Clemency 2.0

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INTRODUCTION:

Contemporary 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. The police are motivated by racist attitudes and act like Rambo wannabees decked out in full military gear. Traditional forms of proof, such as eyewitness identification, fingerprints, and confessions, which the public assumes are foolproof, in fact are anything but—to say nothing about the more exotic forms of

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proof such as “bite-mark” or “blood-spatter” analysis. 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. Prosecutors charge offenders with crimes that have maximum publicity value or can easily be proved in order to enhance their resumes, all while withholding exculpatory evidence from the defense to maximize the likelihood of conviction. Public defenders are so swamped with cases and starved for resources—

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8 See United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) (prosecution of Martha Stewart); Jed S. Rakoff, The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?, N.Y. REV. OF BOOKS (Jan. 9, 2014) (“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.”). http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/.

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 99 (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 (2012); Cone v. Bell, 556 U.S. 449 (2009); Banks v. Dretke, 540 U.S. 668 (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) (Misc. No. 09-0198 (EGS)), 2012 WL 858523; CENTER FOR PROSE-
investigators, assistants, even office supplies—that they wind up being collaborators rather than effective independent advocates for their clients. Judges find themselves crushed by caseloads forcing them to treat cases the same way toll booth operators treat vehicles—make everyone pay the fee before moving on—and hog-tied by mandatory minimum sentencing laws, which force them to impose lengthy and unjust terms of imprisonment. All told, the system treats defendants like widgets wending their way down the assembly line, none of whom the actors in the process believes is innocent, all of whom must be processed quickly to keep the line from backing up. The result is not a pretty sight.

The picture would be slightly less ugly if there were an effective postconviction filter to ensure that any innocent parties not exonerated by the jury or trial judge were freed at a later stage of the case. The judiciary sometimes performs that role by setting aside an erroneous conviction—which includes the conviction of an innocent defendant, the classic erroneous conviction—when a court reviews a case on appeal or in habeas corpus proceedings. Appellate and post-conviction review, however, is no guarantee of 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 doubt.” In addition, an appellate court may uphold a conviction or sentence even if it concludes that there was an error that occurred before or at 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, but most errors can. Even a constitutional error occurring at trial can be harm-

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less depending on the nature of the error, its likely effect on the trial, and the strength of the government’s independent proof.17 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 defendant nor one convicted after an error-filled trial can be certain of success on appeal.

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 harmless... Only the rare type of error—in general, one that infects the entire trial process and necessarily renders [it] fundamentally unfair—requires automatic reversal.”) (italicization and bracketed material in Glebe; other internal punctuation omitted); Neder v. United States, 527 U.S. 1, 8 (1999); Arizona v. Fulminante, 499 U.S. 279, 309 (1991); Rose v. Clark, 478 U.S. 570, 579 (1886).


There is no shortage of commentators willing to identify flaws in the criminal justice system or to recommend improvements. Few government officials, however, will undertake that exercise while in office. They prefer to wait until returning to the private sector before suggestion how the government has gone wrong and how it should be corrected. 19

Recently, however, we have seen the emergence of an exception to that rule. Alex Kozinski, a judge on the United States Court of Appeals for the Ninth Circuit, has written a scathing review of the criminal process at work today and has offered a fistful of various potential reforms. 20 Among his suggested reforms are 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 discovery violations; publicly identifying misbehaving government officials; eliminating prosecutorial immunity for misconduct at trial; and repealing judicial elections. 21 Judge Kozinski’s recommendations range from the sound and long overdue to the imaginative and whimsical, but one matter is clear. There is no doubt that he sincerely believes that the criminal justice system needs some major repair work.

Interestingly, one area that Judge Kozinski does not address is 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, the reason for his silence is that the Presidents and governors have recently abandoned any serious use of their clemency powers to rectify mistakes made before or at trial, likely because they fear the political backlash that would inevitably follow a violent rampage committed by clemency recipient. 22 Judge Kozinski does not explain why he foregoes entreatying the nation’s chief executives to fix injustices on a case-by-case basis until a systematic reform is accomplished, so we can only guess what his reason(s) 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 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 comes to an end. 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 ar-

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21 Id. at xx-xlv.

22 See infra notes 131 & 236.

23 See, e.g., S. 52, the Smarter Sentencing Act, 114th Cong. (2015); S. 467, the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System Act of 2015 (the CORRECTIONS Act),
ticle, however, will focus on an aspect of the criminal justice system that has received less attention: clemency.

Theoretically and practically, clemency is the last stage in the correctional process. “Executive clemency,” the Supreme Court has noted (tongue-in-cheek, some say), provides “the ‘fail safe’ in our criminal justice system.” 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 truly has turned his life around. By then, of course, the offender may have been reincarcerated for a violation if 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 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 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 recommending 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 civilization. The Old Testament teaches that divine clemency has existed for as long as men and women themselves. The hu-


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 judgement, 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 it a rival of justice. See, e.g., HENRY FIELDING, TOM JONES 98 (1991) (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.”).  

26 See, e.g., Genesis 4:8-16 (“‘I was driven 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,’ 15 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.”).
man version of mercy, known as clemency, has existed almost as long. The Code of Hammurabi, for example, contained a clemency provision.\textsuperscript{27} Greek and Roman rulers exercised that power.\textsuperscript{28} Clemency also has been a longstanding part of the English legal system. The early English, Scottish, and Irish kings granted clemency.\textsuperscript{29} The English Crown granted clemency long before the Norman Invasion\textsuperscript{30} and continued to do so long afterwards.\textsuperscript{31}

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

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\textsuperscript{29} See, e.g., 3 U.S. DEPT’ 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 (1920-1921).

\textsuperscript{30} See 4 WILLIAM BLACKSTONE, COMMENTARIES *397; NAOMI D. HURNAND, THE KING’S PARDON FOR HOMICIDE BEFORE AD 1307 (1970).

\textsuperscript{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 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, A TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 1-10 (1909). Parliament, however, granted itself clemency power in the Act of Settlement of 1721, 7 Geo. 1, c. 29.

cised the crown’s delegated clemency authority. After the Revolution, state governors and legislatures jointly exercised clemency or the legislature, fearing misuse by the executive, did so alone. Today, the federal and state constitutions generally lodge the clemency power in the hands of the chief executive, whether our president or a governor, and make that power an unlimitable prerogative of its recipient.


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 adhering to the common law practice."); Ex parte Grossman, 267 U.S. 87, 108-13 (1925); 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 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., Menitove, supra note 28, at 449.

36 See, e.g., CROUCH, supra note 27, at 14; Kobal, supra note 32, at 589-90; Menitove, supra note 28, at 449.


38 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 to 1.11 (2011); Office of the Pardon Attorney, U.S. DEP’T OF JUSTICE, http://www.justice.gov/pardon/. 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; Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 HARV. L. REV. 1332, 1345 n.55 (2008); 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).

39 See CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922). For links to state clemency policies, see CRIMINAL JUSTICE POLICY FOUNDATION, available at http://www.cjpf.org/clemency/find-your-state. 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 (Vernon’s Ann. Texas Const. 2015). Limitations like those are designed to eliminate the potential for corruption in the issuance of clemency. See Kobal, 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
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 amnesty—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.” 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.”

Under American law, the pardon power is a presidential prerogative that the President can exercise for any reason that he deems just. His clemency decisions are not subject to judicial review. Presidents also can extend clemency at the wholesale level, by pardoning a category of offenders, rather than just one, an authority that the President possesses under the pardon of a crime, commutation of a sentence, 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, [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 (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.


See Ex parte Garland, 71 U.S. (32 How.) 333, 380-81 (1866) (“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).
cial review. The Framers assumed that the President would exercise his authority with “scrupulousness and caution.” 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.”

Executive clemency is a valuable tool, one that Presidents have used throughout our history. Presidents have extended offenders “forgiveness, release, [and] remission” from a conviction or punishment for a host of reasons: as a correction for an errant conviction or unduly severe

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46 In Blackstone’s words, “the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on performance whereof the validity of the pardon will depend; and this by the common law.” BLACKSTONE, supra note 30, at *401; see also, e.g., THE FEDERALIST No. 74, at 446 (Clinton Rossiter ed., 2003) (Alexander Hamilton) (“Humanity and good policy conspire to dictate that the benign prerogative of pardoning 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.

47 The Supreme Court has endorsed that principle on several occasions. See, e.g., Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280 (1998) (“[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.) 333, 380 (1866) (“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 or mercy reposed in him cannot be fettered by any legislative restrictions.”); Ex parte Wells, 59 U.S. (18 How.) 307, 311-12 (1855); 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 27 (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, supra note 30, at *399-400. Parliament restrained the crown’s clemency power in certain statutes. See, e.g., the Act of Settlement of 1701, 12 & 13 Will. III, c. 2 (prohibiting the king from using his pardon power to prevent the House of Commons from impeaching a crown official); the Habeas Corpus Act of 1679, 31 Cha. II, c. 2, §12 (making it 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, supra note 30, at *399-400; Kobil, supra note 32, at 585-89.


49 Ex parte Wells, 59 U.S. (18 How.) at 310 (“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.”).
punishment, as a decision that a lesser punishment better serves the nation’s interests, as a means of demonstrating that he oversees the operation of the criminal law, or simply as an act of grace. Anglo-American law has always believed that, given the fallibility of humans and the

50 See, e.g., Ex parte Grossman, 267 U.S. 87, 120 (1925) (“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 someone oversees the operation of the criminal law, e.g., the Attorney General, U.S. Attorneys or some U.S. Attorneys in criminal litigation in the federal courts, but that is an impossible task. Even aided by his lieutenants at the Justice Department, the government pursues. Some U.S. Attorneys or U.S. Attorneys overseeing the operation of the criminal law, which exempts the individual, on whom it is bestowed, from the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon.”).

51 See, e.g., Biddle v. Perovich, 274 U.S. 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 Williams W. Smithers, Nature and Limits of the Pardoning Power, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 549 (1910-1911) (surveying the justifications for clemency).

52 Blackstone noted that clemency can “endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.” BLACKSTONE, supra note 30, at *398; see also COKE, supra note 42, 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. United States Attorneys’ Mission Statement, U.S. DEP’T OF JUSTICE, http://www.justice.gov/usao/about/mission.html. 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.

53 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 intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from 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. Some clemency recipients—e.g., Jefferson Davis; Robert Stroud, known as the “Birdman of Alcatraz”; George Steinbrenner; and Richard Nixon—are well-known public figures. But most are not. Presidents generally have exercised executive clemency to give average, anonymous Americans another chance.

II. THE WITHERING OF EXECUTIVE CLEMENCY

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

punishment the law inflicts for a crime he has committed.”); see also, e.g., 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).

54 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 preventing miscarriages of justice where judicial process has been exhausted.”); Ex parte Grossman, 267 U.S. 87, 120-21 (1925); Ex parte Wells, 59 U.S. (18 How.) 307, 310 (1855); 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 43, at 1173 & n.15; Menitove, supra note 28, at 452-53; Ridolfi, supra note 50, 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) (“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.”); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871).

55 See, e.g., Love, supra note 43, 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.”).

56 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 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 39, at 1506-07; Rosenzweig, supra note 54, at 602-03. The demise of commutation in
George Washington and John Adams may not have used their power vigorously, but Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams were far more generous. “Lincoln’s military pardons are the stuff of legend,” but “he also issued 331 clemency warrants to people convicted in the civilian courts.” President Theodore Roosevelt issued 134 clemency grants in the first year of his presidency, while his fifth cousin President Franklin Roosevelt issued 204 in the same period. But from President Reagan through President Obama the pardon power has fallen into desuetude. In fact, it could be said that the grant of executive clemency today has become as rare as a blue moon.

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57 See Love, supra note 43, 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.”).

58 See Rosenzweig, supra note 54, at 602.

59 Love, supra note 43, at 1178 (“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 single 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, ABRAHAM LINCOLN: THE WAR YEARS 52 (1939) (noting that Lincoln had a reputation as “a pardoner, softhearted rather than hardhearted”).


61 See Barkow & Osler, supra note 32, at 8-9. Former Justice Department Pardon Attorney Margaret Love has made that point with a note 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 43, at 1169. Others have noticed the drop-off, too. See, e.g., Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Rev. Aug. 149, 2003) (“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.”); available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html (last
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. 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 are mistaken. They fail to reflect a reduced need for clemency due to improvements in the criminal justice system; they overestimate the likely need for mercy today; or they fail to precisely identify the blame for clemency’s demise. The two best explanations 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.62 The upshot is that some Presidents likely view clemency as all cost and no benefit.63 Second, the public believes that Presidents have granted individuals mercy in settings demonstrating favoritism, not mercy. Doing so has generated public cynicism in the legitimacy of presidential clemency, deterring Presidents from granting it.

A. IMPROVEMENTS IN THE ACCURACY OF THE TRIAL PROCESS

Clemency was originally justified as a necessary tool to correct erroneous convictions.64 One explanation for the desuetude of clemency is that the criminal justice system has done a better job of filtering out the innocent from the guilty.65 Today’s criminal justice process bears only


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. Love, supra note 43, 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 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).

62 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.”).

63 See, e.g., Love, supra note 43, 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 54, 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 39, at 142 (noting that his death penalty commutations “stirred up a firestorm of protest”); Kobil, supra note 56, at 224.

64 See supra note 32 and accompanying text.

65 See, e.g., Love, supra note 43, 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 ver-
faint resemblance to the ones that Coke, Blackstone, and the Framers knew. The trial process is now in the hands of a professional lawyer, whether prosecutor, defense counsel, or judge. The Federal Rules of Criminal Procedure and Evidence have supplanted the practices followed at common law, and today’s rules are more likely to produce an accurate result than their predecessors. Defendants also have postconviction avenues open to them that were unheard of at common law. A defendant convicted after a trial in federal court can ask the trial judge to set aside the verdict for insufficient evidence or for a new trial on the ground that the guilty verdict is against the weight of the evidence. If the trial court denies those requests, the defendant has

66 At common law, a victim had to pursue a prosecution, because there was no office of public prosecutor. State and federal governments later established such an office, FRIEDMAN, supra note 61, at 21, 29–30, and it is the standard practice today everywhere. Similarly, at common law, a defendant charged with a felony was not entitled to be represented by counsel (although, ironically, a defendant charged with a misdemeanor was). See Powell v. Alabama, 287 U.S. 45, 60 (1932); FRIEDMAN, supra note 61, at 27. By contrast, today a defendant cannot be sentenced to a term of imprisonment without first being afforded the right to obtain counsel or to have 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, at trial, at sentencing, and at 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).


68 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 (1987); Ferguson v. Georgia, 365 U.S. 570 (1961).

69 The common law in England and in the early days in the 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 61, 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 1869, Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, and did not extend that right to all convicted defendants until 1891, The 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 (codified as amended in scattered sections of U.S.C. (2006)). 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.


an appeal of right to a circuit court.\textsuperscript{72} If that option also fails, he can seek relief in habeas corpus.

Atop all that is the fact that 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 Fourth,\textsuperscript{74} Fifth,\textsuperscript{75} Sixth,\textsuperscript{76} Eighth,\textsuperscript{77} and Fourteenth Amendments,\textsuperscript{78} and it has also adopted various remedies to enforce violations of those provisions.\textsuperscript{79}


\textsuperscript{74} See, e.g., Terry v. Ohio, 392 U.S. 1, 19 (1968) (finding that the government’s brief detention for questioning of a person is a “seizure” under the Fourth Amendment and a “pat down” of his clothing for weapons is a “search”); Katz v. United States, 389 U.S. 347, 358–59 (1967) (holding that government’s warrantless recording of a telephone conversation is a “search” under the Fourth Amendment).

\textsuperscript{75} See, e.g., Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that the Fifth Amendment self-incrimination clause requires “use immunity” in order for the government to compel a person to testify over a self-incrimination claim); 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, 612–13 (1965) (holding that the self-incrimination clause prohibits a prosecutor from commenting on the defendant’s decision not to testify at his trial); Green v. United States, 355 U.S. 184, 188 (1957) (holding that the Fifth Amendment double jeopardy clause bars retrial of an acquitted defendant).

\textsuperscript{76} 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 be confronted with the witnesses against him and therefore limits use at trial of out-of-court statements); 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); Massiah v. United States, 377 U.S. 201, 204–05 (1964) (holding that the Sixth Amendment counsel clause prohibits the police from deliberately eliciting incriminating statements from a charged suspect in the absence of counsel or a waiver); 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); see generally Perry v. New Hampshire, 132 S. Ct. 716, 716 (2012) (discussing Sixth Amendment fair trial guarantees).

\textsuperscript{77} 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 where the crime did not result, and was not intended to result, in death of the victim); Roper v. Simmons, 543 U.S. 551, 569–75 (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) (ruling 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 (1972) (upholding challenge based on the Eighth Amendment cruel and unusual punishments clause to purely discretionary capital sentencing schemes).

\textsuperscript{78} See, e.g., Ake v. Oklahoma, 470 U.S. 68, 86 (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); Chambers v. Mississippi, 410 U.S. 284, 294–303 (1973) (finding due process violated when state evidentiary rules excluded compelling evidence of innocence); Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that due process requires the prosecution to disclose exculpatory information to the defense); Tumey v. Ohio, 273 U.S. 510, 531 (1927) (explaining that due process is violated when town mayor-and-judge receives fees only for cases resulting in a conviction). The Constitution plays a more limited role in regulating the plea bargaining process than the trial. Plea-bargaining between the prosecutor and defense counsel does not violate a defendant’s Fifth Amendment self-incrimination privilege or Sixth Amendment right to a fair trial. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (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 (1974), however, the Constitution does not bar a prosecutor from making good on a
The result is that 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 he is not guilty of a crime.80

Critics might say, however, that this conclusion does not end the discussion. It is too easy, they would say, to assume that the system gets it right in ninety-five-plus percent of the cases. That assumption is flatly inconsistent with the conclusion of Judge Kozinski and numerous other scholars discussed at the outset of this article that the criminal justice system is hardly as accurate as the public believes it to be. There are numerous instances of people who were wrongly convicted and were freed only because a judge later found, sometimes by virtue of some of the very types of proof that those parties disparage, particularly DNA evidence, that someone else committed the crime. The Innocence Project has proved that conclusion true. What is more, 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 that they didn’t commit to obtain their release from the judge by being sentenced to “time served.”81 If that is true, then it is equally reasonable to believe that a defendant, facing multiple charges, perhaps due to overlapping statutes promise to throw the book at a defendant who declines a plea offer. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357 (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, 1411 (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 (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 (1971) (holding that due process requires a prosecutor to keep promises made to induce a defendant to plead guilty pursuant to a plea bargain).
that separately but cumulatively punish the same conduct, would plead guilty so that the prosecutor doesn’t throw the book at him.

The critics’ arguments are weighty, but ultimately unpersuasive. I accept that many of those criticisms are true. It is difficult to argue with the fact that, over the last two decades, DNA evidence has exonerated numerous prisoners, some of whom spent years in prison for crimes they did not commit. That is a tragedy for them, and a scar on our criminal justice system. But it does not overcome the gravamen of my argument. 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.) The flaws that courts and legislatures have 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. If not, we have bigger problems than erroneous convictions caused by mistakes.

82 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 (1983); Larkin, supra note 1, at 753 & n.173.

83 Respectable, experienced people believe that the practice occurs frequently. See, e.g., Amsterdam, supra note 79, 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 . . . [M]uch of the litigation we do see is about peripheral procedural matters . . . [J]ury trials almost never happen in part because trials almost never happen . . . [W]e 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 . . . [A]nd 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[.]”). The Constitution does not prohibit it. See Bordenkircher v. Hayes, 434 U.S. 357 (1978).


85 I find the critics’ argument unpersuasive for another reason too, one that I can only sketch here. They assume that American society has a greater interest in preventing mistakes before or at trial than it actually has. In truth, the public—and some Supreme Court justices for that matter—are quite hypocritical in their attitude toward the operation of the criminal process. Justice Hugo Black once wrote that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Griffin v. Illinois, 351 U.S. 12, 19 (1965) (plurality opinion of Black, J.). But neither he nor the other justices have ever taken that Olympian statement seriously. If it did, it would cap the amount of money that people like Bill Gates or Warren Buffet could spend at a trial were they ever charged with a crime or order the states to provide the same amount of money that they could spend. See, e.g., Dominick Dunne, The Verdict, VANITY FAIR, Mar. 1992 (discussing the William Kennedy Smith rape trial: “Two other defense attorneys had preceded [Roy] Black on this case: Herbert ‘Jack’ Miller of Washington, D.C., who had been Senator Edward Kennedy’s lawyer in the Chappaquiddick affair in 1969 and who was replaced after the prosecution likened his strategy to those he had used at that time, and Mark Schnapp of Miami, who received a call from Willie Smith two days after the incident and remained on the case as part of the four-lawyer defense team after Black took over. Although Black reportedly received only a quarter of a million dollars for his services, a relatively low fee considering the family involved, he took the case because of the international attention focused on it. However, the total amount spent on Smith’s defense seemed, by comparison with the money the prosecution spent, prodigious. Five private investigators worked for months digging up information on the background of Patricia Bowman, as well as of Anne Mercer and her boyfriend, Chuck Desiderio, the two people Bowman telephoned to come to the Kennedy compound on the night of the incident. In addition, a dozen or so expert witnesses were called to cast doubt on Bowman’s story.”), http://www.vanityfair.com/magazine/1992/03/dunne199203. It has been fifty years since Justice Black penned that remark, the Court has done nothing of the kind since then, and it never will. It is one thing to make such grandiose statements, another to mean them. A far better reflection of the
B. REFINEMENTS IN THE SENTENCING PROCESS

An offender can receive an unduly harsh sentence when the trial judge makes a mistake at sentencing or when he correctly applies an unduly harsh statute.\footnote{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); BLACKSTONE, supra note 30, at 492 (“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.} Correcting an unjust sentence has therefore been an historic rationale for clemency.\footnote{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 45, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 2003). The need has endured since then. As one commentator noted early in the twentieth century, “The very nature of criminal law makes such a power vested somewhere esse- sary.” Goodrich, supra note 29, at 336-37. The problem still exists today. See, e.g., 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.”); United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004), aff’d, 433 F.3d 738 (10th Cir. 2005). 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).} Yet, Congress has revised the fed-

Court’s attitude toward the criminal process is its decision in McCleskey v. Kemp, 481 U.S. 279 (1987). McCleskey challenged the constitutionality of the death penalty on the ground that the evidence showed a material difference in the likelihood of receiving the death penalty based on the race of the victim, with juries far less likely to sentence a killer to death when the victim was black. The Court assumed that McCleskey’s statistics were correct but rejected his argument for several reasons, one of them being that its effect if true would call into question the operation of the entire criminal justice system. \textit{Id.} at 314-15.

The public, of course, is also willing to be hypocritical about the operation of the criminal justice system. As long as it believes that only other people can wind up in its maw and as long as it does not see too many of the system’s warts on TV, the public is glad to let the criminal process operate with whatever degree of accuracy the system’s professionals can produce. That certainly won’t be the degree of accuracy that Judge Kozinski and others expect the criminal courts to have, but they underestimate the number of errors that most members of the public are willing to overlook (as long as they are not the ones mistakenly locked up).


91 *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.’”).


93 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 Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013).


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

96 *See*, e.g., *id.* at 375-77 (“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).
Guidelines or a sentence that was above or below the designated range.98 Although the Supreme Court later held that the Sixth Amendment Jury Trial Clause barred Congress from making the Sentencing Guidelines mandatory,99 the 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 last century have likely made it unnecessary for the president to use his clemency power often to remedy an unjust sentence or gross sentencing disparities.100

C. SHIFTS IN THE UNDERLYING RATIONALE FOR PUNISHMENT

Another reason why the clemency power has fallen into desuetude is that we have witnessed a 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 for the rehabilitation of the offender.101 Then-new medical, sociological, and psychological theories could transform a prison—then often called “penitentiaries,” because they would reform offenders morally, rather than merely be warehouses for incapacitating them—from “the black flower of civilized society” into a treatment facility where prisoners would be reformed, not punished.102

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 system.103 For the bulk of the twentieth century, the criminal justice system strove not only to separ-


99 See 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); 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) (internal quotations and citations omitted); Gall v. United States, 552 U.S. 38, 52-53 (2007).

100 See Rosenzweig, supra note 54, at 604.

101 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).


103 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)
rate 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 during the prior decade, combined with social unrest to generate distrust in government institutions, including the criminal justice system. Critics on the right and the left argued that the rehabilitative ideal was either an instrument of coercion and injustice or the product of the fanciful belief that government knew how to reform hardened criminals in a facility brimming with other predators. The result was that retribution and incapacitation replaced rehabilitation as the purpose of the criminal law, and punishments became increasingly severe. In the Sentencing Reform Act of 1984 Congress even went so far as to prohibit district courts from relying on rehabilitation as a sentencing justification under the new,

(sSex 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 Francis T. Cullen, Rehabilitation and Treatment Programs, in Crime: Public Policies for Crime Control 259-276, 287 (James Q. Wilson & Joan Petersilia eds., 2002); Michael Jacobson, Downsizing Prisons 180 (2005) (listing academic skills training, vocational skills training, cognitive skills programs, and drug treatment and sex-offender intervention programs); 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.

104 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) (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 61, 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); 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).

105 See, e.g., Larkin, supra note 103, at 9-10.

then-mandatory Sentencing Guidelines. Margaret Love, a former Justice Department Pardon Attorney, also witnessed the changeover from a rehabilitation-oriented to a punitive mindset in the clemency process at her former department and believes that nothing has changed. The result is that the Justice Department and the President are unlikely to rely often on rehabilitation as a ground for granting clemency.

D. JUSTICE VS. MERCY

Clemency can be used to rectify a mistake at trial or sentencing that renders a conviction or punishment unjust, or it can serve 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 the classic example; statutes imposing mandatory minimum sentences are modern examples. Clemency can extend an offender mercy even when his or her sentence appears entirely just.

But there is no consensus over that opinion. Some scholars have argues that justice and mercy are distinct (albeit sometimes confused) concepts, and because of that difference, 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.

Others have held that opinion too.


108 See Love, supra note 43, 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.”).


110 Hereafter I will use the term “his” (or an analogous pronoun) to refer to “his or her.”


112 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 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).

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

114 IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (1999) (Part I of THE METAPHYSICS OF MORALS (1797)).

For a president who is concerned 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 operation of the criminal justice system 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 Texas governor declined to commute the capital sentence of Karla Fay Tucker, a woman convicted of pick-axing 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 white woman mercy would have generated considerable criticism as showing illegitimate favoritism.\(^{116}\)

The proper tradeoff between justice and mercy is not an easy one to resolve, philosophically or legally.\(^{117}\) 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.\(^{118}\) 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 the federal laws that are designed to address that problem.\(^{119}\) 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 presents us with just such a case,” asking us to decide not only whether we have just crack cocaine sentencing laws, but also whether we have a just criminal justice system.\(^{120}\) A president troubled by that disparity could well decide that granting other-

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\(^{116}\) See Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in Sarat & Hussain, *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.


\(^{119}\) See *id.* at 288-91.

wise 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 disparity. If so, the president would in effect be choosing the appearance of justice over mercy.

E. 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 they shunted victims to the side. 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.

Victims’ rights groups enjoy the same efficiencies that other single-interest groups do, but they also have the ability to generate a wealth of public sympathy, an enormously powerful weapon in politics, particularly when used in conjunction with contemporary professional coverage and social media communications. A compelling story about an attractive victim with whom the public can identify is worth far more than all policy arguments combined. That asset has made victims one of the most powerful nongovernmental interest groups in the criminal justice and political processes. They have been able to push numerous bills through the legislative halls that directly or indirectly grant victims’ rights in the criminal process, and they also have been able to amend state constitutions to guarantee their rights.


122 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. Bebloof, 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).

123 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 viewpoint. See, e.g., Mancur Olson, The Logic of Collective Action 1–2, 33–52 (1971).


125 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 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).


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. 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 nonmovement voters who are sympathetic to its cause. Those results could happen even when the President grants clemency 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

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130 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 Salarino, chairwoman of Crime Victims United of California. Salarino 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. For an 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).
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 polls.

The result is to deter Presidents from exercising clemency in cases where extending mercy is justified on the merits but is 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.\footnote{See Jailhouse Nation, \textit{THE ECONOMIST} 11 (June 20-26, 2015) (“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 woman and raping and trying to kill another. \textit{Brown}, \textit{supra} note 39, 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.” \textit{Id.} at iii, 102-03.}

Accordingly, unless the President can generate considerable good will from organizations supporting a clemency initiative, he or she may decide that the potential political harm outweighs the potential human and penological benefit.

**F. PRESIDENTIAL ABUSES OF THE CLEMENCY POWER**

There is yet another explanation for the disappearance of clemency, one that may best explains 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.\footnote{See Rosenzweig, \textit{supra} note 54, at 605.}

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,\footnote{See S. Rep. No. 445, 106th Cong. 2 (2000) (report on The 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.”).}

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.\footnote{See \textit{Crouch}, \textit{supra} note 27, at 3-4, 25-26, 95, 108-11, 140-42; Margaret Colgate Love, \textit{Of Pardons, Politics, and Collar Buttons: Reflections on the President’s Duty to be Merciful}, \textit{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 thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife’s expected Senate candidacy.”) (footnotes omitted).} Clinton also used his clemency power promiscuously in his last 24 hours in office, granting pardons and commutations like a drunken sailor on shore leave to people whose representatives had strong White House connections or had contributed generously to the president’s
party or his own presidential library. Clinton’s clemency decisions have left a pall over the entire process.

As the result, when the President does exercise clemency, the public might find it difficult to believe that he has not “done a favour” for a financial contributor or political supporter even when a president and his political party in fact gain utterly no benefit whatsoever. 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 in some time.

III. THE POSSIBLE RECOVERY OF CLEMENCY

A. JOHN KINGDON’S “THREE STREAMS” THEORY OF PUBLIC POLICYMAKING

Different public policy scholars have offered several theories to explain how an issue becomes law. In his 1984 book *Agendas, Alternatives, and Public Policies*, Professor John

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135 See, e.g., Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 136-37 (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 “inundated” 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); CROUCH, supra note 27, at 114-17; Hamilton Jordan, *The First Grifters*, WALL ST. J. (Feb. 20, 2001); Love, supra note 43, at 1198 (“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 1195-200. Former President Jimmy Carter said that Clinton’s decision to pardon the financial fugitive Marc Rich was “‘disgraceful.’” CROUCH, supra note 27, at 114 (quoting WASH. POST, Feb. 21, 2001).

136 See Love, supra note 43, 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 Bush to charges of incompetence. The two presidents are also at fault: in confirming popular beliefs about pardon’s irregularity and unfairness, they diserved both the institution of the presidency and their own legacies.”).

137 See CROUCH, supra note 27, at 145; Love, supra note 43, at 1194.

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

Kingdon articulated one of them, his “three streams” theory of public policy decision making. The public policymaking process, he posited, is “organized anarchy.”

Different people—elected or appointed officials, their staff, career government employees, academics, think tanks, journalists, or even neighbors of one of those parties—generate ideas in hearings, in classrooms, or over coffee. 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, the chaos is not total; there is at least some organization to this anarchy.

Three “families of processes” come together in federal agenda setting, he argues: “problems, policies, and politics.” It is the timely confluence of those three streams that moves a proposal from a computer 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. 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 idea(s) 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 or the Hoover Institution).

Policies are proposals to address those problems. They can be single-issue (such as US textile trade with China), multi-issue (such as overall US-China trade relations), or all embracing (such as US 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 the problem or its solution. The number of potential options is limited only by the imagination, interest, and energy of all those parties.

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 political 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.

140 Id. 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.

141 Id. at 76; see, e.g., Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (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, supra note 45, at 325 (James Madison).

142 KINGDON, supra note 146, at 87.

143 Id.

144 As opposed to a concern that people just suffer through. Id. at 109-13.

145 KINGDON, supra note 146, 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.
Politics is the lifeblood of the policymaking process. Politics contributes to, and in turn is shaped by, 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, and a shift in the prevailing mood among the electorate. 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 it can: pass legislation. 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. The murders of Martin Luther King and Robert Kennedy by firearms led to the passage of the Gun Control Act of 1968. Just as the murder of Kimber Reynolds and Polly Klaas led to California’s “Three Strikes” recidivist law, the rape and murder of Megan Khanka led to enactment of sex offender registration and notification legislation. Timothy McVeigh’s bombing of the Oklahoma City federal building led to enactment of the Antiterrorism and Effective Death Penalty Act. And the events of 9/11 lead directly to the USA Patriot Act. Perhaps, federal and state governments would have enacted those laws regardless of those events. We don’t and can’t 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, federal law has made it a crime to distribute “controlled substances”—viz., drugs that are considered dangerous because of their psychoactive effect and addictive po-

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150 See Megan’s Law (see supra note 128 for full citation).


tential—without a physician’s prescription or in some instances at all. In 1986, Congress reacted to the birth of “crack” cocaine by enacting the Anti-Drug Abuse Act of 1986, which imposed stiff, mandatory minimum sentences for drug distribution. 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. The result was that the act imposed equally serious punishment on small-scale crack dealers as on large-scale powdered cocaine traffickers. Given the demographics of the crack cocaine trade, the result was that district courts sentenced a large number of African-American drug traffickers to long terms of imprisonment. Almost three decades later, Congress amended that statute through the Fair Sentencing Act of 2010, 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 address the crack-to-powder sentencing disparity because it left perhaps as many as 30,000 drug offenders imprisoned under the pre-act law. Accordingly, he set in motion an initiative to redress it through the exercise of his pardon power. In 2014 Presi-

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157 See, e.g., Larkin, supra note 118, at 241-42.


159 See id.; Larkin, supra note 118, at 242.


dent Obama established what is known as “Clemency Project 2014.” 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. Given the massive number of potential clemency applicants, 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.

This new initiative, however, is unlikely to jump-start a renaissance of the clemency power. The Clemency Project 2014 is twice limited—not only to drug offenders, but also to those offenders who could not benefit from the new crack-to-powder sentencing ratio. There are a large number of offenders serving time for those crimes, but the equally large numbers of federal inmates convicted for immigration offenses or other federal crimes are ineligible. Moreover, even within the limited universe of potentially eligible drug offenders, the program has had only limited effect to date. Perhaps, that result is due to the large number of potentially eligible federal prisoners or to the difficulty of asking attorneys in private law firms unexperienced with the criminal justice system to review prisoners’ case files. Or perhaps it is due to the possibility that there are not as many prisoners who deserve a commutation as the President expected. Of

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See CLEMENCY PROJECT 2014, https://www.clemencyproject2014.org/. 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[e] if they had been sentenced today.” Id.

See, e.g., U.S. Dep’t of Justice, Press Release, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), archived at http://perma.cc/S93G-AKAU (hereafter 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; 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; Austin Tellesco, Obama Could Pardon Hundreds of Nonviolent Drug Offenders, BOSTON GLOBE, Apr. 21, 2014, http://www.boston.com/news/nation/2014/04/21/obama-could-pardon-hundreds-nonviolent-drug-offenders/IUpBrZSir6Vt4joT4R8VOP/story.html. 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 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 member 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 id.; see generally Barkow & Osler, supra note 32, at 3-4 (describing the provenance and scope of the initiative).


As former Pardon Attorney Margaret Love has suggested. See Margaret Love, Clemency Is Not the Answer (Updated), Collateral Consequences Resource Center (July 17, 2015), http://ccresourcecenter.org/2015/07/17/clemency-is-not-the-answer-updated/#more-5556.

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” (i.e., couriers) for unduly severe periods of confinement. See, e.g., ALEXANDER, supra note 2; WESTERN,
course, President Obama’s clemency initiative 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.169

supra note 2. 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. 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; 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). 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 (0.008%) and is more than half again less than the number of clemency applicants (0.003%). 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 that the facts in the indictment suggest. See Larkin, supra note 118, at 286; John Pfaff, For true penal reform, focus on the violent offenders, WASH. POST, July 26, 2015 (“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 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 of 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 26 (June 20, 2015) (“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.”), http://www.economist.com/news/briefing/21654578-americas-bloated-prison-system-has-stopped-growing-now-it-must-shrink-right-choices. 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, the victim is a federal official or the crime occurred on federal property). See Larkin, supra note 118, at 286-87.

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 Department subordinates rather than Executive Order), and the ones that he has made are both trivial and transitory. 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, and he granted the lowest number of pardons in decades. To be sure, he has tried to make up for lost time by commuting more sentences that any President (or all of them) since 1969—thirty-four via the Clemency Project 2014—and there could be more to come because thousands of prisoners are still waiting for their applications to be submitted to him. But unless he replicates “Bill Clinton’s Parting Pardon Party” the night before he leaves office on January 20, 2017, his Clemency Project

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171 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 top consider pardon applications.” See Love, supra note 43, 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 don’t 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.

172 See, e.g., N.Y. TIMES, Overhaul Clemency, supra note 52 (“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; Charlie Savage, Obama Pardons 17 Felons, First in His Second Term, N.Y. TIMES, Mar. 1, 2013 (“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.”), http://www.nytimes.com/2013/03/02/us/politics/obama-pardons-17-felons-first-in-his-second-term.html; 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., 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-a500-1c5bb1d8f6a_story.html.


174 According to the New York Times, more than 35,000 federal prisoners has sought commutations via the Clemency Project 2014, and more than 1,000 lawyers at over 300 law firms have offered to assist a prisoner. Yet, only 6,600 petitions have been submitted to the Justice Department, only 5,000 of them have been assigned to an attorney, and President Obama has commuted the sentences of fewer than 80 offenders. See Davis & Harris, supra note 172; Lardner & Ruckman, supra note 172.

175 See Alschuler, supra note 135 (detailing the “Clemency Gone Wild” last night of the Clinton Presidency).
2014 may not amount to much. In any event, that initiative could end when he leaves office because a new chief executive could abandon the project.176

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.177 That expansion 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 218,292.178 The imprisonment rate has also vaulted to new heights. For most of the twentieth century, the rate was 100 per 100,000 citizens.179 As of 2007, however, the rate was 724 per 100,000, more than seven times as much.180

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177 See, e.g., COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2011, 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 207,000 by the end of fiscal year 2008 and more than 213,000 by the end of fiscal year 2009.”); see PETERSILIA, supra note 89, 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), http://www.census.gov/prod/2011pubs/12statab/law.pdf. The states have also seen a tremendous increase in the number of prisoners. As the result, critics have vied for the snazziest label or saying. 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).

178 Weekly Population Report, FED. BUREAU OF PRISONS (Dec. 28, 2012), http://www.bop.gov/locations/weekly_report.jsp (last visited Dec. 31, 2012); MARTHA HURLEY, AGING IN PRISON: THE INTEGRATION OF RESEARCH AND PRACTICE 6 (2013) (noting that the number of federal prisoners increased from 2131,739 in 200 to 187,886 in 2009 to 190,641 in 2010). By the end of Fiscal Year 2014 the number exceeded 219,000. NATHAN JAMES, CRS, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS R42937, at 2 (Apr. 15, 2014), https://www.fas.org/sgp/crs/misc/R42937.pdf. The number of federal prisoners has declined since then, dropping to 207,339 as of August 6, 2015. See Statistics, FED. BUREAU OF PRISONS (Aug. 6, 2015), http://www.bop.gov/about/statistics/population_statistics.jsp. The post-1980 increase was not uniform across all categories of crime. From 1980 to 1997, there was an 82 percent increase in the number of offenders imprisoned for violent crimes; a 207 percent increase in the number of offenders imprisoned for non-violent crimes (excluding drug offenses), and 1,040 percent 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 Visher eds., 2005). The increased number of drug prosecutions and the stiff penalties imposed under the controlled substances laws are widely seen as the cause of most of the post-1980 increase in imprisonment. See id.; CLEAR, supra note 179, at 36.


180 Id.
The post-1980 increase in the federal prison population has led to a corresponding increase in the costs of federal corrections.\(^{181}\) In 1980, the average annual cost for a federal prisoner was approximately $14,000.\(^{182}\) By 2010, that number had doubled to approximately $28,000.\(^{183}\) Four years later, the cost again increased to $31,000 per inmate.\(^{184}\) 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 so unless the political branches take steps to change the current trajectory of the federal correctional process.\(^{185}\)

\(^{181}\) Members of the Senate and House Appropriations Committees are well aware of that increase. See, e.g., DEPARTMENTS OF COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES, APPROPRIATIONS BILL, 2015, 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.’”); COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2012, 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.”).

\(^{182}\) 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 [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 (2007); PEW CHARITABLE TRUSTS, COLLATERAL COSTS: IMPrISONMENT’S EFFECTS ON EMPLOYMENT OPPORTUNITY (2010).


\(^{185}\) See, e.g., DEPARTMENTS OF COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES, APPROPRIATIONS BILL, 2015 S. Rep. No. 113-181, 113th Cong. 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.”); DEPARTMENT OF COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2012, S. Rep. No. 112-78, at 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
A significant part of that increase is due to the cost of inmate medical care,\textsuperscript{186} a facet of corrections that has become particularly expensive over the last thirty years.\textsuperscript{187} Part of the explanation for that cost increase is attributable to the rise in the prison population. Another explanation is that, generally speaking, offenders entering prison possess inferior medical states than the general public due to alcohol or drug use, neglect, a lack of health insurance or available and free community health services, or for other reasons.\textsuperscript{188} 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, diabetes), mental diseases (for example, schizophrenia, personality disorders), and comorbidities (multiple health problems).\textsuperscript{189} Studies conducted from 1997–2001 show that U.S. spending on health care for

\textsuperscript{186} 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. \textit{See}, e.g., Brown v. Plata, 131 S. Ct. 1910, 1928 (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. \textit{See}, e.g., United States v. DeCollogero, 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. \textit{See} United States v. Hilton, 946 F.2d 955 (1st Cir. 1991); United States v. Studley, 907 F.2d 254 (1st Cir. 1990); United States v. Depew, 751 F. Supp. 1195, 1199 (E.D. Va. 1990); Marjorie Russell, \textit{Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?}, 3 \textit{Widener J. Pub. L.} 799, 813–14 (1994).

\textsuperscript{187} \textit{See} U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-2012 (Feb. 2015) (hereafter MEDICAL PROBLEMS); B. JAYE ANNO ET AL., \textit{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), \url{http://static.nicic.gov/Library/018735.pdf}; 1-2 \textit{NAT’L COMM’N ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS} (Mar. 2002); LOIS DAVIS ET AL., RAND, UNDERSTANDING THE PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA xxviii (2011); Brie A. Williams, \textit{et al., Balancing Punishment and Compassion for Seriously Ill Prisoners}, 155 \textit{ANNUALS OF 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 costs for aged or infirm prisoners. Fear of assault can also increase the stress felt by elderly prisoners, further weakening their medical condition. \textit{Anno, supra}, at 11-12. The BOP could house elderly prisoners in separate facilities, but that option has its own direct and indirect costs (e.g., construction and maintenance costs, salary and fringe benefit costs for additional prison guards). \textit{Id.}


\textsuperscript{189} \textit{See} MEDICAL PROBLEMS, \textit{supra} note 187, at 1-7 & Tbls. 1-4; \textit{Davis, supra} note 187, at xviii.
prisoners rose 27 percent to approximately $3.5 billion.\textsuperscript{190} From 1992 to 2000, the simple daily cost of prisoner health care rose a steep 31.5 percent.\textsuperscript{191}

Escalating prisoner health care costs are particularly noteworthy in the case of “elderly” or “geriatric” inmates,\textsuperscript{192} a group that some commentators have identified as the fastest growing segment of the prison population.\textsuperscript{193} 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.\textsuperscript{194} Common physical impairments such as loss of vision, hearing, and mobility can be corrected with glasses, hearing aids, and canes, but diseases that are the consequence of a lifetime of drug use, or neglect, inadequate treatment, such as cardiac or respiratory impairments, hepatitis, or HIV/AIDS, can impose enormous treatment

\textsuperscript{190} ANN0, supra note 187, at 11.

\textsuperscript{191} Id.

\textsuperscript{192} There is no uniform definition of an “old,” “elderly,” or “geriatric” prisoner. Different federal and state laws use ages from 50 to 70 when referring to such inmates. \textit{See} TINA CHIU, VERa INST., IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 4 (Apr. 2010); HURLEY, supra note 178, at 23-27, 43-44. The National Institute of Corrections recommends using 50 as the chronological starting point for “elderly” prisoners. \textit{See} JOANN MORTON, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR., AN ADMINISTRATIVE OVERVIEW OF THE OLDER INMATE 4 (1992). Perhaps proving that the old saw that “It’s not the age; it’s the mileage,” age 50 is important because most elderly prisoners are 10-15 years older physiologically than chronologically, due to drug use, neglect of their health, and other factors. \textit{See} John J. Kerbs & Jennifer M. Jolley, \textit{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); Curtin, \textit{ supra} note 130, at 475.

\textsuperscript{193} HURLEY, supra note 178, at 41; Kathleen Auerhahn, \textit{Sentencing Policy and the Shaping of Prison Demographics, in} Kerbs & Jolley, \textit{ supra} note 192, at 21; \textit{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 prisoners. . . . 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 41,486 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. \textit{See} ACLU, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY, v, 5 & Fig. 3 (June 2012) (hereafter \textit{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 of 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. \textit{See}, e.g., HURLEY, supra note 178, at 13; Curtin, \textit{ supra} note 130, at 483-84.

\textsuperscript{194} \textit{See}, e.g., ANN0, supra note 187, at 11-12 (noting that twenty-three percent of federal inmates reported a physical or mental condition needing treatment, that eighteen percent of federal prisoners were under care for a severe chronic illness, and that average annual cost of confining an elderly inmate was $60,000-70,000, versus $27,000 for other inmates); CHIU, supra note 192, at 5; HURLEY, supra note 178, at 13; MORTON, supra note 192, at 18. There are additional factors at work too, such as the need to transport inmates to out-of-prison facilities for special care. \textit{See}, e.g., \textit{AT AMERICA’S EXPENSE}, supra note 193, 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. \textit{Id.} at 30; HENRICHSON & DELANEY, supra note 183, at 4-5 & Figs. 1-3.
costs and are not infrequent among old inmates. 195 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 elderly while confined. The imprisonment of a large number of elderly inmates raises a variety of unique issues. 196 Confinement of an elderly prisoner can cost from $66,000 to $104,000 for the severely ill per year. 197 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. 198

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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 a just such a reconsideration of that process on the ground that the process has lost its way in the current legal and political climate. 199 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 re-examination.

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 whatever effect the Clemency Project 2014 may ultimately have. 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 mercy or finance for resurrecting the clemency process. The question then becomes how a revised clemency program will look?

IV. A NEW CLEMENCY PROCESS

Revitalizing clemency is a three-step process. We must, first, re-examine the role that the Department of Justice and White House officials current 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

195 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 (e.g., hypertension) and can lead to additional aftercare resulting from an assault. See At America’s Expense, supra note 193, at 28-29; Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics 271-72 (2015); Hurley, supra note 178, at 13, 31-34, 61, 103-05.


197 See, e.g., Abner, supra note 193, at 10; Petersilia, supra note 181, at 18; Petersilia, supra note 61, at 24.

198 See Anno, supra note 187, at 11 (charting escalating average health care costs per inmate from 1991–2000).

199 See, e.g., Barkow & Osler, supra note 32, at 19-25; Menitove, supra note 28, at 448.
institutions play and, if so, whether to add another agency into the mix. Finally, we need to ask what part of the problem is attributable to the individuals we elect as President and, if that part is nontrivial, how, if at all, we can overcome the shortcomings in the people we elect to that position.200

A. REVISIG 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: the Pardon Attorney and the Deputy Attorney General. The Pardon Attorney heads up a small office known as the Office of the Pardon Attorney.201 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 later 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.202 It is unreasonable to expect an adversary to offer an entirely dispassionate appraisal

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200 One option is to amend the Pardon Clause to restrict the President’s power, and one restriction would be to empower the 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 a non-starter. Menitove, supra note 28, at 457.

201 For a description of the workings of the federal clemency process from President Washington through George W. Bush, see Love, supra note 43, at 1175-1204.

202 See, e.g., Alschuler, supra note 135, at 1164; Barkow & Osler, supra note 32, at 13-15, 18-19; Kobil, supra note 32, at 622-24; Love, supra note 43, at 1193-95; Rosenzweig, supra note 54, at 606 (“career prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues”), 609-10; N.Y. TIMES, Overhaul Clemency, supra note 52 (“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 31, at 557) (criticizing the notion that “it is frequently considered advisable to consult the prosecuting attorney” due to the “common belief” that he is “disinterested”; “[T]his is generally in 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.
of a party’s repentance, let alone his guilt. Even if the Justice Department as an institution could do so, granting the Department a veto over a clemency application certainly does not satisfy the requirement that justice not only must be done, but also must appear to be accomplished. Having (at least institutionally) prosecuted 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. But the Department should not be empowered to strangle a clemency application in the cradle or control how it is presented to the President.203

**B. CREATING A HYBRID CLEMENCY PROCESS**

**1. PARDONS AND COMMUTATIONS**

How, then, should the current process be revised? One alternative is to use the U.S. Sentencing Commission,204 a component of the Judicial Branch that Congress chartered in 1984 to create determinate Sentencing Guidelines for use by district courts.205 An alternative is to create a new independent administrative agency that considers every clemency application and sends the President its recommendation.206 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 decisionmaking, 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 its recommendations, 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.207

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),208 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.209 The FACA does not apply to the President’s reliance on the opinions of the American Bar Association’s Committee on Federal Judiciary regarding potential nominees to the federal bench,210 so the FACA also may not apply

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203 See, e.g., Barkow & Osler, supra note 32, at 19.
204 See id.
206 See, e.g., Kobil, supra note 56, at 228-32; Love, supra note 43, at 1210; Menitove, supra note 28, at 450-52; see generally Rosenzweig, supra note 54, at 609-11 (discussing the various options).
207 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 leave the decision to an Article III judge.
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.\textsuperscript{211} To be sure, those problems are not insoluble. Congress regularly funds the Executive Office of the President without imposing 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.\textsuperscript{212}

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 the those groups might hold views about the circumstances that justify clemency that could easily 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 who 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 over 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, but 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 make that decision himself puts distance between the Pardon Attorney and the Justice Department, which may 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

\textsuperscript{211} 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).

\textsuperscript{212} See Barkow & Osler, supra note 32, at 20 & n.83.
Attorney’s current location within the same agency that prosecuted every clemency petitioner. 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 and has been rehabilitated. 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 others 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 Styx behind bars. 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. Current federal law, however, works in a different manner.

The Sentencing Reform Act of 1984 (SRA) 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.” 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. The statute did not define the “extraordinary and compelling rea-

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213 See Alschuler, supra note 135, 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.

214 See Barnett, supra note 116, 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 Hill; footnote omitted).

215 Prisoners occasionally have been released on parole to avoid deception, Barnett, supra note 116, at 518, but the status of parole in the federal system could be said to be not entirely clear. See Larkin, supra note 94.


218 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 favour 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).
sons warrant[ing]” release, however, and, as a historical matter, the BOP has construed that phrase very narrowly, finding few prisoners eligible for compassionate release. Initially, the only inmates lucky enough to be released were terminally ill prisoners predicted to die within a year. In 1994, the BOP slightly expanded the circumstances permitting compassionate release for severe but nonterminal illnesses, but not for non-medical reasons. 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 incapacitated; or there is another “extraordinary and compelling” reason for compassionate release.

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.

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221 See Berry, supra note 224, 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).


223 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 224, 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
That restriction has led to numerous instances of injustice. The Government Accountability Office noted in 2012 that the BOP has asked a district court for compassionate release “in a limited number of cases.”

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.

The problem may be due to the BOP’s cumbersome, multistage process for handling release petitions. To some extent, those procedures bring to mind Grant Gilmore’s quip that “[i]n hell there will be nothing but law, and due process will be meticulously observed.” The process begins when a prisoner submits a satisfactory petition to the warden. If the warden rejects the petition, he must inform the prisoner, who then can appeal the denial through the administrative process. 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. 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 nonmedical reasons, and also asks the relevant U.S. Attorney’s Office for its opinion.

The BOP General Counsel then sends the file to the BOP Director for a final decision. There are no nationwide time limits on how long a party at each stage may take to review a request. Each insti-

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 186, 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.”).

224 GOV’T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES’ TIME IN PRISON 25 (Feb. 2012).

225 See DOJ OIG COMPASSIONATE RELEASE REPORT, supra note 219, at iii, 34-35, 40; see also Berry, supra note 202, at 862-66. The number might even be higher because compassionate release requests can made informally by a prisoner, by a prisoner’s family, or by a BOP employee and because the BOP did not consistently track petitions. DOJ OIG COMPASSIONATE RELEASE REPORT, supra note 219, at 35, 37, 39.

226 The problem actually originated 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 one hundred eleven handbooks created by the BOP of one of its institutions discussed that option. DOJ OIG COMPASSIONATE RELEASE REPORT, supra note 219, at ii.


228 28 C.F.R. 571.61-.63 (2015); DOJ OIG COMPASSIONATE RELEASE REPORT, supra note 219, at 3. The request had to 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.

229 Id.

230 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).

231 DOJ OIG COMPASSIONATE RELEASE REPORT, supra note 219, at 4. The BOP General Counsel has the legal authority to deny a petition as legally insufficient, but does not make final decisions. Id.

232 Id. If the prisoner requests release for non-medical reasons for 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.
tution may have its own standard, and they range from five to sixty-five days.\textsuperscript{233} The entire process can take more than five months.\textsuperscript{234} Those procedures may not be the correctional equivalent of \textit{Jarndyce v. Jarndyce},\textsuperscript{235} 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.

There may 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.\textsuperscript{236} After all, some terminally ill inmates are still at risk of reoffending (think child pornography offenders). 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)\textsuperscript{237} or may be realistically ineligible given the nature of their crimes and the adverse public reaction to word of their release (think violent criminals).\textsuperscript{238} The BOP may also believe that the projected cost savings are ephemeral and, given its limited resources and the likely prospect that most pris-

\footnotesize{\textsuperscript{233} \textit{Id.} at ii.}
\footnotesize{\textsuperscript{234} \textit{Id.} at ii, 38-43.}
\footnotesize{\textsuperscript{235} \textit{See} \textbf{CHARLES DICKENS, BLEAK HOUSE} (1852-1853).}
\footnotesize{\textsuperscript{236} \textit{See supra} note 133; \textit{CHIU, supra} note 192, 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); \textit{Curtin, supra} note 130, 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).}
\footnotesize{\textsuperscript{237} \textit{See} \textbf{ASHLEY NELLYS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA} 6 Tbl. B (July 2013) (noting that there were 4,058 federal prisoners serving a sentence of life imprisonment without parole); \textit{see also CHIU, supra} note 192, at 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.’”).}
\footnotesize{\textsuperscript{238} \textit{See} \textbf{Chanenson, supra} note 223, 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 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); \textit{Curtin, supra} note 130, 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).}
oners will try to snooker government physicians and administrative personnel into ill-advised release decisions, the game is not worth the candle. 239

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 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 court that the interests of justice militate in favor 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. 240 The result is that inmates legitimately facing death or able to prove other “extraordinary and compelling” circumstances would be able to obtain compassionate release without the BOP being blamed for a large number of regrettable release decisions. 241

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—those parties and other “insiders” will have greater personal access to the President than anyone outside of his family. They

239 See CHIU, supra note 192, 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.”).

240 See CHIU, supra note 192, at 5; SAMUELS, supra note 185, at 40-41; Curtin, supra note 130, 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).

241 The BOP recently responded to the Inspector General’s criticisms by revising its internal procedures. See SAMUELS, supra note 185, at 40-41. The new procedures expand from 12 months to 18 months the point when a prisoner with a terminal condition may seek release and also reflect the additional circumstances in which compassionate release may be granted to inmates not suffering from a fatal illness. See 28 C.F.R. Ch. V, Subch. D, Pt. 571, §§ 571-60-571.64 (2015); FED’L BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, Change Notice No. 5050.49, CN-1, Compassionate Release/Reduction in Sentence Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Mar. 25, 2015), http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf; FED’L BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, Program Statement No. 5050.49, Compassionate Release/Reduction in Sentence Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Aug. 12, 2013), http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf. The biggest roadblock, however, the condition that the BOP must petition the district court for relief because the Sentencing Reform Act imposed that requirement. The BOP could agree to submit every case to a district court for its resolution. To date, however, it has not done so.
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.\footnote{See Alschuler, supra note 135, 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 the regulations, and obtained clemency on grounds not available to others.”).}

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 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. 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 may become less suspicious that he is acting for the benefit of cronies.\footnote{See George W. Bush, Decision Points 104 (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 the 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 43, at 1198-99 (“All of the ordinarily applicable standards and procedures went by the boards in the 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.”).}

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 opportunity to score political points.\footnote{See Love, supra note 43, 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.”).} The regular grant of clemency to the type of average Americans that traditionally have
received a second chance with a clean slate over time would help cleanse the process of the taint of disgraceful behavior and favoritism that have 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.246 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 office-holders 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 honestly and judiciously—not perfectly, not even Solomonically, but always to the best of his abilities and always evenhandedly, free from inappropriate considerations. There is no mechanism that can guarantee Presidents will make decisions in that manner. The option available to us is to elect people willing to make these decisions often, seriously, and responsibly 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 wrath of the electorate 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 deterrent could be eliminated. Whether it is because of the confluence of Kingdon’s three streams, the rare contemporary occurrence of bipartisan agreement on the need to remedy a problem, or the right alignment of the stars, the current

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246 See Alschuler, supra note 135, 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).
widespread belief that correctional reform is necessary for reasons of compassion or fiscal responsibility might enable us to restart 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.