).

66. *Id.* at 290.

67. *Id.* at 288; Love, *supra* note 44, at 1190.

68. Barkow, *Prosecutor Bias*, *supra* note 64, at 288.

69. *Id.*

70. *Id.* at 291. The numbers in the text are approximations due to rounding.

71. *Id.* (noting that the grant rates were six percent for President Clinton, two percent for President George W. Bush, and, through his first term, less than one percent for President Obama). President Obama has picked up some speed since the end of his first term, but he is still hardly sprinting. See *infra* notes 192 & 196.

Several explanations have been offered for the infrequent use of clemency today. The next subsections examine the likely role that each one has played. It turns out that most of the explanations for the demise of clemency miss the point. Due to improvements in the criminal justice system, clemency is less necessary to correct fact-finding mistakes, and the return of sentencing discretion to federal trial judges shows that the risk of unduly severe sentences has been reduced. Moreover, many criticisms of the federal clemency process fail to precisely identify the blame for clemency's demise.

The two best explanations for why Presidents have recently declined to exercise clemency on a regular basis are the following: First, Presidents rarely gain political capital from granting mercy and always risk losing it.⁷² The upshot is that some Presidents likely view clemency as all cost and no benefit.⁷³ Second, the public believes that Presidents have granted individuals clemency in settings demonstrating favoritism, not mercy. Doing so has generated public cynicism in the legitimacy of presidential clemency, deterring Presidents from granting it.

B. Possible Explanations for that Decline

1. Improvements in the Accuracy of the Trial Process

Not everyone who is convicted committed a crime. When the criminal trial process was rudimentary and the post-conviction process nonexistent, clemency served as a tool to correct erroneous convictions.⁷⁴ Accordingly, one explanation for the re-

72. See, e.g., CROUCH, *supra* note 27, at 5 ("Pardons rarely provide any political benefit to presidents, and they always involve some risk to their political capital The current political environment rewards—or at least does not punish—a president who is sparing with the pardon power.").

73. See, e.g., LOVE, *supra* note 44, at 1195 ("At the beginning of the Clinton Administration, the effects of mandatory sentencing and the abolition of parole swelled commutation filings. Yet President Clinton was disinclined to pardon: apart from the risk of making a mistake, he did not want to be outflanked by Republicans on criminal justice issues." (footnotes omitted)); ROSENZWEIG, *supra* note 55, at 607–08 (describing the hailstorm of criticism that former Mississippi Governor Haley Barbour received for his end-of-term pardons). The costs may be highest when executives face commutation decisions in capital cases. See, e.g., CELESTE, *supra* note 40, at 142 (noting that Governor Celeste's death penalty commutations "stirred up a firestorm of protest"); KOBIL, *supra* note 59, at 224.

74. See *supra* note 34 and accompanying text.

cent desuetude of clemency may be that the criminal justice system has done a better job of filtering out the innocent from the guilty. That turns out to be the case.⁷⁵

Today's criminal justice process bears only faint resemblance to the ones that Coke, Blackstone, and the Framers knew. The investigation of federal crimes is handled by full-time, trained law enforcement officers and supported by forensic technicians, laboratory personnel, and other experts. Federal law enforcement agencies can also draw on the resources of state and municipal police departments.⁷⁶ The trial process is now in the hands of professional lawyers, including prosecutors, defense counsel, and judges.⁷⁷ The Federal Rules of Criminal Procedure⁷⁸

75. See, e.g., Love, *supra* note 44, at 1182–83 (“At a time when basic principles of culpability were still loosely defined, and courts had only limited authority to review a jury’s guilty verdict or vary statutory penalties, pardon performed a variety of important error-correcting and justice-enhancing functions that are nowadays played by courts, and was accordingly valued almost as much by prosecutors and judges as it was by criminal defendants. Indeed, one authority on nineteenth century pardoning has concluded, based on archival research and the reasons given by the attorney general for recommending pardon, that prosecutors and judges relied upon the easy availability of clemency to excuse a somewhat less than rigorous attention paid to due process and a hands-off approach to jury verdicts. Between 1885 and 1931, 181 pardon recommendations were based in whole or in part upon ‘doubt as to guilt,’ 52 cited ‘insufficient evidence’ to support conviction, 93 announced that grantees were innocent or the victims of mistaken identification, and 46 noted the ‘dying confession of the real murderer.’” (footnotes omitted)); *id.* at 1204 (“Clemency is less necessary, and is therefore less justifiable, when mercy ‘shines in the code.’” (citation omitted)).

76. Sheriffs were the principal law enforcement officers at common law. They had no investigative staff, but they could conscript the citizenry into assisting by invoking the “hue and cry,” an ancient means of conscripting local residents into acting as an English version of the “posse” seen in movies about the American West. In colonial America, members of the public served as “watchmen” by patrolling the streets and making arrests. Today, there is a large cadre of federal agents who focus on the investigation of crimes. In most major cities we have large-scale police departments, which use full-time professionals to investigate crimes and apprehend suspects, and they are supplemented by state law enforcement personnel. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 729 (2012).

77. At common law, a victim had to pursue a prosecution because there was no office of public prosecutor. FRIEDMAN, *supra* note 64, at 21. State and federal governments later established such an office, *id.* at 29–30, and it is the standard practice everywhere today. Similarly, at common law, a defendant charged with a felony was not entitled to representation by counsel (although, ironically, a defendant charged with a misdemeanor was). See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); FRIEDMAN, *supra* note 64, at 27. By contrast, today a defendant cannot be sentenced to a term of imprisonment without first either being afforded the right

and Evidence⁷⁹ have supplanted the practices followed at common law,⁸⁰ and today's rules are more likely to produce an accurate result than their predecessors.⁸¹ Defendants also have post-conviction avenues open to them that were unheard of at common law.⁸² A defendant convicted after a trial in federal court can ask the trial judge to set aside the verdict for insufficient evi-

to obtain counsel or having one appointed if he is indigent. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). A defendant's right to counsel comes into play at pretrial proceedings, trial, sentencing, and his first appeal of right. See, e.g., *Mempa v. Rhay*, 389 U.S. 128, 135-37 (1967) (sentencing); *White v. Maryland*, 373 U.S. 59, 60 (1963) (preliminary hearing); *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (first appeal of right); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (trial); *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961) (arraignment).

78. See FED. R. CRIM. P. 1-61.

79. See FED. R. EVID. 101-1103.

80. For a concise discussion of English common law criminal procedure, see PLUCKNETT, *supra* note 33, at 424-41; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978). For a concise discussion of American criminal procedure from the colonial period through the nineteenth century, see FRIEDMAN, *supra* note 64, at 20-27, 235-58, 383-418.

81. For example, at common law a defendant could offer an unsworn statement on his own behalf but could not testify in his defense because he was deemed an "incompetent" witness, due to his interest in the outcome. See 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 576-79 (2d ed. 1923). Today, a defendant has a constitutional right to testify in his defense. See *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Ferguson v. Georgia*, 365 U.S. 570, 570 (1961).

82. The common law in England and in the early United States offered scant opportunity for a defendant to obtain a new trial. See *Herrera v. Collins*, 506 U.S. 390, 408-10 (1993); FRIEDMAN, *supra* note 64, at 255-58. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, did not establish a right to appeal a conviction in a federal criminal case. Congress did not create a right to appeal in capital cases until 1889, Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, and did not extend that right to all convicted defendants until 1891, Circuit Courts of Appeals (Evarts) Act, ch. 517, § 5, 26 Stat. 826, 827 (1891). Shortly thereafter, the Supreme Court held that defendants have no constitutional right to an appeal, *McKane v. Durston*, 153 U.S. 684, 688 (1894), thereby making clear that appellate rights were up to the legislatures to define. As for post-conviction avenues, the Judiciary Act of 1789 extended the right to petition for a writ of habeas corpus to parties held in federal custody, but Congress did not grant parties in state custody that opportunity until the Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385. Today, the Antiterrorism and Effective Death Penalty Act of 1996 regulates habeas corpus. See Pub. L. No. 104-132, 110 Stat. 1214. Finally, while the Constitution vests the clemency power in the President, U.S. CONST. art. II, § 2, cl. 1, it does not require the states to have a clemency process, *Herrera*, 506 U.S. at 414.

dence⁸³ or for a new trial on the ground that the guilty verdict is against the weight of the evidence.⁸⁴ If the trial court denies those requests, the defendant has the right of appeal to a circuit court.⁸⁵ If that option also fails, he can seek relief in the Supreme Court of the United States or in habeas corpus.⁸⁶

Furthermore, the Supreme Court has constitutionalized the criminal process. Over the last sixty years, the Court has decided a legion of cases analyzing the pretrial, trial, and post-trial processes under the Fifth,⁸⁷ Sixth,⁸⁸ Eighth,⁸⁹ and Fourteenth

83. See FED. R. CRIM. P. 33.

84. See FED. R. CRIM. P. 39.

85. See FED. R. APP. P. 4.

86. See 28 U.S.C. §§ 1254(1), 2255 (2012).

87. See, e.g., *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (holding that the Fifth Amendment Self-Incrimination Clause requires “use immunity” for the government to compel a person to testify over a self-incrimination claim); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that the Fifth Amendment Double Jeopardy Clause applies to the states); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring that a person in custody be advised of his right to remain silent and to speak with an attorney before being questioned in order for any statement to be admissible); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that the Self-Incrimination Clause prohibits a prosecutor from commenting on the defendant’s decision not to testify at his trial); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment Self-Incrimination Clause applies to the states); *Green v. United States*, 355 U.S. 184, 188 (1957) (holding that the Fifth Amendment Double Jeopardy Clause bars retrial of an acquitted defendant).

88. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004) (holding that the Sixth Amendment Confrontation Clause guarantees a defendant the right to confront the witnesses against him, therefore limiting use of out-of-court statements at trial); *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 (2000) (holding that the Sixth Amendment Jury Trial Clause guarantees a defendant the right to have the jury make all findings necessary for a sentence to be imposed in excess of the statutory maximum); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (holding that the Sixth Amendment Jury Trial Clause applies to the states); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (holding that the Sixth Amendment Speedy Trial Clause applies to the states); *Washington v. Texas*, 388 U.S. 14, 18 (1967) (holding that the Sixth Amendment Compulsory Process Clause applies to the states); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (holding that the Sixth Amendment Confrontation Clause applies to the states); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment Counsel Clause guarantees an indigent defendant charged with a felony the right to the appointment of trial counsel at state expense); *In re Oliver*, 333 U.S. 257, 272 (1948) (holding that the Sixth Amendment Public Trial Clause applies to the states). See generally *Perry v. New Hampshire*, 132 S. Ct. 716, 716–20 (2012) (discussing Sixth Amendment fair trial guarantees).

89. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that the Eighth Amendment prohibits imposing the death penalty for the rape of a child

Amendments.⁹⁰ The Court has also adopted various remedies to enforce violations of those provisions.⁹¹ The result is that

where the crime did not, and was not intended to, result in the victim's death); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the Eighth Amendment prohibits imposing the death penalty on minors); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits imposing the death penalty on mentally retarded defendants); *Harmelin v. Michigan*, 501 U.S. 957, 997–1001 (1991) (Kennedy, J., concurring) (stating that the Eighth Amendment prohibits only grossly disproportionate terms of imprisonment); *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (rejecting the claim that the death penalty is invariably a cruel and unusual punishment and upholding a capital sentencing scheme that guided the jury's discretion); *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (upholding challenge based on the Eighth Amendment Cruel and Unusual Punishments Clause to purely discretionary capital sentencing schemes).

90. See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (holding that the state court violated due process by forbidding the defendant from introducing evidence to show that someone else committed the crime); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (holding that the state court violated due process by excluding at trial evidence showing that the defendant's confession was coerced); *Ake v. Oklahoma*, 470 U.S. 68, 86–87 (1985) (stating that due process requires that an indigent defendant be provided psychiatric assistance when the defendant shows that sanity will be a significant issue at trial); *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (noting that delay in bringing charges against a defendant can violate due process if the government acted for an improper reason and the defendant was prejudiced by the delay); *Gardner v. Florida*, 430 U.S. 349, 351 (1977) (ruling that due process bars the state from sentencing a defendant to death based on a presentence report not disclosed to the defense); *Estelle v. Williams*, 425 U.S. 501, 505–06 (1976) (stating that a defendant has a right not to be tried in jail garb); *Wardius v. Oregon*, 412 U.S. 470, 478–79 (1973) (holding unconstitutional a nonreciprocal notice-of-alibi discovery obligation placed on a defendant); *Chambers v. Mississippi*, 410 U.S. 284, 294–303 (1973) (finding due process violated when state evidentiary rules excluded compelling evidence of innocence); *Illinois v. Allen*, 397 U.S. 337, 345–47 (1970) (limiting a trial judge's discretion to exclude a defendant from trial due to obstructive conduct); *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) (ruling that due process forbids the prosecution from increasing the charges against a defendant on remand for having successfully challenged his conviction on appeal); *Foster v. California*, 394 U.S. 440, 443 (1969) (ruling that it violates due process to use at trial the results of a police-staged, unduly suggestive identification procedure); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (ruling that it violates due process in a capital case to exclude members of the venire from the jury due to their general opposition to capital punishment); *Shepard v. Maxwell*, 384 U.S. 333, 362 (1966) (ruling that the defendant was denied a fair trial due to massive and prejudicial pretrial publicity); *Estes v. Texas*, 381 U.S. 532, 534 (1965) (ruling that live broadcasting of the defendant's trial violated due process); *Turner v. Louisiana*, 379 U.S. 466, 474 (1965) (ruling that due process was violated when deputy sheriffs who testified at trial fraternized with jurors during trial and deliberations); *Jackson v. Denno*, 378 U.S. 368, 380 (1964) (ruling that a defendant has a right to have a determination made of the voluntariness of his confession outside the presence of the trial jury); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (ruling that defendant had been denied a fair trial due to the

broadcasting of the defendant's interview with the sheriff in which he confessed to the crime); *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (holding that due process requires the prosecution to disclose exculpatory information to the defense); *Cole v. Arkansas*, 333 U.S. 196, 202 (1948) (reversing a state supreme court decision as violating due process for upholding the defendant's sentence on the ground that he had committed an offense not charged against him); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (ruling that the admission of a coerced confession violates the Due Process Clause).

The Constitution plays a more limited role in regulating the plea-bargaining and appellate processes than the trial. Plea-bargaining between the prosecutor and defense counsel does not violate a defendant's Fifth Amendment right to a fair trial. *See, e.g., McMann v. Richardson*, 397 U.S. 759 (1970). Absent case-specific proof of racial animus or some other invidious or retaliatory intent, *see, e.g., Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974), however, the Constitution does not bar a prosecutor from making good on a promise to throw the book at a defendant who declines a plea offer. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Yet the Due Process Clause does regulate the plea bargaining process to at least a minimal extent. *See, e.g., Missouri v. Frye*, 132 S. Ct. 1399, 1410–11 (2012) (holding that defense counsel's failure to advise a defendant of a favorable plea offer allows a prisoner to challenge his later guilty plea); *Lafler v. Cooper*, 132 S. Ct. 1376, 1382, 1390–91 (2012) (holding that defense counsel's constitutionally deficient advice not to accept a favorable plea offer allows a defendant to challenge his conviction at trial); *Santobello v. New York*, 404 U.S. 257, 262–63 (1971) (holding that due process requires a prosecutor to keep promises made to induce a defendant to plead guilty pursuant to a plea bargain). The Constitution does not guarantee a defendant the right to appeal a judgment of conviction and sentence, *see McKane v. Durston*, 153 U.S. 684, 686–88 (1894), but if a state creates an appellate process the Constitution plays a limited role in regulating access to it, *see, e.g., Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (holding that an indigent defendant has a right to appointed counsel on his first appeal as of right); *Griffin v. Illinois*, 351 U.S. 12, 16–19 (1956) (holding that indigent defendants have a right to a free trial transcript for an appeal of right).

91. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 398 (1971) (ruling that the victim of an unconstitutional search can bring a damages action against the responsible government officials); *Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (ruling that the police must deliver the now-famous *Miranda* warnings before interrogating a person in custody); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (ruling that the Sixth Amendment Counsel Clause prohibits the police from deliberately eliciting incriminating statements from a person charged with a crime in the absence of counsel or a waiver); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (adopting an exclusionary rule to suppress evidence obtained by federal law enforcement officers in violation of the Fourth Amendment); *see also Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961) (applying the *Weeks* exclusionary rule to evidence obtained by state law enforcement officers in violation of the Fourth Amendment); *cf. Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part by Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 700–01 (1978) (explaining that section 1 of the Ku Klux Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2012)) provides a private party with a

there is scarcely any feature of the criminal processes that is not regulated by federal constitutional law. Unless several centuries of improvements in the federal criminal justice system have had utterly no effect on the accuracy of the process, we should expect to see a reduction in the number of instances in which the President must pardon a defendant because the defendant is not guilty of a crime.⁹²

Critics might say, however, that this conclusion does not end the discussion. It is too easy, they argue, to assume that the system gets it right in more than ninety-five percent of cases. That assumption, moreover, is flatly inconsistent with the conclusion of Judge Kozinski and other scholars discussed at this Article's outset that the criminal justice system is not as accurate as the public believes it to be. There are numerous instances of people who were wrongly convicted and freed only because a judge later found that someone else committed the crime. The Innocence Project has proven that conclusion true time and again. Furthermore, it is eminently sensible to believe that some defendants, held in jail pending trial because they could not afford bail, have pleaded guilty to a crime they did not commit to obtain release by being sentenced to "time served."⁹³ If that is true, then it is equally reasonable to believe that a defendant facing multiple charges, perhaps due to overlapping statutes that sepa-

damages remedy against state and local officials for a violation of the Constitution).

Of course, it has not been all strawberries and cream for defendants or prisoners. See, e.g., *Minneci v. Pollard*, 132 S. Ct. 617, 619–20 (2012) (declining to imply a *Bivens* action for federal prisoners raising tort claims against personnel of a privately-managed prison); *United States v. Leon*, 468 U.S. 897, 912, 922–23 (1984) (adopting a "reasonable mistake" exception to the *Weeks* exclusionary rule); see also *Herring v. United States*, 555 U.S. 135, 140 (2009) (extending the *Leon* exception); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (same); *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (same).

92. See, e.g., Rosenzweig, *supra* note 55, at 604–05; Sebba, *supra* note 28, at 83.

93. See, e.g., Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1413–14 (2003) ("The plea bargaining system effectively substitutes a concept of partial guilt for the requirement of proof of guilt beyond a reasonable doubt. It is marvelously designed to secure conviction of the innocent."); Anthony B. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 789 (1970).

rately but cumulatively punish the same conduct,⁹⁴ would plead guilty so the prosecutor does not throw the book at him.⁹⁵

Many of those criticisms are true and weighty. It is impossible to deny that, over the last two decades, DNA evidence has exonerated numerous inmates, some of whom spent years in prison for crimes they did not commit.⁹⁶ That is a tragedy for them and a scar on our criminal justice system. Most of those cases involve state convictions, but the federal law enforcement process is not immune from its own flaws. For example, in 2015, the FBI admitted that its forensic experts mistakenly testified about the reliability of certain types of laboratory tests that they had performed for years.⁹⁷

94. Congress can carve a particular crime into as many distinct pieces as it likes and impose a separate punishment for each one. The Fifth Amendment Double Jeopardy Clause is no barrier. *See* *Missouri v. Hunter*, 459 U.S. 359, 367–68 (1983).

95. Scholars with experience in the criminal justice system believe that that result occurs frequently. *See, e.g.*, Amsterdam, *supra* note 93, at 789–90; Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1426 (2012) (reviewing STUNTZ, *supra* note 1) (“In the state criminal courts, which do most of the work in our system, we see high-volume, bureaucratic justice dominated by plea bargains . . . ; much of the litigation we do see is about peripheral procedural matters . . . ; jury trials almost never happen in part because trials almost never happen . . . ; we skimp on and dither about police budgets, while prison populations swing widely with political winds and turn upward even at a time of lowering or flat crime rates . . . ; and prosecutorial discretion often takes the cynical, even sadistic, form of strategically choosing from a menu of highly technical criminal laws with rigid mens rea requirements and strict and severe sentencing schemes such that there is little left for a trial judge—or any honest jury—to do.” (citations omitted)). The Constitution does not prohibit it. *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 372–73 (1978).

96. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting); *Kansas v. Marsh*, 548 U.S. 163, 208–10 (2006) (Souter, J., dissenting); Julie Seaman, *When Innocence Is No Defense*, N.Y. TIMES (Aug. 12, 2015), http://www.nytimes.com/2015/08/12/opinion/when-innocence-is-no-defense.html?emc=edit_ty_20150812&nl=opinion&nid=69361534&r=0 [<https://perma.cc/8RFX-RGYZ>] (“[S]ome 115 prisoners have been exonerated from death row since 1989.”).

97. *See, e.g.*, Spencer S. Hsu, *FBI admits flaws in hair analysis over decades*, WASH. POST (Apr. 18, 2015), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html?tid=a_inl [<https://perma.cc/3GWR-3JP6>] (“The Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000.”).

Ultimately, however, those criticisms are unpersuasive because they do not overcome the gravamen of the argument made here. The criminal justice system has improved over the last sixty-plus years—if not, we ought to ask the Supreme Court for our money back—and undoubtedly has been upgraded over the last six hundred. The flaws that courts and legislatures traditionally identified and remedied should have largely disappeared, to the benefit of suspects and defendants at the retail level and the criminal justice system and public at the wholesale level. There will still be mistakes—no human institution is ever perfect—but the system should no longer have any built-in flaws that will inevitably distort the fact-finding process. If not, we have bigger problems than erroneous convictions caused by mistakes.⁹⁸

98. Some critics will say that I have also overlooked the argument that there is a unique risk that innocent defendants will be convicted and executed in capital cases. This risk has always existed, they will say, but, pointing to opinions by Supreme Court Justices David Souter and Stephen Breyer, they will maintain that scientific proof now supports the contention that the death penalty poses an unacceptable likelihood of executing an innocent man. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756–57 (2015) (Breyer, J., dissenting); *Kansas v. Marsh*, 548 U.S. 163, 208–10 (2006) (Souter, J., dissenting); see also, e.g., BANNER, *supra* note 35, at 303–05. I have not overlooked those claims. I just find them unpersuasive, for several reasons.

First, those criticisms are advanced against the state criminal process in capital cases, not the federal government. See, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (collecting early studies alleging the execution of innocent parties). The latter has executed only three offenders over the last forty years, the best-known one being Timothy McVeigh, who was responsible for the Oklahoma City bombing that killed 168 people and injured hundreds of others. See *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1999); DEATH PENALTY INFO. CTR., *Searchable Execution Database*, <http://www.deathpenaltyinfo.org/views-executions> [https://perma.cc/D2ZZ-YUPQ] (last visited May 10, 2016). No one claims that McVeigh or the other two offenders were innocent. Second, there are various procedural safeguards used only in federal capital cases that minimize the risk an innocent defendant will be convicted and sentenced to death. The Justice Department will not bring a capital case unless the Attorney General personally approves it after review by the Capital Case Section of the Criminal Division and the Attorney General's Review Committee on Capital Cases. See CAPITAL CASE SECTION, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/capital-case-section> [https://perma.cc/L968-SM6F]. Trial and post-trial procedures are more favorable to the defense in capital than noncapital cases. See, e.g., 18 U.S.C. § 3005 (2012) (requiring the appointment of two defense lawyers in every capital case, one of whom must be "learned in the law applicable to capital cases"); *id.* § 3592 (listing aggravating and mitigating factors for the jury to consider); *id.* § 3593 (requiring a hearing before the judge or jury on the appropriateness of the death penalty); *id.* § 3595 (requiring appellate

2. Refinements in the Sentencing Process

An offender can receive an overly punitive sentence when the trial judge makes a mistake at sentencing or correctly applies an unduly harsh statute.⁹⁹ Correcting an unjust sentence has therefore been an historic rationale for clemency.¹⁰⁰ Yet,

review in every case where a prisoner was sentenced to death); *id.* § 3599 (providing counsel for indigent prisoners for post-conviction proceedings in capital cases); *id.* § 3600 (offering DNA testing). Third, Article III judges are responsible for supervising and adjudicating the trial, direct appeal, and collateral attack processes in federal capital cases. By virtue of their life tenure, those judges will not be thinking about their reelection prospects when examining the proof against an offender facing the gallows. Fourth, there are so many issues of national importance on a President's plate that his decision whether to commute a particular sentence to life imprisonment is far less likely to be influenced by his reelection prospects than could be true in the case of a governor. Plus, a second-term President cannot be reelected, so that factor disappears in any such case. Fifth, journalists in the national media seeking a Pulitzer Prize would be hot on the trail of any condemned federal prisoner with any remotely plausible claim of innocence. In sum, it is highly unlikely today that the federal government will execute an innocent party.

99. A defendant could also receive an unjustifiably *lenient* sentence, but the clemency process cannot correct that error. *See* Schick v. Reed, 419 U.S. 256, 267 (1974); 4 BLACKSTONE, COMMENTARIES *92 ("A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*."). The clemency power is not a resentencing power, nor does it give the President the opportunity to review the correctness of the district court's judgment. Article III would prohibit executive review of a federal court's judgment because federal courts cannot issue advisory opinions and because separation of powers principles bar the reopening of federal court final judgments by the other branches. *See, e.g.,* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995); Mistretta v. United States, 488 U.S. 361, 385 (1989); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). The President's Article II power complements a federal court's Article III authority. A judgment of conviction and sentence entered by a district court authorizes the federal government to punish an offender as provided in the judgment and as required by the Due Process Clause. The President, as the federal government's chief executive officer, may implement only a portion of the judgment in his favor, or even none at all, by exercising his Article II clemency authority.

100. Alexander Hamilton made that point in the *Federalist Papers*:

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

THE FEDERALIST No. 74, *supra* note 46, at 446. The need has endured since then. As one commentator noted early in the twentieth century:

Congress has revised the federal sentencing process in several ways over the twentieth century to reduce the risk of unduly onerous punishments and sentencing disparities.

To start with, Congress adopted parole in 1910 in part to permit executive officials to soften the rigors of the sentence imposed on a particular offender.¹⁰¹ Congress revised the parole system in 1976, “at least in part, ‘to moderate the disparities in the sentencing practices of individual judges.’”¹⁰² In 1925, Congress authorized district courts to place offenders on probation where incarceration was unnecessary.¹⁰³ Parole and probation helped to ameliorate unduly punitive statutes and sentences.

Congress later completely revamped the correctional process in the Sentencing Reform Act of 1984 to eliminate gross disparities in terms of imprisonment.¹⁰⁴ Among other things, that stat-

The very nature of criminal law makes such a power vested somewhere essential to relieve the vigor and cruelty of the law. The law must, in theory at least, apply to all persons alike. It cannot take into consideration the particular individual, nor the defects or injustices that frequently arise in its administration. Cases frequently arise to which no general rule can apply without the gravest of injustices, and the most grievous inhumanity, cases where had the legislature known of the particular facts, and had been familiar with the general surroundings, it would have relieved them of the general terms of the law, and the courts had they the power, would have excepted them from the particular statute.

Goodrich, *supra* note 29, at 336–37. The problem still exists today. *See, e.g.*, United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71 (2011); Barkow & Osler, *supra* note 32, at 4–5; Jane L. Fryod, *Safety Valve Failure: Low-Level Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1491 (2000) (“[T]he [Sentencing] Guidelines provide graduated, proportional increases in sentence severity for additional misconduct or prior convictions, whereas mandatory minimums sentences do not.”).

101. *See* Federal Parole Act of 1910, ch. 387, 36 Stat. 819 (1910). The 1910 Act authorized separate parole boards at each prison. That practice lasted until 1948, when Congress consolidated the separate boards into one. *See* Act of June 25, 1948, ch. 645, § 4201, 62 Stat. 683, 854.

102. *See* *Mistretta*, 488 U.S. at 365 (quoting United States v. Addonizio, 442 U.S. 178, 189 (1979)). Beginning in 1972, the U.S. Parole Commission used a Salient Factor Score, which gave objective weight to various criteria in order to reduce subjectivity and disparity. *See* U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 391 (1980); *Addonizio*, 442 U.S. at 182 n.4.

103. Federal Probation Act of 1925, ch. 521, 43 Stat. 1259 (1925) (codified as amended at 18 U.S.C. § 3651 (2012)).

104. The Sentencing Reform Act of 1984 was adopted as Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified as revised at 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. §§ 991–998 (2012)).

ute identified the purposes of punishment as retribution, incapacitation, deterrence, and education;¹⁰⁵ it rejected using imprisonment for the purpose of rehabilitation;¹⁰⁶ it declared that parole was prospectively abolished;¹⁰⁷ it chartered the United States Sentencing Commission and directed it to adopt mandatory Sentencing Guidelines regulating sentencing decisions;¹⁰⁸ it provided the Sentencing Commission with “detailed guidance”¹⁰⁹ as to the factors the Commission should consider when drafting the Sentencing Guidelines;¹¹⁰ and it authorized limited appellate review of a sentence to challenge the application of the Sentencing Guidelines or a sentence that was above or below the designated range.¹¹¹ Although the Supreme Court later held that the Sixth Amendment Jury Trial Clause barred Congress from making the Sentencing Guidelines mandatory,¹¹² the

105. See 18 U.S.C. § 3553(a)(2) (2012); *Mistretta*, 488 U.S. at 375 (“Congress further specified four ‘purposes’ of sentencing that the Commission must pursue in carrying out its mandate: ‘to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense’; ‘to afford adequate deterrence to criminal conduct’; ‘to protect the public from further crimes of the defendant’; and ‘to provide the defendant with needed . . . correctional treatment.’”).

106. See 28 U.S.C. § 994(k) (2012).

107. For the argument that the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), had the unintentional effect of bringing parole back to life, see Larkin, *supra* note 36, at 307–08.

108. See 28 U.S.C. §§ 991, 994, 995(a)(1) (2012).

109. *Mistretta*, 488 U.S. at 376.

110. See, e.g., *id.* at 375–76 (“To guide the Commission in its formulation of offense categories, Congress directed it to consider seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. Congress set forth 11 factors for the Commission to consider in establishing categories of defendants. These include the offender’s age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. Congress also prohibited the Commission from considering the ‘race, sex, national origin, creed, and socioeconomic status of offenders’ and instructed that the guidelines should reflect the ‘general inappropriateness’ of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors.” (citations and footnotes omitted)).

111. See 18 U.S.C. § 3742 (2012).

112. See *United States v. Booker*, 543 U.S. 220, 244 (2005) (holding unconstitutional the mandatory nature of the U.S. Sentencing Guidelines); *Apprendi v. New*

Guidelines remain in effect as advisory tools for the district court's use at sentencing, and many likely continue to rely on them. The result is that the numerous sentencing reforms that Congress adopted over the last century have likely made it unnecessary for the President to use his clemency power often to remedy an individual unjust sentence or widespread gross sentencing disparities.¹¹³

There is an additional point to consider. Clemency should be used, critics maintain, to respond to the injustices caused by federal statutes imposing mandatory minimum sentences.¹¹⁴ Those laws are blunt instruments. They impose a stiff minimum sentence on every offender convicted of distributing the same quantity of a controlled substance regardless of the facts and circumstances of the offense or any mitigating circumstances of the offender.¹¹⁵ Numerous parties from across the ideological spectrum have criticized mandatory minimum laws on the basis that they impose unduly severe punishments in certain cases.¹¹⁶

Jersey, 530 U.S. 466, 483–84 (2000) (holding that the Sixth Amendment Jury Trial Clause guarantees a defendant the right to have the jury make all findings necessary for a sentence to be imposed in excess of the statutory maximum); *see also* Kimbrough v. United States, 552 U.S. 85, 101 (2007) (“[C]ourts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” (brackets in original) (citations omitted)).

113. *See* Rosenzweig, *supra* note 55, at 604.

114. *See* Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 861 (2015) (“Like the jury, executive clemency provides a key mechanism for making sure laws do not extend to cases where it would be unjust and for providing needed individualized justice. Although not every felony is punishable by death, as it was at common law, federal mandatory sentencing provisions present the same concerns as those mandatory English laws. Clemency in that system was best understood as an adjunct to the sentencing system, compensating for the lack of direct judicial discretion. That same compensatory tool is needed for federal mandatory sentencing laws because the check of judicial discretion is lacking.” (footnotes and internal punctuation omitted)) [hereinafter Barkow, *Clemency*].

115. *See* U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (2011) (describing the new drug mandatory minimums as a “response to a number of circumstances, including the increased incidence of drug use and trafficking and well-publicized tragic incidents such as the June 1986 death of Boston Celtics’ first-round draft pick, Len Bias”); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241, 242–43 (2014).

116. *See, e.g.*, *United States v. Angelos*, 345 F. Supp. 1227 (D. Utah. 2004) (criticizing mandatory minimum sentence imposed in that case), *aff’d*, 433 F.3d 738

Those criticisms have some heft to them,¹¹⁷ but presidential clemency is not the best remedy for widespread, large-scale injustices. Statutes imposing mandatory minimum sentences for illegal drug trafficking have been in effect for thirty years, so there are thousands of offenders who could potentially be eligible for clemency.¹¹⁸ That number is likely to overwhelm the President's ability to decide who should receive a commuted sentence. As discussed below, President Obama has launched a clemency initiative to address this problem, but the scope of the problem may be too much for any one person to resolve. A better fix would be to eliminate or restrict the application of mandatory minimum laws, or to grant district courts greater discretion to depart downwards from a minimum sentence and make such a reform retroactive. Over the last two Congresses, several bills have been introduced that would accomplish those

(10th Cir. 2005); MICHAEL TONRY, *MALIGN NEGLECT* (1995); Larkin, *supra* note 115, at 242 & n.9 (collecting authorities arguing that the mandatory minimum sentences for crack cocaine trafficking lead to racially disparate impacts); Eric Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 1-5 & nn.1-17 (2010) (collecting authorities generally criticizing mandatory minimum sentences). Even conservatives who normally would be thought to support such laws as displaying a "tough on crime" attitude have urged reform of some federal mandatory minimum statutes. See, e.g., *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 66-70 (2009) (statement of Grover Norquist, President, Americans for Tax Reform); *id.* at 117-19 (statement of David A. Keene, Chairman, American Conservative Union).

117. Statutes imposing mandatory minimum sentences can create needlessly cruel terms of imprisonment in some cases, but, contrary to the arguments of many in the academy and public interest groups, those laws may not be the cause of the tremendous increase in imprisonment seen over the last three decades. Professor John Pfaff has persuasively argued that this development is more likely due to an increase in convictions from aggressive charging practices than to mandatory minimum sentences. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 *GA. ST. U. L. REV.* 1239 (2012); John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 *HARV. J. ON LEGIS.* 173 (2015); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 *MICH. L. REV.* 1087, 1110 (2013); see also Stephanos Bibas, *The Truth about Mass Incarceration*, *NAT'L REV.* (Sept. 16, 2015). Moreover, during the same period that prison populations grew, there was a corresponding reduction in the number of parties hospitalized for mental illnesses. See Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 *TEX. L. REV.* 1751 (2006). If prisons absorbed the inmates released from mental hospitals due to deinstitutionalization, the total number of people confined may not have changed considerably, only their location.

118. See Larkin, *supra* note 115, at 252.

goals.¹¹⁹ These reforms would spread the task of resentencing among district court judges across the nation, rather than force the President to make each individual decision. A legislative remedy is far more likely to prove successful than dumping the entire problem in the President's lap.

3. *Shifts in the Underlying Rationale for Punishment*

Another reason that the clemency power has fallen into desuetude is the change in the rationale underlying punishment. From the end of the nineteenth century until well into the twentieth, the overarching rationale for criminal punishment was that it was necessary to rehabilitate the offender.¹²⁰ Then-new medical, sociological, and psychological theories could transform prisons—often called “penitentiaries” on the theory that they would reform offenders morally, rather than merely serve as warehouses for incapacitation—from “the black flower of civilized society” into humane treatment facilities.¹²¹

By the twenty-first century, the criminal justice system had largely abandoned the rehabilitative ideal that animated the criminal process and drove the work of every player in the sys-

119. See, e.g., The Smarter Sentencing Act, S. 502, 114th Cong. (2015); The Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System Act of 2015 (the CORRECTIONS Act), S. 467, 114th Cong. (2015); The Smarter Sentencing Act, H.R. 920, 114th Cong. (2015); The Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013).

120. See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.” (footnote omitted)); TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 18 (1871) (“[T]he protection of society against criminal spoliation through the reformation of the transgressor . . . is the primary aim of public punishment.”); cf. Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17 (1899).

121. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 34–35, 55–60, 92 (2002); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 54–58 (1980); Mark C. Dean-Myrda & Francis T. Cullen, *The Panacea Pendulum: An Account of Community as a Response to Crime*, in JOAN PETERSILIA, *COMMUNITY CORRECTIONS: PROBATION, PAROLE, AND INTERMEDIATE SANCTIONS* 9 (1998); Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 169–78 (Norval Morris & David J. Rothman eds., 1998).

tem.¹²² For the bulk of the twentieth century, the criminal justice system strove to separate not only the guilty from the innocent, but also the reparable from the incorrigible based on the assumption that rehabilitation was desirable and possible. That consensus fell apart in the 1970s as an increasing crime rate, which began rising during the prior decade, combined with social unrest to generate distrust in government institutions, including the criminal justice system. Critics on the right and left argued that the rehabilitative ideal was either an instru-

122. But not entirely. See Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 31–34 (2013). District courts may consider the possibility of rehabilitation when deciding whether placing an offender on probation or supervised release. See, e.g., 18 U.S.C. § 3563(a)(4) (2012) (domestic violence offender rehabilitation program is a mandatory condition of probation); *id.* § 3563(b)(9) (medical, psychiatric, or substance abuse treatment is a discretionary condition of probation); *id.* § 3583(d) (domestic violence offender rehabilitation program is a mandatory condition of supervised release). The Federal Bureau of Prisons has authority to decide what in-custody educational, vocational, or substance abuse treatment programs are best for each prisoner. See, e.g., 18 U.S.C. § 3621(e) (substance abuse treatment); *id.* § 3621(f) (sex offender treatment). Congress also enacted the Second Chance Act, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified at 42 U.S.C. §§ 17501–55 (2012)), to help offenders re-enter the community and avoid recidivism. See S. REP. NO. 111-229, at 70 (2010) (“The Second Chance Act . . . imposed new requirements on BOP to facilitate the successful reentry of offenders back into their communities and reduce the rate of recidivism. Among those requirements are the establishment of recidivism reduction goals and increased collaboration with State, tribal, local, community, and faith-based organizations to improve the reentry of prisoners.”); H.R. REP. NO. 111-149, at 71 (2009) (“The Second Chance Act clarified that BOP has the authority to place offenders in community corrections, including residential reentry centers (RRCs), for up to 12 months to facilitate their successful reentry and reduce recidivism. In addition, the Act directed BOP to provide incentives, such as increased time in community corrections, to encourage prisoners to fully participate in skills development programs. The Second Chance Act also makes clear that community corrections may include a period of home confinement for up to the shorter of 10 percent of an offender’s term of imprisonment or six months.”). There is some, albeit limited, evidence that participation in prison programs decreases recidivism. See MICHAEL JACOBSON, *DOWNSIZING PRISONS* 180 (2005) (listing academic skills training, vocational skills training, cognitive skills programs, and drug treatment and sex-offender intervention programs); Francis T. Cullen, *Rehabilitation and Treatment Programs*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL* 259–276, 287 (James Q. Wilson & Joan Petersilia eds., 2002); Joan Petersilia, *Community Corrections*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL*, *supra*, at 500–02 (drug treatment programs); *id.* at 502–04 (work programs such as Texas’s RIO (Re-Integration of Offenders) Program, New York City’s Center for Employment Opportunities, and Chicago’s Safer Foundation); Richard Rosenfeld et al., *The Contribution of Ex-Prisoners to Crime Rates*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL*, *supra*, at 80, 92.

ment of coercion and injustice or the product of the fanciful belief that government knew how to reform hardened criminals in a facility brimming with predators.¹²³ The result was that retribution and incapacitation replaced rehabilitation as the purpose of the criminal law, and punishments became increasingly severe.¹²⁴ In the Sentencing Reform Act of 1984¹²⁵ Congress even went so far as to prohibit district courts from relying on rehabilitation as a sentencing justification under the new, then-mandatory Sentencing Guidelines.¹²⁶ Margaret Love, a former Justice Department Pardon Attorney, also witnessed the changeover from a rehabilitation orientation to a punitive

123. For critics on the left, see, for example, FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME & PUNISHMENT IN AMERICA* 39–40 (1971); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 244 (1977); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 116–17 (1973); DANIEL GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* (1969); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976). For critics on the right, see, for example, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, *FINAL REPORT* 83 (1982); DAVID FOGEL, “...WE ARE THE LIVING PROOF...”: *THE JUSTICE MODEL FOR CORRECTIONS* 280 (1975) (arguing that rehabilitative services should be optional); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 66–76 (1976) (advocating a “just deserts” theory instead of rehabilitation); JAMES Q. WILSON, *THINKING ABOUT CRIME* 162–67 (1983). See generally FRANCIS T. CULLEN & CHERYL LERO JONSON, *CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES* 33–34 (2012); PETERSILIA, *supra* note 64, at 64–65. For critics of the effectiveness of the rehabilitative ideal, see, for example, DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); *THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS* (Lee Sechrest et al. eds., 1979) (agreeing with Martinson, *infra*); WILSON, *supra*, at 189–90, 247 nn.18–20 (citing studies concluding that rehabilitative efforts had been unsuccessful); *id.* at 193 (arguing the purpose of the correctional system should be “to isolate and to punish, not to reform,” because we do “not know how to do much else”); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *PUBLIC INTEREST* 22 (1974) (concluding that there was no reliable evidence that rehabilitation had worked or could work).

124. See, e.g., Larkin, *supra* note 122, at 9–10.

125. Pub. L. No. 98-473, ch. II, 98 Stat. 2031 (codified as amended at 18 U.S.C. § 3551 and 28 U.S.C. §§ 991–98 (2012)).

126. See 18 U.S.C. § 3582(a) (2012) (“[I]mprisonment is not an appropriate means of promoting correction and rehabilitation.”); *Tapia v. United States*, 564 U.S. 319 (2011) (ruling that a district court may not lengthen a defendant’s sentence to enable him to become rehabilitated).

mindset in the clemency process at her former department and believes that nothing has changed since her tenure.¹²⁷

The result is that the President is unlikely to use rehabilitation as a guidepost for making clemency decisions. Of course, the President will occasionally be able to point to an inmate's rehabilitation as a justification for clemency. But he may not invoke that basis frequently if the accepted purposes of punishment are retribution and incapacitation, because clemency would erode those rationales.¹²⁸

4. Justice vs. Mercy

Clemency can be used to ameliorate a punishment that, while permissible in some or even most cases, turns out to be wholly unjust when applied to a specific offender. Jean Valjean is a classic example;¹²⁹ statutes imposing mandatory minimum sentences are modern examples. Clemency can extend an offender mercy even when his sentence appears entirely just.¹³⁰

But there is no consensus with respect to that opinion. Some scholars have argued that justice and mercy are distinct (albeit sometimes confused¹³¹) concepts.¹³² Because of that difference,

127. See Love, *supra* note 44, at 1194–95 (“[P]erhaps the most important negative influence on presidential pardoning was the hostility of federal prosecutors and a change in the administration of the pardon program at the Justice Department that allowed prosecutors to control clemency recommendations. . . . Once pardon policy became part and parcel of a tough-on-crime agenda, pardon practice served primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them. With very little independent interest at the White House in the routine work of pardoning, it was inevitable that the number and frequency of clemency grants would steadily decline through the 1980s.”).

128. References to “he” or “his” include “she” or “her” unless the context dictates otherwise.

129. See VICTOR HUGO, *LES MISÉRABLES* (1862).

130. See, e.g., ANNALISE ACORN, *COMPULSORY COMPASSION* (2004) (arguing that mercy can play a role in restorative justice if it enables an offender to express genuine shame, remorse, and contrition); Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288 (1993); Rapaport, *supra* note 40, at 1505.

131. See *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) (“The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law. . . . The clemency power is designed to serve the same function. Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or

they can be (or at least appear to be) in irreconcilable conflict. Immanuel Kant certainly thought so. He concluded that pardoning someone guilty of a crime is “the greatest injustice” to society.¹³³ Others have held that opinion too.¹³⁴

For a President who is concerned about how clemency will appear to the public, that prospect can give him pause. Given the reforms that the criminal justice system has undergone since the Pardon Clause became law, a President could reasonably be troubled by two perceived results of granting an individual clemency. He could decide that extending mercy to a justly convicted and sentenced offender creates an injustice for other offenders in similar circumstances who have not sought clemency, or could give rise to a public perception that some offenders receive favorable treatment because they are fortunate enough to have a lawyer or someone in a position to gain the President’s attention. A President who makes the categorical judgment that mercy is unnecessary in a system that, to the extent humanly possible, produces justice in individual cases will be reluctant to intervene in the criminal justice system’s operation and will devote to other matters the time that he would have spent making clemency decisions. That fear may explain why George W. Bush, when he was Governor of Texas, declined to commute the capital sentence of Karla Fay Tucker, a woman convicted of pickaxing two people to death, but whom impartial observers believed had undergone a wholesale transformation while on death row. Bush may have feared that granting an attractive

unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system. The law must serve the cause of justice.” (citation omitted)).

132. See, e.g., MURPHY & HAMPTON, *supra* note 32, at 175.

133. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (Hackett Pub. Co. 1999) (1797).

134. See, e.g., MURPHY & HAMPTON, *supra* note 32, at 162–86; Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 284–88 (1993); cf. James D. Barnett, *The Grounds of Pardon*, 61 AM. L. REV. 694, 699 (1927) (“If I were conscious that I had ever advised the president to exercise clemency for no better reason than because I felt sorry for the prisoner or those interested in him, I should feel that my conduct had differed, indeed, in degree, but not in kind, from what it would have been had I given such advice for a bribe in money.” (footnote omitted) (quoting U.S. Attorney General Charles Bonaparte)). For example, Jeffrie Murphy finds that mercy is superfluous given justice or is a vice because it subtracts from justice. See MURPHY & HAMPTON, *supra* note 32, at 169.

white woman mercy would have generated considerable criticism as showing illegitimate favoritism.¹³⁵

The proper tradeoff between justice and mercy is not an easy one to resolve, philosophically or legally.¹³⁶ The issue arises most acutely today in connection with the racial disparity in imprisonment arising from the application of the mandatory minimum sentencing laws to crack cocaine offenders. The lengthier sentences imposed on primarily African-American small-scale crack offenders than on predominantly white small-scale powder cocaine offenders is not due to intentional racial discrimination, but is nonetheless troubling to many people today.¹³⁷ The reason is that the disparity could leave the black community with the impression that they are victimized both by the traffic in crack cocaine they witness in their communities and by the federal laws that are designed to address that problem.¹³⁸ As Professor Glenn Loury has noted, "Assessing the propriety of creating a racially defined pariah class in the middle of our great cities at the start of the twenty-first century" poses a very troubling problem, asking us to decide not only whether we have just crack cocaine sentencing laws, but also whether we have a just criminal justice system.¹³⁹ A President troubled by that disparity could well decide that granting otherwise justified mercy to a large number of white offenders would undermine public confidence in the legitimacy of the criminal justice system by exacerbating the current racial dis-

135. See Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 32, at 43. Sometimes mercy can work in one prisoner's favor but against everyone else's. Missouri Governor Mel Carnahan commuted the death sentence imposed on Darrell Mease simply because Pope John Paul II, who happened to be visiting Missouri on the date of Mease's scheduled execution, asked Carnahan to show mercy to Mease. Thereafter, Carnahan refused to commute the capital sentences of other prisoners who may have had a better case for mercy in order to avoid looking "soft on crime." *Id.* at 40–41.

136. For an excellent discussion of the competing views, see *id.* at 45; Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 32, at 20–32.

137. See Larkin, *supra* note 115, at 249–88 (collecting sources).

138. See *id.* at 289–91.

139. GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 27 (2008).

parity. By declining to extend clemency, the President would, in effect, be choosing the appearance of justice over mercy.

5. *The Victims' Rights Movement*

Another likely explanation is attributable to the rise of the victims' rights movement over the last few decades. For most of our history, victims had no role in the criminal justice system other than as complainants or witnesses; like Victorian Era children, victims were to be seen, but not heard. Once organized police forces and public prosecutors offices developed in the nineteenth century, they gained a monopoly over decision-making authority in the criminal process, and shunted victims to the side.¹⁴⁰ Beginning early in the 1980s, however, victims began to assert their right to be involved in a process that began when they were assaulted, robbed, or defrauded. Since then, they have made up for lost time.¹⁴¹

Victims' rights groups enjoy the same efficiencies that other single-interest groups do,¹⁴² but they also have the ability to generate a wealth of public sympathy. That is an enormously powerful weapon in politics, particularly when used in conjunction with contemporary professional media coverage or social media communications.¹⁴³ A compelling story about an attractive victim with whom the public can identify is worth far more than policy arguments.¹⁴⁴ That asset has made victims one

140. See, e.g., FRIEDMAN, *supra* note 64, at 28, 67–71, 149–55, 358–60.

141. See *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (noting that victims' absence from the criminal process conflicted with "a public sense of justice keen enough that it has found voice in a nationwide victims' rights movement") (internal punctuation omitted); see also, e.g., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982); DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 3–35 (3d ed. 2010); JOHN PRATT, *PENAL POPULISM* 85–89 (2007); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *MISS. L.J.* 514 (1982).

142. The costs of organizing and communicating are far less for special interest groups than for the general public. Single-issue groups also can focus their energies—and, more importantly, their campaign contributions and votes—on legislators inclined toward their viewpoints. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 1–2, 33–52 (1971).

143. See Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 *N.Y.L. SCH. L. REV.* 665, 669–70 (2000).

144. See, e.g., FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* 4–6, 12–16 (2001) (discussing how

of the most powerful nongovernmental interest groups in the criminal justice and political processes.¹⁴⁵ They have been able to push numerous bills through the legislative halls that directly¹⁴⁶ or indirectly¹⁴⁷ grant victims' rights in the criminal process, and they also have been able to amend state constitutions to guarantee their rights.¹⁴⁸

the rape and murder of a twelve-year-old by a parolee lead to the adoption of California's "Three-Strikes" law by popular referendum).

145. Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 868 & n.9 (1996).

146. *See, e.g.*, Crime Victims' Rights Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004); Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (1997); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990); Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984); Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

147. *See, e.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended at 18 U.S.C. § 3559(e) (2012)) (authorizing life imprisonment for repeat child sex offenders); Victims of Trafficking and Violence Protection Act of 2000 ("Aimee's Law"), Pub. L. No. 106-386, 114 Stat. 1464 (codified at 42 U.S.C. § 13713 (2012)) (potentially reducing federal funding for states without "truth in sentencing laws"—that is, laws requiring offenders to serve at least 85% of their sentences); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the "Wetterling Act" or "Megan's Law"), Pub. L. No. 104-145, 110 Stat. 1345 (codified at 42 U.S.C. § 14071) (reducing federal funds by 10% for noncompliant states), *repealed and replaced by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093, 3093-94 (codified at 42 U.S.C. §§ 14072-14073) (requiring that registered sex offenders notify the FBI when they move to a new state), *repealed and replaced by* Adam Walsh Child Protection and Safety Act of 2006, *supra*. Offenders have challenged those laws on several grounds but have been unsuccessful. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 85 (2003) (rejecting ex post facto challenge to Alaska sex offender registration law); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 1-2 (2003) (rejecting due process challenge to Connecticut sex offender registration statute).

148. *See, e.g.*, Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 (1994). Victims' rights advocates have also urged Congress to pass a Crime Victims' Rights Amendment to the Federal Constitution. *See, e.g.*, S.J. Res. 52, 104th Cong. (1996); H.R.J. Res. 174, 104th Cong. (1996); S.J. Res. 65, 104th Cong. (1996); S.J. Res. 6, 105th Cong. (1997); H.R.J. Res. 45, 114th Cong. (2015); Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012). Subcommittees of the House and Senate Judiciary Committees have held hearings on such an amendment, but to date Congress has not passed one by the necessary

Presidents now must consider not only the effect that clemency may have on the immediate victims of a crime and their families, but also the political fallout from angering the victims' rights movement.¹⁴⁹ As Professor Marie Gottschalk has noted, "Released long-time prisoners do not pose a major public threat, but they do pose a potential risk to political careers."¹⁵⁰ Like other organizations devoted to a single issue, the political strength of the victims' rights movement poses the risk for the President that a clemency grant will anger a large number of voters strongly motivated to express their displeasure at the ballot box. A clemency decision that leads to the release of an offender who commits another offense, particularly one that is violent or whose facts indicate depravity, could generate even more heated and larger opposition by enraging the members of this movement and by generating the displeasure of additional non-movement voters who are sympathetic to its cause. Those results could happen even when the President grants clemency

two-thirds vote. See, e.g., *Victim's Rights Amendment: Hearing on H.J. Res. 45 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015), <http://judiciary.house.gov/index.cfm/hearings?ID=B855D611-BAC2-4F83-9D95-29A2873851D9> [<https://perma.cc/PL95-32QN>]. See generally Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005) (detailing the efforts to pass a victims' rights constitutional amendment).

149. See, e.g., Timothy Curtin, Note, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473, 477 (2007) ("[E]arly-release programs are a double-edged sword for reform-minded politicians. Their opponents waste no time in branding them soft on crime, and proponents risk enraging victims' rights groups.") (footnotes omitted); *id.* at 477 n.31 ("The people who commit these heinous crimes have to be held accountable," said Harriet Salarno, chairwoman of Crime Victims United of California. Salarno said she might not fight low-security confinement for old, sick convicts whose offenses were minor, but she objects to changes for those with violent pasts, however distant."); Kobil, *supra* note 32, at 607–08. To be sure, the middle of the nineteenth century witnessed large-scale campaigns to grant and oppose clemency in capital cases. See BANNER, *supra* note 35, at 166. Today's 24/7/365 news cycle and the Supreme Court's repeated "on-again, off-again" capital sentencing decisions have aggravated the problem. For a modern-day example of political pressure to grant clemency, see Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 238 (2002).

150. GOTTSCHALK, *supra* note 57, at 189 ("[Arkansas Governor Mike] Huckabee's commutation and pardon record came under national scrutiny and spurred a spate of political obituaries after a man he had granted clemency to in 2000 killed four police officers in Tacoma, Washington, in 2009.").

to an offender who did not victimize a specific individual. Parents terrified of the prospect that their children could become addicted to drugs, for example, might treat the large-scale grant of clemency to drug offenders, even if it comes only in the form of the commutation of a long sentence to time served, as a retreat in the “war on drugs” and punish the President or his party at the next election.

To be sure, not every victim is opposed to extending an offender mercy in a proper case. The new restorative justice movement gives victims an opportunity to meet face-to-face with the offenders who injured them, and, if offenders take responsibility for and genuinely express remorse for their actions, some crime victims may be able to begin to heal from the insults a crime inflicted.¹⁵¹ If so, they may not oppose seeing the President shorten the term of imprisonment imposed on their wrongdoers. The willingness of some individual victims to see an offender receive mercy, however, does not eliminate the risk that a President faces whenever commuting a sentence that the offender may recidivate after his release, a result that produces one or more new and, it will be argued, needless victims.

The result is to deter Presidents from exercising clemency in cases where extending mercy is justified on the merits but may be politically costly. In most cases, Presidents see little benefit of any type—electoral, professional, or personal—from extending criminals mercy, and they fear major political blowback if an offender granted clemency commits a horrific crime afterwards. Witness what happened to then-Presidential Candidate Michael Dukakis in 1988.¹⁵² Add in the fact that society today

151. See, e.g., ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* (2004).

152. See *Jailhouse nation*, THE ECONOMIST (June 20, 2015), <http://www.economist.com/news/leaders/21654619-how-make-americas-penal-system-less-punitive-and-more-effective-jailhouse-nation> [https://perma.cc/56FR-2HHS] (“One reason Michael Dukakis was never president was that a murderer called Willie Horton, who was released on furlough while Mr[.] Dukakis was governor of Massachusetts, took the opportunity to rape someone.”). A lesser known, but certainly no less grievous, incident occurred when Pat Brown was governor of California. Brown commuted the death sentence imposed on Edward Wein for multiple rapes and kidnapping to life imprisonment without possibility of parole, and as he was leaving office, commuted it again to life imprisonment with the possibility of parole. The state parole board released Wein on parole eight years later, and he responded to everyone’s trust by raping and killing a

demands perfection; one failure can tar a clemency program that has a world-class success rate.¹⁵³ Accordingly, unless the President can generate considerable goodwill from organizations supporting a clemency initiative, he may decide that the potential political harm outweighs the potential human and penological benefit.

6. *Presidential Abuses of the Clemency Power*

There is yet another explanation for the disappearance of clemency, one that may best explain the demise of clemency over the last few decades. That rationale is based not on law or policy, but realpolitik: Recent presidential abuses of the pardon power have poisoned the well.¹⁵⁴ For example, President Bill Clinton was twice guilty of that crime. He offered conditional commutations to the members of a Puerto Rican terrorist group, the Armed Forces of National Liberation (or FALN),¹⁵⁵ very possibly to enlist the support of the Puerto Rican community for his wife Hillary's upcoming Senate race and for Vice President Al Gore's campaign to replace him as President.¹⁵⁶ Clinton also used his clemency power

woman and raping and trying to kill another. BROWN, *supra* note 40, at 90–105. Writing long after the fact, Brown concluded that “[e]ven now, twenty-five years later, I still can’t decide whether I would have let those twenty-three prisoners die [Brown commuted the death sentences of that number on his watch] if it meant saving the life of that one woman.” *Id.* at iii, 102–03. More recently, an offender whose sentence former Arkansas Governor Mike Huckabee commuted murdered four police officers after his release. See Barkow, *Clemency*, *supra* note 114, at 823.

153. See Barkow, *Prosecutor Bias*, *supra* note 64, at 316 (“Horton’s violence overshadowed the fact that the [furlough] program overall had a 99.5% success rate.”).

154. See Rosenzweig, *supra* note 55, at 605.

155. See S. REP. NO. 231, at 2 (2000) (report on Pardon Attorney Reform and Integrity Act, 106th Cong. (2000)) (“On August 11, 1999, President Clinton offered clemency to 16 people who had been convicted of a seditious conspiracy that involved the planting of over 130 bombs in public locations in the United States and the killing of 6 people. Those 16 felons belonged to the violent Puerto Rican separatist organizations called the Armed Forces for National Liberation (known by its Spanish initials, ‘FALN’) and Los Macheteros, which have declared war against the United States in order to bring attention to their political views. Approximately 4 weeks later, on September 7, 1999, 11 of those terrorists who accepted the clemency offer were released from prison. The public reaction in America was widespread outrage.”).

156. See CROUCH, *supra* note 27, at 3–4, 25–26, 95, 108–11, 140–42; Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1484 (2000) (“The President defended his decision in terms of ‘equity and fairness,’ but it was widely criticized as a thin-

promiscuously in his last twenty-four hours in office, granting pardons and commutations the same way that a drunken sailor on shore leave spends money. Clemency recipients were often people (or their representatives) with strong White House connections or who had contributed generously to the President's party or his own presidential library.¹⁵⁷ Clinton's clemency decisions have left a pall over the entire process.¹⁵⁸

ly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife's expected Senate candidacy." (footnotes omitted)).

157. See, e.g., CROUCH, *supra* note 27, at 114-17; Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1136-37 (2010) ("On January 20, 2001, hours before the inauguration of George W. Bush, President Clinton issued 177 pardons and commutations. More than thirty of Clinton's grantees had not filed applications with the Department of Justice, and thirty more had filed applications so recently that the Department could not evaluate them in the ordinary course of events. For weeks, the White House had been 'undated' with pardon requests, pardon lobbying, and pardon meetings. White House Counsel Beth Nolan explained: 'They were coming from everywhere We had requests from members of Congress on both sides of the aisle, in both Houses. We had requests from movie stars, newscasters, former Presidents, former first ladies' Former Attorney General Dick Thornburgh likened the White House in the last weeks of the Clinton administration to a Middle Eastern bazaar. FBI Director Louis Freeh objected to something worse: '[T]he White House went to extraordinary lengths to deceive the Attorney General, myself, the Department of Justice and everyone about who was on the secret pardon list.") (footnotes omitted); *id.* at 1138-60 (describing numerous cases of cronyism); Love, *supra* note 44, at 1195-98 ("President Clinton entered his final year in office having pardoned less generously than any president since John Adams As President Clinton's final day in office approached, many in Washington were braced for some last minute surprises. But no one was quite prepared for the 177 grants announced on the morning of January 20 just before the new president was to take the oath of office, which were unprecedented in number and in kind."); *id.* at 1195-1200; Ruckman, *supra* note 65, at 464-65; Hamilton Jordan, *The First Grifters*, WALL ST. J. (Feb. 20, 2001), <http://www.wsj.com/articles/SB982638239880514586> [<https://perma.cc/49V3-JB86>]. Former President Jimmy Carter said that Clinton's decision to pardon the financial fugitive Marc Rich was "disgraceful." CROUCH, *supra* note 27, at 114.

158. See Love, *supra* note 44, at 1171-72 ("It would be bad enough if presidents had made a conscious choice not to pardon at all or to make only occasional symbolic use of their constitutional power. But what makes current federal pardoning practice intolerable is that as the official route to clemency has all but closed, the back-door route has opened wide. In the two administrations that preceded Obama's, petitioners with personal or political connections to the presidency bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged. The Department of Justice invited these end runs by refusing to take seriously its responsibilities as presidential advisor in clemency matters, by exposing President Clinton to charges of cronyism, and then President

As a result, when the President does exercise clemency, the public might find it difficult to believe that he has not done a favor for a financial contributor or political supporter, even when a president and his political party in fact gain no benefit.¹⁵⁹ As Professor Stephanos Bibas put it, “Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich.”¹⁶⁰ Finally, any exercise of clemency poses the risk that an exonerated party will later commit a horrific crime, generating public outrage. Presidents worried about “their place in history” may decide not to take that risk. The result is that executive clemency has not played its historic role in prisoner release decisions for some time.

III. THE POSSIBLE RECOVERY OF CLEMENCY

A. John Kingdon’s “Three Streams” Theory of Public Policymaking

Public policy scholars have offered several theories to explain how an issue becomes law.¹⁶¹ In his 1984 book *Agendas, Alternatives, and Public Policies*,¹⁶² Professor John Kingdon articulated one of them, his “three streams” theory of public policy decision making. The public policymaking process, he posited, is “organized anarchy.”¹⁶³ Different people—elected or ap-

Bush to charges of incompetence. The two presidents are also at fault: in confirming popular beliefs about pardon’s irregularity and unfairness, they disserved both the institution of the presidency and their own legacies.”).

159. See CROUCH, *supra* note 27, at 145; Love, *supra* note 44, at 1194.

160. BIBAS, *supra* note 13, at 24.

161. See JAMES E. ANDERSON, PUBLIC POLICYMAKING (7th ed. 2010) (describing the different theories).

162. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984). Kingdon published a second edition in 1995. See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995) [hereinafter KINGDON].

163. KINGDON, *supra* note 162, at 86. Kingdon sees all public policy decisions as involving a sequential, four-step process: (1) setting the “agenda,” i.e., the list of subjects to which government officials and closely-involved private parties will devote time and political capital (which he further subdivides into the “governmental agenda,” the items for discussion, and the “decision agenda,” the items set up for action); (2) identifying possible alternative resolutions; (3) choosing one option to become positive law (e.g., a statute); and (4) implementation of that decision. *Id.* at 2–4. *Agendas, Alternatives, and Public Policies* deals with the first two stages of this process. *Id.* at 3.

pointed officials, their staff, career government employees, academics, think tanks, journalists, or even neighbors of one of those parties—generate ideas in hearings, classrooms, or coffee shops. Yet, notwithstanding the oftentimes-chaotic operation of the federal policymaking process, a feature attributable to the Framers' decision to separate the federal government's power to prevent despotism,¹⁶⁴ the chaos is not total; there is at least some organization to this anarchy.¹⁶⁵ Three "families of processes" come together in federal agenda setting, Kingdon argues: "problems, policies, and politics."¹⁶⁶ It is the timely confluence of those three streams that moves a proposal from a computer or conversation to the statute books.

Problems are matters of concern that cannot be ignored or endured. They must be solved, and there is a critical mass of individuals with the same goal.¹⁶⁷ Problems can arise from disasters (such as a plane crash), from sudden, tragic, gripping events (such as 9/11), from intense or long-term media attention to an issue that affects everyone and everyone can understand (such as the impending bankruptcy of a major social program like Medicare), from individuals or groups who thrust themselves or their ideas into the public debate (such as the Tea Party), or in other, more traditional ways (such as policies generated by think tanks such as the Heritage Foundation).

Policies are proposals to address those problems. They can be single-issue (such as U.S. textile trade with China), multi-issue (such as overall U.S.-China trade relations), or all embracing (such as U.S. worldwide defense policy). The number of parties who develop solutions is as vast as the number of people on the staff of policymakers, the number of members in the academy or think tanks, and the number of public or private parties who are or will be affected by a problem or its solution. The number of potential options is limited only by the imagination,

164. *Id.* at 76; *see, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721–22 (1986) (holding that the separation of powers doctrine protects individual liberty); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *THE FEDERALIST* No. 47, at 325 (James Madison) (Benjamin Fletcher Wright ed., 1961).

165. KINGDON, *supra* note 162, at 87.

166. *Id.*

167. As opposed to a concern that people just suffer through. *Id.* at 109–13.

interest, and energy of all those parties.¹⁶⁸ Most policies, however, never develop beyond an embryonic stage. Policymakers have a limited number of hours to address a seemingly unlimited number of problems and solutions, so they must prioritize. Triage is inevitable. That is where the last stream becomes critical. The political stream can thrust an issue to the top of the agenda and turn it from a proposal into a reality.

Politics is the lifeblood of the policymaking process. Politics contributes to, and in turn is shaped by, a host of factors: changes in administrations or in the majority party in either house of Congress; the defeat or retirement of powerful legislators, such as the chairs of the appropriations committees; the election or rise to prominence of charismatic public officials; the passage of public referenda; a shift in the prevailing mood among the electorate; and so forth. Regardless of what the cause may be, it is the political stream that galvanizes the public to demand action and that induces policymakers to follow through even if for no reason other than self-preservation. Legislatures oftentimes react to a crisis in the only way that they can: pass legislation.¹⁶⁹ Consider just these examples: The kidnapping of Charles Lindbergh's son led to enactment of the Federal Kidnapping Act, also known as the Lindbergh Law.¹⁷⁰ The murders of Martin Luther King and Robert Kennedy by firearms led to the passage of the Gun Control Act of 1968.¹⁷¹ The murder of Kimber Reynolds and Polly Klaas led to California's "Three Strikes" recidivist law.¹⁷² The rape and murder of Megan Kanka led to enactment of sex offender registration

168. KINGDON, *supra* note 162, at 87, 116–44. When it comes to choosing from among those options, however, often the dispositive factors are their cost and the room in the budget for any particular proposal. *Id.* at 105–09.

169. "'Rule one: Never allow a crisis to go to waste,' Mr. Emanuel said in an interview on Sunday. 'They are opportunities to do big things.'" Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, N.Y. TIMES (Nov. 10, 2008), <http://www.nytimes.com/2008/11/10/us/politics/10obama.html?pagewanted=all> [<https://perma.cc/VGU9-J8N9>].

170. 18 U.S.C. § 1201 (2012).

171. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified in scattered provisions of 18 U.S.C.).

172. See Tim Newburn, *Contrasts in Intolerance: Cultures of Control in the United States and Britain*, in THE POLITICS OF CRIME CONTROL 227, 252 (Tim Newburn & Paul Rock eds., 2006).

and notification legislation.¹⁷³ Timothy McVeigh's bombing of the Oklahoma City federal building led to enactment of the Antiterrorism and Effective Death Penalty Act.¹⁷⁴ And the events of 9/11 lead directly to the USA PATRIOT Act.¹⁷⁵ Perhaps federal and state governments would have enacted those laws regardless of their precipitating events. We do not and cannot know if that would have been the case. But we do know that those events triggered a public demand that took the form of "Don't just stand there, do something!"—and our elected officials did.

Today may be another such moment. Both major political parties believe that features of the criminal justice system are broken, there is bipartisan support for revision of that system, and there are numerous reform proposals being considered. The question is whether Kingdon's political stream will generate sufficient emphasis on the need to reform not only the sentencing laws but also the clemency process. Two features of contemporary politics could supply that needed push: President Obama's Clemency Project 2014 or the costs of maintaining the correctional system we now have. The next two sections discuss the likelihood that those factors will prompt a reconsideration of the clemency process.

B. *President Obama's Clemency Project 2014*

Since 1914,¹⁷⁶ federal law has made it a crime to distribute "controlled substances"¹⁷⁷—that is, drugs that are considered

173. See Megan's Law, *supra* note 147.

174. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

175. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at scattered sections of the U.S. Code).

176. Harrison Narcotics Tax Act of 1914, ch. 1, 38 Stat. 785 (1914).

177. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–904 (2012)), defines a "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986." 21 U.S.C. § 802(6) (2012). That act incorporates the definition of a "drug" from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1) (2012). The Controlled Substances Act was enacted as Title II of

dangerous because of their psychoactive effect and addictive potential—without a physician’s prescription or, in some instances, at all.¹⁷⁸ In 1986, Congress reacted to the birth of crack cocaine by enacting the Anti-Drug Abuse Act of 1986,¹⁷⁹ which imposed stiff mandatory minimum sentences for crack cocaine distribution.¹⁸⁰ Under the 1986 law, the amount that triggered the mandatory minimum sentence for the distribution of crack cocaine was 100 times less than the predicate amount for the powdered version of the same drug.¹⁸¹ The result was that the Act imposed equally serious punishments on small-scale crack dealers as on large-scale powdered cocaine traffickers.¹⁸² Given the demographics of the crack cocaine trade,¹⁸³ district courts have sentenced a large number of African-American drug traffickers to long terms of imprisonment.¹⁸⁴ Almost three decades later, Congress amended that statute through the Fair Sentencing Act of 2010,¹⁸⁵ which reduced the crack-to-powder ratio from 100:1 to 18:1. The new ratio, however, applies only prospectively, leaving thousands of prisoners to serve sentences that the new law deemed unduly long.

President Obama believed that the prospective-only nature of the Fair Sentencing Act of 2010 rendered it inadequate to

the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

178. See, e.g., Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015). For the history of drug regulation in America, see, for example, JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1985); H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980* (2001); DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL* (3d ed. 1999); John Kaplan, *Taking Drugs Seriously*, 92 PUB. INT. 32 (1988); Ethan A. Nadelmann, *The Case for Legalization*, 92 PUB. INT. 3 (1988); James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENT. 21 (1990).

179. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841 (2012)).

180. See, e.g., Larkin, *supra* note 115, at 241–42.

181. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2–3, 30 (2007).

182. See *id.*; Larkin, *supra* note 115, at 242.

183. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 365 (1997) (“Everyone concedes that there exists a striking and racially identifiable pattern in the demographics of the drug trade.”); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 49–54, 63–70, 98 (2011).

184. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS, *supra* note 181, at 15–17; Larkin, *supra* note 115, at 242, 279.

185. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

address the crack-to-powder sentencing disparity because it left perhaps as many as 30,000 drug offenders imprisoned under the pre-Act law.¹⁸⁶ Accordingly, he set in motion an initiative to redress it through the exercise of his pardon power. In 2014, President Obama established what is known as “Clemency Project 2014.”¹⁸⁷ He directed the Attorney General to review the cases of prisoners sentenced under the now amended version of the Anti-Drug Abuse Act of 1986 to determine whether he should exercise his clemency power to reduce their sentences.¹⁸⁸ Given the massive number of potential clemency appli-

186. See Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?_r=0 [<https://perma.cc/7CNJ-XFYF>]; Editorial, *President Obama Takes On the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html> [<https://perma.cc/YW8G-PV38>]; Richard A. Serrano, *Prison terms for crack cocaine offenses reduced*, L.A. TIMES (July 2, 2011), <http://articles.latimes.com/2011/jul/01/nation/la-na-crack-prisoners-20110701> [<https://perma.cc/N732-BY96>].

187. See CLEMENCY PROJECT 2014, <https://www.clemencyproject2014.org/> [<https://perma.cc/ML73-9R7C>] (last visited May 10, 2016). The Clemency Project describes itself as “a working group composed of lawyers and advocates including the Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers, as well as individuals within those organizations . . . to provide pro bono (free) assistance to federal prisoners who would likely have received a shorter sentence if they had been sentenced today.” *Id.*

188. See, e.g., Press Release, U.S. Dep’t of Justice, *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants* (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new> [<http://perma.cc/S93G-AKAU>] [hereinafter DOJ], *New Clemency Initiative*; see also Matt Apuzzo, *Justice Dept. Expands Eligibility for Clemency*, N.Y. TIMES (Apr. 23, 2014), <http://www.nytimes.com/2014/04/24/us/politics/clemency.html> [<https://perma.cc/GZ63-JA5B>]; Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, N.Y. TIMES (Jan. 30, 2014), <http://www.nytimes.com/2014/01/31/us/politics/white-house-seeks-drug-clemency-candidates.html> [<https://perma.cc/P2Y8-ZTVX>]; *Life sentences for drugs plummet 78% under Obama*, THE CLEMENCY REPORT, <http://clemencyreport.org/life-sentences-for-drugs-plummet-78-under-obama/> [<https://perma.cc/G5SG-CR25>] (last visited May 10, 2016); Austin Tedesco, *Obama Could Pardon Hundreds of Nonviolent Drug Offenders*, BOS. GLOBE (Apr. 21, 2014), <http://www.boston.com/news/nation/2014/04/21/obama-could-pardon-hundreds-nonviolent-drug-offenders/IUpBrZSir6Vt4joT4R8VOP/story.html> [<https://perma.cc/6H9V-LKYN>]. The criteria for consideration are the following: (1) an applicant is currently imprisoned and likely would have received a substantially lower sentence if convicted of the same offense(s) today; (2) the applicant is a non-violent, low-level offender without significant ties to large scale

cants, private parties and organizations, such as the Mercy Project and Clemency Resource Center at the New York University Law School, have volunteered to review clemency petitions.¹⁸⁹

This new initiative, however, is unlikely to jump-start a renaissance of the clemency power. The Clemency Project 2014 is not limited to those drug offenders who would benefit from the new crack-to-powder sentencing ratio were they sentenced today, but they may wind up being the principal beneficiaries of the pro bono legal assistance that the bar is providing. A large number of federal prisoners were convicted of drug offenses, but a greater number of federal inmates are serving time for other federal crimes.¹⁹⁰ Moreover, the program has had only limited effect to date. Perhaps that result is due to the large number of potentially eligible drug offenders sent to federal prison in the twenty-four years that passed between the enactment of the Anti-Drug Abuse Act of 1986 and the Fair Sentencing Act of 2010. Perhaps it is due to the logistical difficulties involved in obtaining a sufficient number of lawyers to represent a large number of prisoners or in asking attorneys in private law firms lacking experience with the criminal justice sys-

criminal organizations, gangs or cartels; (3) he or she has served at least 10 years of the sentence; (4) the applicant does not have a significant criminal history; (5) the prisoner has demonstrated good conduct in prison; and (6) the offender has no history of violence prior to or during their current term of imprisonment. DOJ, *New Clemency Initiative*, *supra*. The Justice Department also recruited members of the bar to submit clemency applications on behalf of drug offenders and engaged in some internal restructuring so that it would be able to review the large number of expected applications. *See Tedesco, supra*. *See generally* Barkow & Osler, *supra* note 32, at 3–4 (describing the provenance and scope of the initiative).

189. *See Center on the Administration of Criminal Law launches Clemency Resource Center*, N.Y.U. (July 15, 2015), <http://www.law.nyu.edu/news/Center-on-Administration-of-Criminal-Law-launches-Clemency-Resource-Center> [<https://perma.cc/C77J-QKTI>]; *The Mercy Project*, N.Y.U., <http://www.law.nyu.edu/centers/adminofcriminallaw/mercyproject> [<https://perma.cc/SFS3-H9GY>] (last visited May 10, 2016).

190. In Fiscal Year 2014, the Justice Department brought 56,218 cases in federal district court against 74,379 defendants. There were 11,514 criminal cases based on drug offenses, constituting approximately 20 percent of the total. The remaining 80 percent (44,704 cases) were for immigration violations, violent crimes, labor racketeering, official corruption, theft, regulatory offenses, and other federal offenses. *See* U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEY'S ANNUAL STATISTICAL REPORT 5–7, 11–12 (2014), <http://www.justice.gov/sites/default/files/usao/pages/attachments/2015/03/23/14statrpt.pdf> [<https://perma.cc/7QBZ-FV5M>].

tem to review prisoners' case files.¹⁹¹ Or perhaps there are not as many prisoners who deserve a commutation as the President expected.¹⁹² Of course, President Obama's clemency initia-

191. As former Pardon Attorney Margaret Love has suggested. See Margaret Love, *Clemency Is Not the Answer (Updated)*, COLLATERAL CONSEQUENCES RESOURCE CTR. (July 17, 2015), <http://ccresourcecenter.org/2015/07/17/clemency-is-not-the-answer-updated/#more-5556> [<https://perma.cc/MTD6-A8QD>].

192. A commonly voiced criticism of the federal drug laws that impose lengthy terms of imprisonment for trafficking in small quantities of "crack" cocaine is that they have imprisoned a huge number of small-scale users, dealers, or "mules" (that is, couriers) for unduly severe periods of confinement. See, e.g., ALEXANDER, *supra* note 2, at 79; WESTERN, *supra* note 2, at 64. Yet a July 2015 story in the *New York Times* gives reason to question that claim. See Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 3, 2015), http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?_r=0 [<https://perma.cc/R2FN-83GT>]. The story discusses the likelihood that President Obama will commute the drug sentences for the largest number of federal prisoners in recent memory (which he later did). See Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES (July 16, 2015), http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?_r=0 [<https://perma.cc/RZ9M-A9B3>]; Editorial Bd., *President Obama Takes On the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html> [<https://perma.cc/M2V9-65GM>]. In the process, the author makes a point worth some follow-up. The article notes that more than 30,000 prisoners have applied for relief, that the private sector lawyers who have volunteered to screen those applications have reviewed approximately 13,000 of them, and that those lawyers have forwarded 113 to the Justice Department for its review. If those numbers are even remotely correct, there seems to be little merit to the argument that the federal drug laws have incarcerated thousands of offenders for utterly unjust periods of time. A total of 113 qualified applicants is less than one percent of the 13,000 applicants already considered (0.8%) and is more than half again less than the number of clemency applicants (0.3%). It therefore may be the case that the critics are wrong in arguing that the crack cocaine laws are oppressive and have turned America's prisons into warehouses for small-fry drug offenders.

Criminal justice experts have always argued that the most important document in a prisoner's file is the presentence report prepared for the district court for use at sentencing, because that report identifies all of the aggravating and mitigating circumstances of the crime, the offender, and his background, factors that may well indicate that the offense or offender is far more heinous than the facts in the indictment or information suggest. See Bibas, *supra* note 117; Larkin, *supra* note 115, at 286; John Pfaff, *For true penal reform, focus on the violent offenders*, WASH. POST (July 26, 2015), https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html [<https://perma.cc/W8P5-9UQG>] ("Obama made this a key point in his NAACP speech: 'But here's the thing: Over the last few decades, we've also locked up more and more nonviolent drug offenders than ever before, for longer than ever before. And that is the real reason our prison population is so

tive is still underway, and the volunteers, the Justice Department, and the President could eventually find a large number of crack offenders whose sentences should be commuted. But at the end of the day, the project may not generate the large number of commutations that the President anticipated and that critics hoped would pan out.¹⁹³

The upshot is this: It is unlikely that President Obama will revitalize clemency as an important penological tool, regardless of the final score for the Clemency Project 2014. He has made few structural changes in the architecture of the clemency process (and those that were made were carried out by Justice De-

high.' This claim, which is widely accepted by policymakers and the public, is simply wrong. It's true that nearly half of all federal inmates have been sentenced for drug offenses, but the federal system holds only about 14 percent of all inmates. In the state prisons, which hold the remaining 86 percent, over half of prisoners are serving time for violent crimes, and since 1990, 60 percent of the growth in state prison populations has come from locking up violent offenders. Less than a fifth of state prisoners—17 percent—are serving time for nonviolent drug offenses. And contrary to Obama's claim, drug inmates tend to serve relatively short sentences. It is the inmates who are convicted of violent crimes who serve the longer terms."). It could be the case that a crack offender pleaded guilty to an indictment or information charging him with having committed a minor drug offense simply because it was easier to prove that crime than the conspiracy, drug enterprise, or violent crimes that he committed or because the sentence would be the same regardless of the offense of conviction. See, e.g., *American prisons: The right choices*, THE ECONOMIST (June 20, 2015), <http://www.economist.com/news/briefing/21654578-americas-bloated-prison-system-has-stopped-growing-now-it-must-shrink-right-choices> [<https://perma.cc/2ZTK-R8JT>] ("Cy Vance, Manhattan's district attorney, is a fan of what he calls intelligence-driven prosecution. Under his tutelage, a Crime Strategies Unit collects information on the most persistent criminals, which can inform prosecutors even if it does not form part of the case. 'If I know someone who is involved in shootings or violence, even if he is arrested for shoplifting, I want to charge it as aggressively as possible,' says Mr Vance."). That may be particularly true because the federal government cannot make it a crime to commit a violent crime where no special federal interest is involved (for example, if the victim is a federal official or the crime occurred on federal property). See Larkin, *supra* note 115, at 286–87.

193. Some criminal justice scholars and others have been quite critical of President Obama's stingy use of clemency. See, e.g., Douglas Berman, *Nearly a year into clemency initiative, turkeys remain more likely to get Prez Obama pardon than people*, SENTENCING L. & POL'Y BLOG (Nov. 26, 2014, 7:23 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2014/11/nearly-a-year-into-clemency-initiative-turkeys-remain-more-likely-to-get-prez-obama-pardon-than-peop.html [<https://perma.cc/6QMY-SGTR>]; Greg Korte, *Obama administration clemency push gets slow start*, U.S.A. TODAY (June 1, 2015), <http://www.usatoday.com/story/news/politics/2015/05/31/obama-clemency-initiative/27963853/> [<https://perma.cc/M449-XXHN>].

partment subordinates rather than Executive Order), the ones that he has made are both trivial and transitory, and he has less than one year left in office.¹⁹⁴ Aside from that initiative, President Obama has been stingy in his exercise of the pardon power. He granted fewer clemency petitions during his first term in office than any other modern President,¹⁹⁵ and he granted the lowest number of pardons in decades.¹⁹⁶ To be sure, since late 2014 he has tried to make up for lost time by commuting more sentences than any President (or all of them) since 1969—

194. The Department appointed a new lawyer to be Pardon Attorney, detailed additional lawyers to that office, and asked the U.S. Attorneys for assistance in identifying meritorious clemency candidates. See Barkow & Osler, *supra* note 32, at 3–4; DOJ, *New Clemency Initiative*, *supra* note 188. In January 2016, however, the Justice Department attorney responsible for overseeing the Clemency Project 2014 resigned, perhaps because insufficient resources had been devoted to the project. See Sari Horwitz, *Attorney overseeing clemency initiative leaving in frustration*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/world/national-security/attorney-overseeing-clemency-initiative-leaving-in-frustration/2016/01/19/903ee75a-bec6-11e5-bcda-62a36b394160_story.html [<https://perma.cc/4WBR-CCWN>].

195. See Barkow & Osler, *supra* note 32, at 3, 8–9. Apparently, some supporters once argued that President Obama was “‘too busy’ in his first two years in office to consider pardon applications.” See Love, *supra* note 44, at 1171 n.6. That argument gives new meaning to chutzpah. “Presidents Lincoln and Franklin Roosevelt had plates at least as full at the beginning of their tenures”—unless the Civil War and the Great Depression do not count—and they “still managed to take care of this bit of presidential housekeeping business.” *Id.* In any event, President Obama has now had seven years in office and still has not made much use of clemency.

196. See, e.g., Editorial, *It’s Time to Overhaul Clemency*, N.Y. TIMES (Aug. 18, 2014), http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0 [<https://perma.cc/7ZTM-A7NW>] (“Judging by the numbers, President Obama, who has, so far, granted just 62 clemency petitions, is the least merciful president in modern history.”); Julie Hirshfeld Davis & Gardiner Harris, *Obama Commutes Sentences for 46 Drug Offenders*, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/us/obama-commutes-sentences-for-46-drug-offenders.html> [<https://perma.cc/SN9Y-UXNJ>]; Charlie Savage, *Obama Pardons 17 Felons, First in His Second Term*, N.Y. TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/02/us/politics/obama-pardons-17-felons-first-in-his-second-term.html> [<https://perma.cc/C5HT-5ZWG>] (“During Mr. Obama’s first term, he exercised his clemency powers three times, issuing a total of 22 pardons and one commutation. He also denied 1,019 applications for a pardon and 3,793 applications for commutation. His rate of approvals was unusually low, by historical standards, based on statistics dating to 1900, on the Justice Department Web site.”). President Obama’s infrequent use of the pardon power has surprised, chagrined, and offended supporters, critics, and independent observers. See, e.g., George Lardner, Jr. & P.S. Ruckman, Jr., Opinion, *Obama’s weak approach to pardons*, WASH. POST (Apr. 9, 2015), http://www.washingtonpost.com/opinions/obamas-weak-approach-to-pardons/2015/04/09/493b9f70-dca3-11e4-a500-1c5bb1d8ff6a_story.html [<https://perma.cc/A7R4-ABYX>].

approximately three hundred via the Clemency Project 2014¹⁹⁷—and there could be more to come because thousands of prisoners are still waiting for their applications to be submitted to him.¹⁹⁸ But unless he replicates “Bill Clinton’s Parting Pardon Party” the night before he leaves office on January 20, 2017,¹⁹⁹ his Clemency Project 2014 may not amount to much. In any event, that initiative could end when he leaves office because the new chief executive could abandon it.²⁰⁰

C. *The Size and Cost of Corrections Today*

There is another factor that is likely to have far greater effect on our correctional process: money. The post-1970 nationwide punitive approach to sentencing, particularly the adoption of mandatory minimum sentencing laws, has led to a vast expansion in the size of the federal correctional system.²⁰¹ That ex-

197. See Horwitz, *supra* note 194 (“Obama has commuted the sentences of 184 federal inmates.”); see also, e.g., Matt Apuzzo, *Obama Commutes Long Sentences of 22 Drug Offenders*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/04/01/us/obama-commutes-long-sentences-of-22-drug-offenders.html?_r=0 [https://perma.cc/B65X-3Y6X]; Rachel E. Barkow & Mark Osler, *The president’s idle executive power: pardoning*, WASH. POST (Nov. 26, 2014), http://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaa1e3a33ef_story.html [https://perma.cc/M6XA-MXDU]; Lardner & Ruckman, *supra* note 196; Office of the Press Secretary, *President Obama Grants Commutations and Pardons*, WHITE HOUSE (Dec. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/18/president-obama-grants-commutations-and-pardons> [https://perma.cc/5FCY-6CLV] (noting that President Obama pardoned two offenders and commuted the sentences of 95 others) [hereinafter WH Press Release].

198. According to the *New York Times*, more than 30,000 federal prisoners have sought commutations via the Clemency Project 2014. Yet, as of July 2015 President Obama had commuted the sentences of fewer than 80 offenders. See Davis & Harris, *supra* note 196; Lardner & Ruckman, *supra* note 196. The number has increased since then. See WH Press Release, *supra* note 197.

199. See Alschuler, *supra* note 157 (detailing the “Clemency Gone Wild” last night of the Clinton Presidency).

200. See, e.g., Douglas Berman, *Highlighting why dozens of commutations barely moves the mass incarceration needle*, SENTENCING L. & POL’Y BLOG (July 14, 2015, 10:15 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/07/highlighting-why-dozens-of-commutations-barely-move-the-mass-incarceration-needle.html [https://perma.cc/T976-3JPU].

201. See, e.g., S. REP. NO. 111-229, at 69 (2010) (“The Federal prison population has grown explosively over the last 20 years.”); H.R. REP. NO. 110-919, at 57 (2008) (“The Federal prison population has grown explosively over the last 20 years. Rising from roughly 25,000 prisoners in 1980, the population is estimated to be

pansion can be seen in both the number of prisoners and the rate of imprisonment. In 1940, the federal system was home to 24,360 prisoners; forty years later, that number was essentially unchanged (24,252). Yet, by the end of 2012, the number of federal prisoners had skyrocketed to 218,687.²⁰² The imprisonment rate has also vaulted to new heights. For most of the twentieth century, the rate was 100 per 100,000 citizens.²⁰³ As of 2007, however, the rate was 724 per 100,000, more than seven times as much.²⁰⁴

207,000 by the end of fiscal year 2008 and more than 213,000 by the end of fiscal year 2009.”); *see also* PETERSILIA, *supra* note 64, at 3, 13. The states have also seen an increase in the number of prisoners. In 1990, there were 708,393 state prisoners, while in 2009 that number was 1,405,622. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 218 (2011), <https://www.census.gov/library/publications/2009/compendia/statab/129ed.html> [<https://perma.cc/L5S6-9WYR>]. As a result, critics have vied for the snazziest label or catchphrase. *See, e.g.*, MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS 201 (2006) (describing America as the “carceral state”); TRAVIS PRATT, ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN UNITED STATES 6 (2009).

202. FED. BUREAU OF PRISONS, *Population Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops [<https://perma.cc/Q2VC-HWQY>]; MARTHA HURLEY, AGING IN PRISON: THE INTEGRATION OF RESEARCH AND PRACTICE 6 (2013) (noting that the number of federal prisoners increased from 131,739 in 2000 to 187,886 in 2009 to 190,641 in 2010). By the end of Fiscal Year 2013 the number exceeded 219,000. NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 2 (Apr. 15, 2014), <https://www.fas.org/sgp/crs/misc/R42937.pdf> [<https://perma.cc/P8EC-GZ86>]. The number of federal prisoners has declined since then, dropping to 207,339 as of 2015. *See* PEW CHARITABLE TRUSTS, FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN 9 (2015), http://www.pewtrusts.org/~media/assets/2015/08/pspp_feddrug_brief.pdf [<https://perma.cc/6WZJ-JRKY>]. The post-1980 increase was not uniform across all categories of crime. From 1980 to 1997, there was an 82% increase in the number of offenders imprisoned for violent crimes, a 207% increase in the number of offenders imprisoned for non-violent crimes (excluding drug offenses), and 1,040% increase in the number of offenders confined for drug crimes. *See* Joan Petersilia, *From Cell to Society: Who is Returning Home?*, in PRISONER REENTRY AND CRIME IN AMERICA 15, 21 (Jeremy Travis & Christy Visser eds., 2005). Some commentators attribute the cause of most of the post-1980 increase in imprisonment to an increased number of drug prosecutions and the stiff penalties imposed under the controlled substances laws. *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 36 (2007).

203. CLEAR, *supra* note 202, at 5.

204. *Id.*

The post-1980 increase in the federal prison population has led to a corresponding increase in the costs of federal corrections.²⁰⁵ In 1980, the average annual cost for a federal prisoner was approximately \$14,000.²⁰⁶ By 2010, that number had doubled to approximately \$28,000.²⁰⁷ Four years later, the cost again increased to approximately \$31,000 per inmate.²⁰⁸ Because the cost of inmate care has increased yearly, the budget for the Federal Bureau of Prisons has become an increasingly large component of the Justice Department's overall budget and will continue to do

205. Members of the Senate and House Appropriations Committees are well aware of that increase. *See, e.g.*, S. REP. NO. 113-181, at 80 (2013) ("By law, the BOP must accept and provide for all Federal inmates, including but not limited to inmate care, custodial staff, contract beds, food, and medical costs. The BOP cannot control the number of inmates sentenced to prison and, unlike other Federal agencies, cannot limit assigned workloads and thereby control operating costs. In effect, the BOP's expenses are mandatory, which leaves the Bureau with extremely limited flexibility Prison overcrowding has been identified as a programmatic material weakness in every Performance and Accountability Report prepared by the Department since 2006. According to the Office of the Inspector General [OIG], the DOJ faces a significant challenge in 'addressing the growing cost of housing a continually growing and aging population of Federal inmates and detainees.'"); H.R. REP. NO. 112-169, at 58 (2011) ("The [Appropriations] Committee believes it is imperative that experts at BOP and outside the government fully understand the drivers of population, costs and recidivism so that overcrowding, costs and recidivism can be addressed. The Committee encourages BOP to undertake a comprehensive analysis of its policies and determine the reforms and best practices that will help reduce spending and recidivism.").

206. In 1980, the federal inmate population was 24,640, and federal prison operating expenditures were \$319,274,000. *See* U.S. GEN. ACCOUNTING OFFICE, FEDERAL AND STATE PRISONS: INMATE POPULATIONS, COSTS, AND PROJECTION MODELS 24, 30, 31 (1996), <http://www.gao.gov/archive/1997/gg97015.pdf> [<https://perma.cc/MDT5-7WHU>] [hereinafter GAO, FEDERAL AND STATE PRISONS]. Of course, imprisonment also imposes "collateral" costs, such as diminished post-release employment opportunities and the burdens that inmates' families suffer. *See, e.g.*, DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA 4, 86 (2007); PEW CHARITABLE TRUSTS, COLLATERAL COSTS: IMPRISONMENT'S EFFECTS ON EMPLOYMENT OPPORTUNITY 9, 18 (2010).

207. *See* FAMILIES AGAINST MANDATORY MINIMUMS, ALTERNATIVES TO INCARCERATION IN A NUTSHELL, <http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf> [<https://perma.cc/PF6W-FKGZ>]. The average cost was even higher for state inmates, \$31,286, ranging from \$14,603 in Kentucky to \$60,076 in New York. *See* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9-10, 14 n.9 (2012) (citing data from 40 states).

208. *See* Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12,523 (Mar. 9, 2015).

so unless the political branches take steps to change the current trajectory of the federal correctional process.²⁰⁹

A significant part of that increase is due to the cost of inmate medical care,²¹⁰ a facet of corrections that has become particularly expensive over the last thirty years.²¹¹ Part of the explana-

209. See, e.g., 2015 S. REP. NO. 113-181, at 80 (2013) (“[T]he Bureau’s budget consumes 25 percent of the budget for the Department of Justice. Moreover, recent per capita expenditure data from the BOP indicate that it is becoming more expensive each year to incarcerate an inmate in the Federal system . . . BOP could eventually consume an even greater share of the Department’s overall budget and potentially lead to an increase in the overall crowding rate as resources become tighter.”); S. REP. NO. 112-78, at 37, 62 (2011) (“The [Appropriations] Committee must provide an increase of more than \$350,000,000 above fiscal year 2011 to safely guard the Nation’s growing Federal prison inmate and detention populations. . . . [T]he Committee is gravely concerned that the current upward trend in prison inmate population is unsustainable and, if unchecked, will eventually engulf the Justice Department’s budgetary resources.”); JULIE SAMUELS ET AL., URBAN INST., *STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM* 2, 14 (Nov. 2013) (noting that BOP’s requested Fiscal Year 2014 budget was one-quarter of the entire Justice Department budget request and could increase to almost thirty percent by 2020). Increased imprisonment expenses also crowd out other uses of law enforcement dollars. See Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Div., U.S. Dep’t of Justice, to the Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 7 (July 11, 2013), <https://www.justice.gov/sites/default/files/criminal/legacy/2013/07/11/2013annual-letter-final-071113.pdf> [<https://perma.cc/334M-ZHBT>].

210. Incarceration denies prisoners the opportunity to provide their own medical care, so the obligation to provide it falls to the government. Otherwise, a prisoner could suffer a slow, painful death that would violate the Eighth Amendment Cruel and Unusual Punishments Clause. The relevant legal standard prohibits the government from being deliberately indifferent to a prisoner’s legitimate medical needs. See, e.g., *Brown v. Plata*, 563 U.S. 493, 510 (2011); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1977). At the same time, prisoners cannot demand the identical medical care that wealthy private parties could afford. See, e.g., *United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir. 1987) (“Persons forfeit a variety of freedoms in consequence of proven criminality. And, though it is plain that an inmate deserves adequate medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy.”). The federal courts have held that the BOP can provide even seriously ill prisoners with necessary medical care. See *United States v. Hilton*, 946 F.2d 955, 960 (1st Cir. 1991); *United States v. Studley*, 907 F.2d 254, 255, 259 (1st Cir. 1990); *United States v. Depew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990); Marjorie Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 813–14 (1994).

211. See B. JAYE ANNO ET AL., NAT’L INST. OF CORR., U.S. DEP’T. OF JUSTICE, *CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES* 11–12 (2004), <http://static.nicic.gov/Library/018735.pdf> [<https://perma.cc/DK94-5EA7>]; BUREAU OF JUSTICE STATISTICS,

tion for that cost increase is attributable to the rise in the prison population. Another explanation is that, generally speaking, offenders entering prison have a poorer medical condition than the general public does, due to alcohol or drug use, neglect, a lack of health insurance or available and free community health services, or for other reasons.²¹² And part of the explanation is that prison overcrowding contributes to the spread of communicable diseases. At their time of release, inmates have a greater incidence of communicable diseases (for example, TB, hepatitis, and HIV/AIDS), chronic illnesses (for example, cardiac or pulmonary disorders and diabetes), mental diseases (for example, schizophrenia and personality disorders), and comorbidities (multiple health problems).²¹³ Studies conducted from 1997–2001 show that U.S. spending on health care for prisoners rose 27% to approximately \$3.5 billion.²¹⁴ From 1992 to 2000, the simple daily cost of prisoner health care rose a steep 31.5%.²¹⁵

U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–2012 (2015) [hereinafter DOJ, MEDICAL PROBLEMS]; LOIS DAVIS ET AL., RAND CORP., UNDERSTANDING THE PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA xxviii (2011); 1 NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 70 (2002); Brie A. Williams, et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS INTERNAL MED. 122, 123 (2011). There are indirect costs too. Because weak or elderly prisoners are at risk of victimization by younger inmates, there may be additional security costs for aged or infirm prisoners. Fear of assault can also increase the stress felt by elderly prisoners, further weakening their medical condition. ANNO, *supra*, at 11–12. The BOP could house elderly prisoners in separate facilities, but that option has its own direct and indirect costs (for example, construction and maintenance costs, salary and fringe benefit costs for additional prison guards). ANNO, *supra*, at vii.

212. DAVIS, *supra* note 211, at xvii–xxvii, 2. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), colloquially known as “Obamacare,” might help remedy the lack of medical care prisoners enjoy after release because it renders eligible for Medicaid parties whose income is below 133% of the federal poverty line. DAVIS, *supra* note 211, at xviii.

213. See DOJ, MEDICAL PROBLEMS, *supra* note 211, at 1–7 & tbls. 1–4; DAVIS, *supra* note 211, at xvii, xxii.

214. ANNO, *supra* note 211, at 11.

215. *Id.*

Escalating prisoner health care costs are particularly noteworthy in the case of “elderly” or “geriatric” inmates,²¹⁶ a group that some commentators have identified as the fastest growing segment of the prison population.²¹⁷ The expense of incarcerating elderly prisoners is considerably greater than the cost for younger prisoners, principally because inmates’ medical expenses become markedly greater as their bodies deteriorate.²¹⁸ Common physical impairments such as loss of vision,

216. There is no uniform definition of an “old,” “elderly,” or “geriatric” prisoner. Different federal and state laws use ages from fifty to seventy when referring to such inmates. See TINA CHIU, VERA INST., IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 4 (2010); HURLEY, *supra* note 202, at 23–27, 43–44. The National Institute of Corrections recommends using fifty as the chronological starting point for “elderly” prisoners. See JOANN MORTON, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, AN ADMINISTRATIVE OVERVIEW OF THE OLDER INMATE 4 (1992). Perhaps proving the old saying that “It’s not the age; it’s the mileage,” age fifty is important because most elderly prisoners are ten to fifteen years older physiologically than chronologically due to drug use, neglect of their health, and other factors. See Curtin, *supra* note 149, at 475; John J. Kerbs & Jennifer M. Jolley, *A Path to Evidence-Based Policies and Practices*, in SENIOR CITIZENS BEHIND BARS: CHALLENGES FOR THE CRIMINAL JUSTICE SYSTEM 1, 6 (John J. Kerbs & Jennifer M. Jolley eds., 2014).

217. HURLEY, *supra* note 202, at 41; Kathleen Auerhahn, *Sentencing Policy and the Shaping of Prison Demographics*, in SENIOR CITIZENS BEHIND BARS: CHALLENGES FOR THE CRIMINAL JUSTICE SYSTEM, *supra* note 216, at 21; see CARRIE ABNER, COUNCIL OF STATE GOV’TS, GRAYING PRISONS: STATES FACE CHALLENGES OF AN AGING INMATE POPULATION 9 (2006) (“Elderly inmates represent the fastest growing segment of federal and state prisons. . . . Experts say the growth of the elder inmate population is expected to continue.”); *id.* at 10 (number of federal and state inmates fifty or more years old has increased from 41,586 in 1992 to 113,358 in 2001). In 2012, the ACLU concluded that sixteen percent of the nation’s prisoners were fifty years of age or older and that the number of elderly prisoners had increased from 8,900 in 1981 to 125,000 in 2012 (all numbers are approximations). The ACLU noted that the number of elderly prisoners is expected to jump to 400,000 by 2030 if current rates of incarceration remain constant. See ACLU, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY i, v, 5 & fig. 3 (June 2012) [hereinafter ACLU, AT AMERICA’S EXPENSE]. Elderly prisoners fit into one of a few categories: (1) offenders who started their criminal careers late in life, who often were convicted of a crime of violence against a family member or a sexual offense (almost half a million arrests per year are of people aged fifty and older); (2) offenders who have criminal careers that escalated over time, landing them in prison for longer and longer sentences or for a very long period under a recidivist statute; or (3) offenders convicted of crimes with a long sentence, such as life imprisonment with or without the possibility of parole. See, e.g., HURLEY, *supra* note 202, at 13; Curtin, *supra* note 149, at 483–84.

218. See, e.g., ANNO, *supra* note 211, at 11–12 (noting that twenty-three percent of federal inmates reported a physical or mental condition needing treatment, eighteen percent of federal prisoners were under care for a severe chronic illness, and

hearing, and mobility can be corrected with glasses, hearing aids, and canes, but diseases that are the consequence of a lifetime of drug use, neglect, or inadequate treatment, such as cardiac or respiratory impairments, hepatitis, or HIV/AIDS, can impose enormous treatment costs and are common among elderly inmates.²¹⁹ The increase in the number of federal prisoners and the length of mandatory minimum sentences for drug or firearms crimes means that more and more prisoners will become very old while confined. The imprisonment of a large number of elderly inmates raises a variety of unique issues.²²⁰ Confinement of a severely ill elderly prisoner can cost from \$67,000 to \$104,000 per year.²²¹ In sum, the long prison terms for drug traffickers, violent felons, and habitual criminals means that the number of elderly, infirm, and dying prisoners will increase, and, with it, the cost of their care.²²²

the average annual cost of confining an elderly inmate was \$60,000–70,000, versus \$27,000 for other inmates); CHIU, *supra* note 216, at 5; HURLEY, *supra* note 202, at 13; MORTON, *supra* note 216, at 18. There are additional factors at work too, such as the need to transport inmates to out-of-prison facilities for special care. *See, e.g.*, ACLU, AT AMERICA'S EXPENSE, *supra* note 217, at 28–29. Such increased costs also do not always directly appear in a correctional institution's expenditures. Increased amounts of overtime for correctional officers performing transport and the construction of new in-prison medical facilities could appear in the line items for employees' salaries and capital improvements even though they are directly attributable to inmate medical care. *Id.* at 30; HENRICHSON & DELANEY, *supra* note 207, at 4–5 & Figs. 1–3.

219. The cost of providing medical care for elderly prisoners is much higher than for younger inmates for several reasons: (1) elderly prisoners have more severe chronic illnesses and disabilities; (2) elderly prisoners take a greater number of medications; (3) elderly prisoners require more visits with prison medical staff; (4) elderly inmates need more trips to outside medical centers for specialized care not available in prison, which requires payment to those centers as well as the cost of transporting and providing security for the prisoners; (5) elderly prisoners are exposed to communicable diseases for longer periods of time; (6) prisoners today are often used to house the mentally ill who years ago would have been committed to a mental institution; and (7) elderly prisoners are at greater physical risk of violence in prison, which worsens stress-related illnesses (for example, hypertension) and can lead to additional aftercare resulting from an assault. *See* ACLU, AT AMERICA'S EXPENSE, *supra* note 217, at 28–29; GOTTSCHALK, *supra* note 57, at 269; HURLEY, *supra* note 202, at 13, 31–34, 61, 103–05.

220. *See, e.g.*, ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY 281 (Max Rothman et al. eds., 2000).

221. *See, e.g.*, ABNER, *supra* note 217, at 10; PETERSILIA, *supra* note 64, at 24; Petersilia, *supra* note 202, at 18.

222. *See* ANNO, *supra* note 211, at 11 (charting escalating average health care costs per inmate from 1991–2000).

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Where does that leave us? A re-examination of the rationale for and the operation of the clemency process may be in order. Several scholars have called for such a reconsideration on the ground that the process has lost its way in the current legal and political climate.²²³ One could also point to the vast increase in the size of the federal prison system over the last three decades—in part due to the lengthy mandatory minimum sentences that the federal drug laws dictate for many offenders, sentences that Congress softened on a going-forward basis and that the Clemency Project 2014 seeks to ameliorate—as another reason for a reexamination.

Yet, the considerable and ever-increasing cost of today's sentencing and correctional policies is likely to have a greater effect on clemency policy than the combined weight of all of the academy's criticisms and the Clemency Project 2014. Sophisticated policymakers know that brilliant but unfunded ideas remain just ideas, while brilliant *and funded* ideas can become policy. That is no less true in the criminal justice system than elsewhere and is certainly true today given the size of the federal debt. The result is that there may be reasons grounded in economics or finance for resurrecting the clemency process. The question then becomes, how will a revised clemency program look?

IV. THE REVITALIZATION OF THE CLEMENCY PROCESS

Revitalizing clemency is a three-step process. We must, first, re-examine the roles that the Department of Justice and White House officials currently play in the process of reviewing clemency petitions for the President's consideration. Then, if we decide that the current process does not work as well as we would like it to, we need to decide whether to change the role those two institutions play and, if so, whether to add another agency into the mix. Finally, because the President is the ultimate decision-maker, we need to ask what part of the problem is attributable to the individuals we elect as President and, if

223. See, e.g., Barkow & Osler, *supra* note 32, at 18–25; Menitove, *supra* note 28, at 448.

that part is nontrivial, how, if at all, we can overcome the shortcomings in the people we elect to that position.²²⁴

A. *Revising the Roles in the Current Clemency Process
Played by the Justice Department and White House Staff*

The current federal clemency process places the responsibility for screening applications largely in the hands of two Justice Department officials and their staffs: the Pardon Attorney and the Deputy Attorney General. The Pardon Attorney heads up a small office known as the Office of the Pardon Attorney.²²⁵ Because the President can consider additional information not found in the record of trial, such as post-release charitable works or expressions of responsibility and remorse, FBI agents are available to perform whatever additional investigations are necessary. When the petition is ready for review, the Pardon Attorney, supported by his staff, reviews the file and makes a clemency recommendation to the Deputy Attorney General. The latter official then decides whether to endorse, revise, or reject that recommendation and forwards his decision to the President via the Office of the White House Counsel.

There is widespread agreement that a severe problem with the current process is the inherent conflict of interest created by using the Justice Department as the gatekeeper for clemency requests.²²⁶ That problem did not always exist, at least not to

224. One option is to amend the Pardon Clause to restrict the President's power, and one restriction would be to empower the U.S. Senate to approve or reject a particular grant of clemency by a two-thirds vote, as occurs with treaties. See U.S. CONST. art. II, § 2, cl. 2 (the Treaty Clause). Commentators have recognized, however, that amending the Pardon Clause is not a realistic option. See Menitove, *supra* note 28, at 457; Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U.L. REV. 143, 143–44 (2003). After President Ford pardoned Nixon for Watergate, Senator Walter Mondale proposed an amendment that would have allowed Congress to overrule a clemency grant by a two-thirds vote, but his proposal failed. Given that failure despite the severe adverse public reaction to that pardon, an action that helped cost Ford the 1976 election, any proposal to amend the Constitution is surely a non-starter. Menitove, *supra* note 28, at 457.

225. For a description of the workings of the federal clemency process from President Washington through George W. Bush, see Love, *supra* note 44, at 1175–1204.

226. See, e.g., Alschuler, *supra* note 157, at 1164; Barkow & Osler, *supra* note 32, at 13–15, 18–19; Kobil, *supra* note 32, at 622; Love, *supra* note 44, at 1193–95; Rosenzweig, *supra* note 55, at 606, 609–10 (“[C]areer prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of

the extent we see today. Until the twentieth century, there were a limited number of federal crimes, and U.S. Attorney's Offices brought all federal prosecutions.²²⁷ That meant the Attorney General was not heavily involved in making criminal justice policy for the nation or in the decisions whether and how to charge a particular case. The latter is still true today (except in extraordinary cases), but the former is not. Beginning in the late 1960s, criminal justice policy has been an ongoing subject of national political debate. Since 1980, the prevailing view has been that retribution and incapacitation, accomplished by imposing sometimes severely punitive terms of imprisonment, are the goals at which federal law should aim.²²⁸ That has changed the clemency calculus.

Neither major political party wants to appear "soft on crime," so neither one has generally seen fit to revisit some of the punitive sanctions that have become law over the last three decades. The Attorney General is a presidential appointee.²²⁹ Not only does he take his lead from the President, he is unlikely to place the President in a politically uncomfortable position (certainly

their colleagues."); Ruckman, *supra* note 65, at 469-70; *It's Time to Overhaul Clemency*, *supra* note 196 ("Even if the project succeeds, it is a one-time fix that fails to address the core reasons behind the decades-long abandonment of the presidential power of mercy. A better solution would be a complete overhaul of the clemency process. First and foremost, this means taking it out of the hands of the Justice Department, where federal prosecutors with an inevitable conflict of interest recommend the denial of virtually all applications. Instead, give it to an independent commission that makes informed recommendations directly to the president."). This is an old problem. See Smithers, *supra* note 51, at 557 (in 1911 criticizing the notion that "it is frequently considered advisable to consult the prosecuting attorney" due to the "common belief" that he is "disinterested," and stating that "[T]his is generally an error. The degree of partisanship entering into the selection and the duties of a modern prosecuting officer, the probability of his having set views and his purely legal conception of a case render his opinion of little value in the higher field of clemency. He is not apt to possess or have been impressed with the broader field of facts, and while he may be requested to give some undisputed data, his opinion [on clemency] should not be asked. All the facts, judicial and extra-judicial, plus the doctrines of clemency, ought to guide the executive to an opinion entirely his own. He has no right to shirk the responsibility."). I doubt that receiving a prosecutor's recommendation against or for clemency in a specific case is a bad practice, but I am certain that entrusting the entire recommendation process to the prosecutor's office is.

227. See, e.g., Barkow, *Prosecutor Bias*, *supra* note 64, at 276.

228. See *id.* at 287-89; Larkin, *supra* note 122, at 9-10.

229. See 28 U.S.C. § 503 (2012).

not if he wants to remain Attorney General).²³⁰ Atop that, it is unreasonable to expect an adversary to offer an entirely dispassionate appraisal of a party's repentance, let alone his guilt. The Justice Department sees its mission as the successful prosecution of criminal cases, and the Department, like every institution, will always favor its fundamental responsibility whenever asked to take on an ancillary chore.²³¹ That problem is aggravated in this case because giving the Department responsibility for clemency places it in the role of second-guessing its own decisions, a role that no one can fulfill successfully.²³²

Moreover, granting the Department a veto over a clemency application does not satisfy the requirement that justice not only must be done, but also must appear to have been done. Having institutionally prosecuted and imprisoned a clemency applicant, the Justice Department is in a good position to offer an opinion regarding his character and contrition and how his petition compares to other ones that have previously been resolved or are still pending. The President would want to know the Department's position in every case. But the Department should not be empowered to strangle a clemency application in the cradle or control how it is presented to the President. Doing

230. See Barkow, *Prosecutor Bias*, *supra* note 64, at 312 ("The dominance of law enforcement interests at the Department is a reflection of the dominance of law enforcement interests in the politics of criminal justice. For the last four decades, tough-on-crime politics by law enforcement officials has beat out just about any competing concern at the federal level."); Larkin, *supra* note 1, at 761–62.

231. See, e.g., Barkow, *Prosecutor Bias*, *supra* note 64, at 288–91, 307–19.

232. See, e.g., Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 122 (2011) (noting that legislators should recuse themselves from voting on matters in which they have a personal interest because "the fundamental principles of the social compact [forbid] . . . any man to be a judge in his own case" (quoting THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 31 (1801))); Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 886 (2009) ("[N]o man is allowed to be a judge in his own cause"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (stating that "a law that makes a man a Judge in his own cause" is an act "contrary to the great first principles of the social compact" that "cannot be considered a rightful exercise of legislative authority") (opinion of Chase, J.); Dr. Bonham's Case (1610) 77 Eng. Rep. 638, 652 (ruling that a college of physicians given statutory powers to punish parties for engaging in the unlicensed practice of medicine may not simultaneously act as "judges, ministers, and parties").

so leaves people across the political spectrum doubting that the system has operated fairly. Any procedure that leads people to question the integrity of the criminal justice system erodes the public confidence that system must have in order for it to generate the public respect needed to encourage public cooperation.²³³ The current process clearly poses that risk.

B. *Creating A Hybrid Clemency Process*

1. *Pardons and Commutations*

How, then, should the current process be revised? One option is to use the U.S. Sentencing Commission,²³⁴ a component of the Judicial Branch that Congress chartered in 1984 to create determinate Sentencing Guidelines for use by district courts.²³⁵ An alternative is to create a new independent administrative agency that considers every clemency application and sends the President its recommendation.²³⁶ The President could informally select the panel members or Congress could establish, within limits, a formal agency to assist the President. The members of the panel could be drawn from the ranks of senior or retired federal judges, former Justice Department officials, defense counsel, and members of the general public. Or the panel's members could represent the different constituencies interested in clemency decision-making, such as current or former U.S. Attorneys or Justice Department officials, current or retired federal judges, and members of the defense bar, clergy, or community. The panel could use former or current FBI agents to conduct the necessary investigations. All of these three panels would send their rec-

233. See, e.g., Barkow & Osler, *supra* note 32, at 19; Larkin, *supra* note 1, at 748 & n.151.

234. See *id.*

235. See 28 U.S.C. § 991(a) & (b) (2012); *Mistretta v. United States*, 488 U.S. 361, 368–70 (1989).

236. See Barkow, *Prosecutor Bias*, *supra* note 64, at 324 (noting that Greg Craig, President Obama's first White House Counsel, and then-Deputy Attorney General David Ogden supported the creation of an "independent commission of former judges, prosecutors, defense attorneys and representatives of faith-based groups") (citation omitted); see also, e.g., *id.* at 335–41 (discussing different options for placing clemency-recommendation authority outside of the Justice Department); Kobil, *supra* note 59, at 228–32; Love, *supra* note 44, at 1210; Menitove, *supra* note 28, at 450–52. See generally Rosenzweig, *supra* note 55, at 609–11 (discussing the various options).

ommendations, thumbs up or thumbs down, to the President via the White House Counsel. The Justice Department would be able to offer an opinion on the clemency application, but would not have the veto power that it currently enjoys. Additional permutations are also possible.²³⁷

Two factors complicate resort to an advisory panel of some type. One is that it might be subject to the Federal Advisory Committee Act (FACA),²³⁸ a federal statute requiring (among other things) that “advisory committees” hold open meetings and make their documents available for public access under the Freedom of Information Act.²³⁹ The FACA does not apply to the President’s reliance on the opinions of the American Bar Association’s Standing Committee on Federal Judiciary regarding potential nominees to the federal bench,²⁴⁰ so the FACA also may not apply to such a committee. Congress could always exempt a clemency advisory committee from the FACA to eliminate any doubt, but there well could be strong political pressure to open its work to public scrutiny. The outcome of that fight is difficult to predict.

The other complicating factor is that at some point, Congress’s attempt to regulate the process by which the President receives advice regarding his exercise of the clemency power would amount to interference rather than assistance and therefore violate the Article II Pardon Clause. For example, a requirement that the President obtain recommendations only from government officials appointed with the “advice and consent” of the Senate would artificially narrow the options that a President would want to have available.²⁴¹

237. For example, Congress also could decide that, if the panel recommends in favor of a sentence commutation, the panel should file a motion in district trial court asking the court to reduce the prisoner’s sentence. In this way, the commission would afford a prisoner the opportunity for an independent “second look” at his sentence, a function that parole boards historically provided, but would instead leave the decision to an Article III judge.

238. 5 U.S.C. App. 2 §§ 1–16 (2012).

239. 5 U.S.C. § 552 (2012).

240. *See* *Public Citizen v. Dep’t of Justice*, 491 U.S. 440 (1989).

241. *See id.* at 482–89 (Kennedy, J., concurring in the result) (concluding that applying the FACA to the ABA committee would infringe on the President’s Article II Nomination Clause power).

To be sure, those problems are not insoluble. Congress regularly funds the Executive Office of the President without imposing unconstitutional restrictions on the President's ability to obtain advice from trusted confidants. Nonetheless, complications arise whenever Congress tries to "assist" the President exercise a prerogative. Absent some extraordinary controversy—such as proof that a presidential confidant sold clemency recommendations—those complications make it unlikely that the President would agree to any formalized restrictions on the clemency process.²⁴²

Creation of a new clemency agency also poses political risks for the President. Federal agencies develop their own constituencies over time, those interest groups have their own allies in the public and the media, and they might hold views about the circumstances that justify clemency that conflict with the President's own policies and priorities. Some Presidents may conclude that federal mandatory minimum laws impose unduly severe penalties, while other Presidents may believe those statutes lessen the risk of discrimination among offenders who commit the same crimes. Some Presidents may find that the drug laws unfairly single out minority offenders, while other Presidents see those laws as a necessary protection for the minority residents who do not traffic in drugs but live in the communities that traffickers threaten. Some Presidents may believe that white-collar offenders are insufficiently punished, while other Presidents think that the penalties for white-collar crimes are based on emotion, not reason. No President wants to have an independent clemency agency and its powerful allies challenge his clemency policy, particularly if he believes that clemency decisions are all cost and no benefit. A President may decide that he would rather spend his limited supply of political capital on issues involving economic policy, military policy, and foreign policy than on pardons and commutations.

The best approach is not to task an existing agency with clemency-recommendation authority or to create an entirely new agency for that purpose. The Office of the Pardon Attorney is a valuable component of the clemency process. The problem is not with that office per se, but where that office is

242. See Barkow & Osler, *supra* note 32, at 20 & n.83.

located. Its placement in the Justice Department can prevent that office from fully achieving its noble goals. The Attorney General appoints the Pardon Attorney and could appoint one lacking the independence necessary to challenge the opinions of the Justice Department Criminal Division or the U.S. Attorneys' Offices. Having the President select the Pardon Attorney himself puts distance between the Pardon Attorney and the Justice Department, which should give the Pardon Attorney the independence that the President needs to receive an honest recommendation. Transferring the Office of the Pardon Attorney to the White House also should eliminate the actual or apparent conflict of interest arising from the Pardon Attorney's current location within the same agency that prosecuted every clemency petitioner.²⁴³ Moreover, the shift would not hamper the office's ability to conduct whatever investigation is necessary to examine an applicant's claim that he is remorseful, has been rehabilitated, or deserves mercy. The President can direct the Director of the FBI to assign whatever special agents are needed for that task.

Of course, this reorganization will not eliminate the risk that politics will influence the President's clemency decisions. But no restructuring or relocation of the Office of the Pardon Attorney could have that effect. Any improvement is worthwhile, even a small one, and transferring this office from the Justice Department to the White House is far from a small improvement. If other reforms are necessary too, there will be ample time for the President to adopt them.

2. *Compassionate Release*

It would be sensible to treat separately from the entire process one small category of cases involving what is often called "compassionate release" or "medical clemency." American society has traditionally extended mercy to prisoners nearing the end of a terminal disease by not forcing them to cross the River

243. See Alschuler, *supra* note 157, at 1167–68. Once that office becomes part of the Executive Office of the President, the President can choose to have the Pardon Attorney report to him however he sees fit—that is, directly or through either the White House Chief of Staff or the White House Counsel. That organizational decision is less important than the shift out of the Justice Department.

Styx behind bars.²⁴⁴ Historically, the government accomplished that result by having the chief executive commute a prisoner's sentence or the parole board release the offender on parole.²⁴⁵ Current federal law, however, works in a different manner.

The Sentencing Reform Act of 1984 (SRA)²⁴⁶ grants district courts authority, on motion by the Federal Bureau of Prisons (BOP), to reduce a prisoner's sentence before he has completed his prison term in limited circumstances—namely, if “extraordinary and compelling reasons warrant such a reduction.”²⁴⁷ The Senate Report on the SRA states that this provision would operate as a “safety valve” for use in cases such as those involving the early release of a prisoner suffering from a terminal illness.²⁴⁸ The statute did not define the “extraordinary and compelling reasons warrant[ing]” release,²⁴⁹ however, and, as a historical

244. See GOLDFARB & SINGER, *supra* note 42, at 343; Barnett, *supra* note 134, at 518 (“There is a sort of prevailing notion among the people, or some classes of them, that any prisoner ought not to die in prison, but that he should be released whenever his illness is believed to be fatal. Such people argue that the public interests cannot suffer if the prisoner should be allowed to die outside of the prison walls, and that the dictates of humanity require that himself and his friends should be spared the alleged disgrace of such an ending of his life.”) (quoting New York Governor David Hill; footnote omitted).

245. Prisoners occasionally have been released on parole to avoid deception, Barnett, *supra* note 134, at 518, but the status of parole in the federal system could be said to be not entirely clear. See Larkin, *supra* note 36.

246. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

247. See 18 U.S.C. § 3582(c)(1)(A)(i) (2012).

248. S. REP. NO. 98-225, at 121 (1983) (stating that the provision would enable a district court to shorten a prisoner's term of confinement, “regardless of the length of [the prisoner's] sentence,” in the “unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner”). The Supreme Court has found the Senate Report a useful source of congressional intent regarding the Sentencing Reform Act of 1984 for three reasons: Unlike the House Report, which was not published until after that Act became law, the Senate Report was published before the vote on the Act. Congress rejected the House version of the Act in favor of the Senate bill. And the House Report indicates that that chamber agreed with many of the principles stated in the Senate Report. See *Mistretta v. United States*, 488 U.S. 361, 366 & n.3 (1989).

249. The Bureau of Prisons has historically interpreted its compassionate release authority narrowly, limiting release to prisoners who are near death. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CHANGE NOTICE NO. 5050.46, PROGRAM STATEMENT CONCERNING COMPASSIONATE RELEASE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582(c)(1)(A) & 4205(g) (1998), <https://web.archive.org/web/20100331124854/http://www.bop.gov/policy/progstat>

matter, the BOP has construed that phrase very narrowly, finding few prisoners eligible for compassionate release.²⁵⁰ Initially, the only inmates lucky enough to be released were terminally ill prisoners predicted to die within a year.²⁵¹ In 1994, the BOP slightly expanded the circumstances permitting compassionate release for severe but nonterminal illnesses, but not for non-medical reasons.²⁵² By contrast, the U.S. Sentencing Commission has concluded that there are additional circumstances in which it is appropriate to release an offender before he has completed his prison term. In addition to having a terminal illness, a prisoner should be considered for compassionate release under the Commission's policy statements if any of the following additional factors is present: the prisoner is so physically incapacitated that he cannot engage in self-care; the only family member able to care for a minor child has died or become physically in-

/5050_046.pdf [https://perma.cc/85WW-RNH5] (indicating that prisoners can receive compassionate release only for extraordinary or extremely grave medical circumstances) [hereinafter BOP, COMPASSIONATE RELEASE PROGRAM STATEMENT]; OFFICE OF THE INSPECTOR GENERAL, DEP'T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 7-27 (2013) [hereinafter DOJ, COMPASSIONATE RELEASE REPORT]; Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 190 n.74 (2005).

250. The same is true in the states. See GOTTSCHALK, *supra* note 57, at 166, 189.

251. See, e.g., BOP, COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 249 (indicating that prisoners can receive compassionate release only for extraordinary or extremely grave medical circumstances); DOJ, COMPASSIONATE RELEASE REPORT, *supra* note 249, at 7-27; William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866 (2009); Chanenson, *supra* note 249, at 190 n.74; John R. Steer & Paula K. Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 FED. SENT'G REP. 154, 157 (2000); see also Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT'G REP. 188, 188 (2001) ("[I]n practice the Director of the Bureau of Prisons has moved for a reduction only on behalf of terminally ill prisoners, or, in recent years, on behalf of some whose 'disease resulted in markedly diminished public safety risk and quality of life.'") (footnote omitted).

252. See Berry, *supra* note 251, at 867 ("The 1994 policy also indicates that other medical illnesses, even if not estimated to be terminal within the year, could rise to the level of 'extraordinary and compelling' circumstances. It states, 'As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy. This policy, however, does not allow for non-medical requests, despite the statutory language, legislative history, Sentencing Commission's policy, and Bureau of Prisons' policy, all of which clearly contemplate non-medical compassionate release.'") (footnotes omitted).

capacitated; or there is another “extraordinary and compelling” reason for compassionate release.²⁵³

Prisoners cannot obtain judicial review of the BOP’s denial of compassionate release. The SRA imposes a strict precondition in every case on a district court’s authority. The BOP must file a motion with the district court seeking a reduction in the offender’s sentence before the court may consider a prisoner’s application. Without that motion, a district court cannot reduce a prisoner’s sentence, regardless of his circumstances.²⁵⁴

That restriction has led to injustices. The Government Accountability Office noted in 2012 that the BOP has asked a district court for compassionate release “in a limited number of cases.”²⁵⁵ The Inspector General of the Justice Department went even further, criticizing BOP in a 2013 report for allowing twenty-eight prisoners to die from 2006 to 2011 before the BOP Director made a final decision on their release petitions.²⁵⁶

The problem may be due to the BOP’s cumbersome, multi-stage process for handling release petitions.²⁵⁷ To some extent, those procedures bring to mind Grant Gilmore’s quip that “[i]n

253. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. (U.S. SENTENCING COMM’N 2008).

254. See *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991); *Turner v. U.S. Parole Comm’n*, 810 F.2d 612, 618 (7th Cir. 1987); *Berry*, *supra* note 251, at 865 (“Federal courts have uniformly rejected attempts to appeal the denial of a motion for compassionate release. In fact, there is no published case granting compassionate release reduction outside of a motion by the Director. Instead, the cases stand for the proposition that a district court does not have jurisdiction to address a sentence reduction motion under Section 3582(c)(1)(A) in the absence of a motion by the Director.”); *Russell*, *supra* note 210, at 816 (“There is a federal statutory provision for compassionate release, but it is a tool for the Bureau of Prisons to use and not an alternative available to the prisoner himself.”).

255. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-320, BUREAU OF PRISONS: ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES’ TIME IN PRISON 25 (2012).

256. See DOJ, COMPASSIONATE RELEASE REPORT, *supra* note 249, at iii, 34–35, 40; see also *Berry*, *supra* note 251, at 862–66. The number might even be higher because compassionate release requests can be made informally by a prisoner, by a prisoner’s family, or by a BOP employee and because the BOP did not consistently track petitions. *Id.* at 35, 37, 39.

257. The problem actually originates before the application process even begins. According to the DOJ Inspector General, initially the BOP made almost no effort to notify prisoners of their ability to petition for compassionate release. Only eight of the 1,100 handbooks created by the BOP of one of its institutions discussed that option. DOJ, COMPASSIONATE RELEASE REPORT, *supra* note 249, at ii.

hell there will be nothing but law, and due process will be meticulously observed.”²⁵⁸ The process begins when a prisoner submits a satisfactory petition to the warden.²⁵⁹ If the warden rejects the petition, he must inform the prisoner, who then can appeal the denial through the administrative process.²⁶⁰ If the warden determines that a petition should be granted, he must forward the matter in writing to the BOP General Counsel’s Office, which also reviews the file.²⁶¹ A member of that office solicits the views of the BOP Medical Director or Assistant Director, Correctional Programs Division, depending on whether the petition seeks release for medical or non-medical reasons, and also asks the relevant U.S. Attorney’s Office for its opinion.²⁶² The BOP General Counsel then sends the file to the BOP Director for a final decision.²⁶³ There are no nationwide time limits on how long a party at each stage may take to review a request. Each institution may have its own standard, and they range from five to sixty-five days.²⁶⁴ The entire process can take more than five months.²⁶⁵ Those procedures may not be the correctional equivalent of *Jarndyce v. Jarndyce*,²⁶⁶ but they do help explain why over six years more than two-dozen prisoners died in prison while their compassionate release petitions were still under consideration.

258. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

259. 28 C.F.R. §§ 571.61–.63 (2013); DOJ, *COMPASSIONATE RELEASE REPORT*, *supra* note 249, at 3. The request must identify the “extraordinary and compelling circumstances” that justify release, a plan discussing where the prisoner will reside and receive medical care, and an explanation of how he will support himself and pay for his treatment. *Id.*

260. DOJ, *COMPASSIONATE RELEASE REPORT*, *supra* note 249, at 3.

261. *Id.* Before April 1, 2013, the warden’s decision to grant release also had to be independently reviewed by the BOP Regional Counsel. *Id.* at 4 n.11; *see* *Compassionate Release; Technical Changes*, Interim Rule, 78 Fed. Reg. 40,134–78 (Feb. 28, 2013).

262. DOJ, *COMPASSIONATE RELEASE REPORT*, *supra* note 249, at 4. The BOP General Counsel has the legal authority to deny a petition as legally insufficient, but does not make final decisions. *Id.*

263. *Id.* If the prisoner requests release for non-medical reasons or a medical reason involving a severely debilitating medical condition resulting in an uncertain life expectancy, the Director will consult with the Deputy Attorney General before making a final decision. *Id.*

264. *Id.* at ii.

265. *Id.* at ii, 38–43.

266. *See* CHARLES DICKENS, *BLEAK HOUSE* (1853).

There may be other explanatory factors. BOP's reluctance to expedite petitions may be due to the fear that it will be blamed for release decisions that later prove to have been mistaken.²⁶⁷ After all, some terminally ill inmates are still at risk of reoffending (think offenders who distribute child pornography). The BOP also might have the view that other inmates may be legally ineligible for compassionate release because they were sentenced to life imprisonment (think murderers)²⁶⁸ or may be realistically ineligible given the nature of their crimes and the adverse public reaction to word of their release (think violent criminals).²⁶⁹ The BOP may also believe that the projected cost

267. See *supra* note 133; GOTTSCHALK, *supra* note 57, at 190 ("As Senator James Webb (D-VA) once said at a conference on prisoner reentry, 'The real question is about fear. And I think it pervades the political process.'"); see also, e.g., CHIU, *supra* note 216, at 8 ("Politics and public sentiment present obstacles to fully using statutes already on the books. Releasing older inmates can be viewed as politically unwise, fiscally questionable, or philosophically unpalatable. The decision to grant early release to any prisoner can be politically risky, regardless of potential cost savings. Data or predictions about older inmates' relatively low rates of recidivism may not sway public opinion. A commonly cited reservation is that offenders placed in nursing homes may prey upon an already vulnerable population. A Mansfield University survey of Pennsylvania residents in 2004 found that only 45 percent of respondents favored the early release to parole for chronically or terminally ill inmates, even if they posed no threat to society.") (footnotes omitted); Curtin, *supra* note 149, at 499-500 ("Stories like that reported by Professor Edith Flynn of Northeastern University do nothing to help the profile of early-release programs. In a radio interview, Flynn related the experience of a Michigan inmate, a double amputee aged sixty-five or sixty-six, who was confined to a wheelchair. Within three weeks of securing a compassionate release, this inmate allegedly wheeled himself into a bank armed with a sawed-off shotgun and robbed it alongside two accomplices. He was soon caught and returned to prison for life. While this scenario sounds like a Hollywood heist movie, the damage of such an occurrence to compassionate release programs is all too real.") (footnotes omitted).

268. See ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 6 tbl. B (2013) (noting that there were 4,058 federal prisoners serving a sentence of life imprisonment without parole); see also CHIU, *supra* note 216, at 8-9 ("For many other opponents, the desire to keep individuals confined may trump any other considerations. As Will Marling, executive director of the National Organization for Victim Assistance, said, 'If a person is sentenced to life, we know they are naturally going to get old. A life sentence should mean life.'").

269. See Chanenson, *supra* note 249, at 194 & n.82 (noting that, at the end of Fiscal Year 2003, of the 1,617 inmates in federal custody age 50 or older who spent 15 or more years in custody, 584 were convicted of drug offenses with the remainder fitting into the following categories: (1) 580 prisoners were convicted of violent crimes, including 300 for robbery; (2) 181, for property offenses, including 5 arson

savings are ephemeral and, given its limited resources and the likely prospect that most prisoners will try to snooker government physicians and administrative personnel into ill-advised release decisions, the game is not worth the candle.²⁷⁰

Nonetheless, those concerns can be addressed by a minor revision to current law. Compassionate release petitions could be handled in the same manner as applications for a pardon or commutation, but it makes little sense to take up the President's time with the factual judgment of whether an inmate has six months or less to live. Congress could eliminate the provision barring a district court from considering a compassionate release petition unless the BOP has asked the court to consider it. To reduce the risk of frivolous petitions, Congress could add four other requirements: one demanding that a petition be accompanied by an affidavit from a physician stating that the prisoner has only six months or less to live; another foreclosing relief unless a district court makes that finding, after an adversary hearing if necessary, regardless of the mitigating facts and circumstances of the case; the third being compulsory electronic monitoring; and the last forfeiting the release of any prisoner who reoffends. By allowing every prisoner to seek judicial review and by requiring each applicant to persuade a district

and explosives offenses; (3) 143 for public-order offenses; (4) 83 for weapons offenses; (5) 33 for immigration offenses; and (6) 13 for unknown offenses); Curtin, *supra* note 149, at 480 (" [T]he [Pennsylvania] Department of Corrections conducted a [2003] profile on inmates aged fifty and older. It found these older inmates were more likely to be jailed for violent offenses, including sexual offenses. The same top nine offenses were committed by both old and young inmates. The offenses are rape, first-degree murder, drug offenses, robbery, third-degree murder, aggravated assault, burglary, second-degree murder, and theft. Rape and first-degree murder together made up 36.6% of the elderly prisoners' offenses as opposed to only 13.1% for the younger group.") (footnotes omitted).

270. See CHIU, *supra* note 216, at 8 ("Many opponents of geriatric release question whether cost savings will be realized. Most analyses of the impact of such policies focus on the cost savings to correctional agencies and, therefore, reveal only part of the fiscal picture. Policymakers and taxpayers want to know whether costs are simply being shifted to other state agencies, such as social service or health departments, or to the federal government through Medicare or Medicaid reimbursements after individuals return to the community."); GOTTSCHALK, *supra* note 57, at 189 ("A major obstacle is that older prisoners are more likely to have been incarcerated for a serious violent offense. A 2006 report on North Carolina prisoners found that almost 60 percent of inmates aged fifty and older were serving time for violent or sex crimes. More than half of them were serving a sentence of life or ten years to life.") (footnote omitted).

court that the interests of justice militate in favor of a compassionate release, the BOP is able to shift the blame for a mistaken release decision to the court. Finally, the recidivism rate for federal prisoners granted compassionate release is far lower than the rate for other federal inmates.²⁷¹ Historically, the government accomplished that result by having the chief executive commute a prisoner's sentence or having the parole board release the offender on parole.²⁷²

C. *Improving the President's Own Clemency Decisionmaking*

There are two interrelated problems that cannot be addressed through legislation or reorganization. One is politics; the other, character. Current and former cabinet officials, White House aides, political allies, party officials, principal fundraisers, college roommates—those parties and other “insiders” will have greater personal access to the President than anyone outside of his family. They may use that access to bypass the established clemency process and directly entreat the President for relief on behalf of a relative, a friend, or a client.²⁷³ A President expressing a willingness to accept clemency petitions outside of the formal process will induce insiders and others to submit their petitions directly to the White House.²⁷⁴

271. See CHIU, *supra* note 216, at 5; SAMUELS, *supra* note 209, at 40–41; Curtin, *supra* note 149, at 489 (“Older inmates, both those that are convicted at an older age and those that age in prison, have a recidivism rate close to zero. Burl Cain, the warden of Louisiana’s Angola Prison, characterized this phenomenon as ‘criminal menopause,’ defined as the tendency of prisoners to lose their inclination to commit crimes.”) (footnotes omitted).

272. See *supra* note 251.

273. See Alschuler, *supra* note 157, at 1132–33 (“As the official route to clemency all but closed, a back-door route opened. In the three administrations that preceded Obama’s, applicants with political connections and/or high-priced, well-connected lawyers bypassed the Department of Justice, disregarded its regulations, and obtained clemency on grounds not available to others.”).

274. See GEORGE W. BUSH, DECISION POINTS 104–05 (2010) (“One of the biggest surprises of my presidency was the flood of pardon requests at the end. I could not believe the number of people who pulled me aside to suggest that a friend or former colleague deserved a pardon. At first I was frustrated. Then I was disgusted. I came to see massive injustice in the system. If you had connections to the president, you could insert your case into the last-minute frenzy. Otherwise, you had to wait for the Justice Department to conduct a review and make a recommendation. In my final weeks in office, I resolved that I would not pardon anyone who went outside the formal channels.”); Love, *supra* note 44, at 1198–99 (“All of the ordinarily applicable standards and procedures went by the boards in the

One way to limit at least the appearance of politics is for the President to regularize the clemency process. Every three, four, or six months the President could spend a weekend at Camp David with the Pardon Attorney (and anyone else the President selects) to review and resolve pending clemency petitions, with an announcement to follow afterwards identifying which (if any) applicants will receive clemency. Regularizing the process by having the President make clemency decisions two, three, or four times each year may reduce the influence of politics, or at least the perception that clemency grants are nothing but favors for cronies. One of the problems with the system under Presidents George H.W. Bush, Clinton, and George W. Bush was that they rushed during the last few weeks of their presidencies to decide what to do with a large number of petitions. That approach lends itself to political influences for a combination of reasons: the President is no longer accountable to the electorate; there is the maximum possible number of former administration officials, White House staffers, and other influential parties who can be retained or persuaded to make a pitch for a particular offender; and the public is more focused on the holidays than politics. If the President uses his clemency power more frequently or at regular intervals the public might become less suspicious that he is acting for the benefit of cronies.²⁷⁵

Of course, it is impossible to prevent politics from influencing the decisions of a political official. But a President who considers clemency petitions regularly and frequently will reduce the risk that the public will treat his clemency decisions as an

frenzy of back-door lobbying by Clinton friends and family. In his drive to create an entire legacy overnight, the President gave pardoning a place on his agenda alongside the Middle East peace negotiations and the independent counsel's inquiry into his own conduct. Relieved of the constraints imposed by the Justice Department's administration of the power, he enjoyed a final unencumbered opportunity to reward friends, bless strangers, and settle old scores The pardons granted to fugitive billionaire Marc Rich and his partner Pincus Greene produced instant outrage from all quarters, focused on the key role of former White House Counsel Jack Quinn and his manipulation of the Justice Department advisory process.").

275. See Love, *supra* note 44, at 1194 ("As pardoning became less frequent, the inherent mystery of the pardon process reinforced in the public's mind the popular myth that pardon is available only to those with money and connections, a way for a president to reward intimates at the end of his term.").

opportunity to score political points.²⁷⁶ Over time, the regular grant of clemency to the type of average Americans that traditionally have received second chances would help cleanse the process of the taint of disgraceful behavior and favoritism that has corrupted it over the last few decades. To be sure, improving the appearance of justice may not be as satisfactory to the academy, the media, and knowledgeable members of the public as enhancing its implementation. But the clemency process will be better off even if the only result is that fewer members of the public see the system as less likely to treat cronies more favorably than ordinary people.

The most difficult problem is to improve the character of the people who make the ultimate decisions: the individuals we elect to serve in the Oval Office.²⁷⁷ The number of issues relevant to the decision that each voter makes every four years never seems to shrink, and their degree of difficulty never seems to grow smaller. Recent Presidents have not seen the clemency process as an important part of their job, and voters never fault presidential candidates or officeholders for having that view. A presidential candidate's opinion about pardons and commutations, about the relationship between justice and mercy, is never as important an issue during campaigns as are his views about taxes and spending, guns and butter, or war and peace. Clemency decisions are one of numerous subjects that the public trusts the President to make in an honest and judicious manner—not a perfect, not even a Solomonic way,

276. See Love, *supra* note 156, at 1510–11 (“Purely as a practical matter, a policy of generosity is likely to be more effective than a policy of caution in avoiding unwarranted criticism of particular grants. Until quite recently presidents have been shielded from public criticism in connection with pardoning by the frequency and regularity with which they acted on pardon applications, as well as the sheer volume of their grants. When the President signed a pardon warrant every couple of months, granting relief to dozens of unknown ‘little people’ simply because they had been recommended by the Attorney General, he could credibly distance himself from the merits of any particular case. But so few people have been pardoned in the past twenty years that each new clemency action is regarded with suspicion and subjected to intense scrutiny, no matter how apparently innocuous.”).

277. See Alschuler, *supra* note 157, at 1168 (“In 1215, the Magna Carta declared, ‘To no one will we sell, to none will we deny or delay, right or justice.’ In the administration of President Bill Clinton, the charter’s pledge was broken.”) (footnote omitted).

but always to the best of his abilities and always evenhandedly, free from inappropriate considerations. Unfortunately, there is no mechanism that can guarantee sitting Presidents will make decisions in that manner. The only option available to us is to elect people willing to make these decisions responsibly, seriously, and frequently in the hope that someone who does all three will find the process a worthwhile use of his time.

CONCLUSION

St. Anselm once asked how a perfectly just God could also be merciful, since perfect justice and almighty grace could not seemingly coexist. Fortunately, the criminal justice system does not need to answer that question, one that has proven inscrutable for theologians and philosophers, because its assumptions do not apply to our system. An earthly judicial system will never be able to administer justice perfectly and cannot disburse mercy even approaching the quality of the divine. But the clemency power can try to achieve as much of an accommodation between those two goals as any human institution can. Unfortunately, however, our recent span of presidents, attuned more to political than humanitarian considerations and fearing the electoral wrath of the voters for mistaken judgments, have largely abandoned their ability to grant clemency in order to husband their political capital for pedestrian undertakings. Far worse, others have succumbed to the dark side of "the Force," have used their power shamefully, and have left a stain on clemency that we have yet to remove.

We now have reached a point where that taint can be eliminated. Whether it is because of the confluence of Kingdon's three streams, a federal budget bursting at its seams, the rare contemporary occurrence of bipartisan agreement on the need to remedy a problem, or the right alignment of the stars, the current widespread belief that correctional reform is necessary for reasons of compassion or fiscal responsibility might enable us to revitalize a process that has existed almost as long as we have. If so, if today's moment proves durable, we should see a return of the necessary role that clemency can play in a system that strives to be both just and merciful.