Guiding Presidential Clemency Decision Making

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ABSTRACT

The Article II Pardon Clause empowers the President to grant clemency to any offender for any reason that he or she deems justified. The clause contains only two textual limitations. The President cannot excuse someone from responsibility for a state offense, nor can he prevent Congress from impeaching and removing a federal official. Otherwise, the President's authority is exclusive and plenary. It is, perhaps, the only surviving aspect of the royal prerogatives.

What the clause does not do is give the President a standard, a guideline, or a decision tree for making clemency decisions. There is a consensus that some reasons are entirely legitimate, even laudatory, grounds for clemency, such as freeing someone who was erroneously convicted, who is suffering under an unduly onerous punishment, or who has atoned for his crimes and turned his life around. Nevertheless, neither the President nor the Department of Justice Pardon Attorney, who is responsible for managing the government's clemency process, has devised a standard for the President to use when making clemency decisions. The Pardon Attorney has compiled a list of relevant factors but has not identified which ones are necessary and sufficient, nor has that official assigned those factors an ordinal relationship or different weights. The result is that a President is left to act like a chancellor in equity by relying on his subjective assessment of the "the totality of the circumstances."

This Article discusses the need to make pardon and commutation decisions in a reasonable, orderly manner that would systematize and regularize the Pardon Attorney's recommendation process and the President's decision making. An objective approach would help the President make decisions consistent with longstanding rationales for punishment. The hope is that, in doing so, the President will be able to act justly as well as to persuade the public that the federal clemency system is open to all, not merely to the President's political, financial, or personal allies, cronies, and friends.

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INTRODUCTION: THE ODD NATURE OF THE CLEMENCY POWER

Americans have never willingly chosen to be ruled by a king. The colonies declared their independence in 1776 in a declaration that indicted King George III for a host of violations of their natural rights as citizens of England.[1] For the duration of the Revolutionary War, a Continental Congress became the sovereign. The Articles of Confederation carried forward governance by a collegial body consisting of representatives from each state with no chief executive comparable to a monarch. Members of the founding generation, however, soon concluded that the absence of a chief executive was a grievous flaw in the structure of the new national government.[2] To remedy that defect, the Convention of 1787 proposed in Article II of the Constitution to create the office of "President of the United States."[3]

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1. *See, e.g.*, THE DECLARATION OF INDEPENDENCE paras. 2, 4–31 (U.S. 1776).

2. JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244–87 (1996).

3. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

Whatever else can be said about that position, it is not a kingship.[4] King George III was a hereditary monarch. The President is not; he holds an elected office for four years.[5] Before the advent of the rule of law and the rise of Parliament, the English crown was the complete sovereign; whoever sat on the throne held the power of life and death over everyone in the nation.[6] The President's powers are specified and few. One is lawmaking in nature.[7] One is military.[8] Some are diplomatic.[9] One is informational.[10] Some are administrative or managerial.[11] Presidents also have certain additional implied powers to

4. There is currently a rich debate over the reach of the President's "executive Power." One theory is that the Executive Vesting Clause grants the President all the authority possessed by the English crown that the Constitution did not otherwise grant to Congress or the federal courts. Another theory is that the clause merely designates the President as the official who must execute whatever powers the Constitution or Congress grants him. *See, e.g.*, SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 49–52 (1994); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). This debate is beyond the scope of this Article.

5. U.S. CONST. art. II, § 1, cl. 1; *id.* amend. XII (revising the process for electing the President and Vice President); *id.* amend. XX (establishing that the Vice President shall become President if the President either dies before assuming office or dies during his elected term); *id.* amend. XXII (limiting the number of terms that anyone can serve as President).

6. *See* JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (2004); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 327–32 (2016) [hereinafter Larkin, *Lost Due Process Doctrines*].

7. U.S. CONST. art. I, § 7, cl. 2 (requiring that every bill that passes both houses of Congress be presented to the President for his signature or veto). The President's veto power includes the authority to refuse to sign a bill that he deems constitutional but unwise. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); The Pocket Veto Case, 279 U.S. 655, 678 (1929); Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 462 (D.C. 1982), *summarily aff'd sub nom.* Process Gas Consumers Grp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983); THE FEDERALIST No. 73, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the President's veto power "not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws").

8. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

9. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"); *id.* ("[The President], by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls"); *id.* § 3 ("[The President] shall receive Ambassadors and other public Ministers.").

10. U.S. CONST. art. II, § 3 ("[The President] shall from time to time give the Congress Information of the State of the Union and recommend to their Consideration such Measures as he shall judge necessary and expedient.").

11. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the

implement the ones specified in Article II.[12] Yet, however broad those powers might be,[13] none (or all of them together) comes close to the authority held by King George III's predecessor, William I. Atop all that, Article II empowers Congress to remove the President from office for specified types of misconduct.[14] That provision alone makes it evident that the President is not a monarch.

Yet, one of the President's Article II powers—the authority to grant clemency—quite visibly stands out from the others because it *does* have a regal nature to it. Mercy has ancient roots,[15] and clemency—the law's version of mercy—has a history almost as old.[16] Clemency dates at least as far back as the Code of Hammurabi in Mesopotamia, one of the earliest legal codes.[17] Indeed, clemency has likely existed for as long as there have been political units (or families).[18] If you focused your inquiry

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United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ."); *id.* cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for."); *id.* § 3 ("[The President] shall take Care that the Laws be faithfully executed").

12. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 547, 591 (2006) ("'The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise.'") (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866)). For example, the President can remove appointees because he believes that they are doing a poor job, because they disagree with his policies, because he would simply like someone else to occupy that position, or for no reason at all. *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (ruling that the President has the implied power to remove "Officers of the United States").

13. For a general discussion of presidential powers by someone who would know, see WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS (1916). *See also, e.g.*, EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 (Randall W. Bland et al. eds., 5th rev. ed. 1984); HAROLD J. KRENT, PRESIDENTIAL POWERS (2005); FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994).

14. U.S. CONST. art. II, § 4 ("The President, Vice President, and all other civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors."); *see also id.* art. I, § 2, cl. 4 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all impeachments."); *id.* § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."). Congress's impeachment and removal powers make it the ultimate national authority.

15. *See, e.g.*, *Genesis* 4:13–15 (King James) ("And Cain said unto the LORD, My punishment is greater than I can bear. . . . [I]t shall come to pass, that every one that findeth me shall slay me. And the LORD said unto him, Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold. And the LORD set a mark upon Cain, lest any finding him should kill him.").

16. *See, e.g.*, *Matthew* 27:15–23 (describing Pontius Pilate's decision to pardon Barabbas during Passover); JEFFREY P. CROUCH, THE PRESIDENTIAL PARDON POWER 10–11 (2009); MELISSA BARDEN DOWLING, CLEMENCY AND CRUELTY IN THE ROMAN WORLD (2006); CHARLES L. GRISWOLD, ANCIENT FORGIVENESS: CLASSICAL, JUDAIC, AND CHRISTIAN (2011); DAVID KONSTAN, BEFORE FORGIVENESS: THE ORIGINS OF A MODERN IDEA (2010); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 (1991) [hereinafter Kobil, *Quality of Mercy*]; Adriaan Lanni, *Transitional Justice in Ancient Athens*, 32 U. PA. J. INT'L L. 551 (2010).

17. CROUCH, *supra* note 16, at 10–11.

18. *See* William W. Smithers, *The Use of the Pardoning Power*, 52 ANN. AM. ACAD. POL. & SOC. SCI. 61, 62 (1914) (the clemency power "has never been overlooked since the dawn of history").

solely on Anglo-American legal history, you would see that clemency has an ancient lineage, reaching back to the days of the earliest English, Scottish, and Irish kings and continuing forward past the Norman Conquest to the present.[19] Even after Parliament had defeated the Stuarts in a battle for governmental supremacy culminating in the Glorious Revolution,[20] the Crown retained its historical prerogative over clemency.[21]

The apparently limitless feature of the President's Article II clemency power therefore seems odd. To be sure, the Framers anticipated that George Washington would become the first chief executive and therefore did not fear that the new presidency would become an old-style monarchy on this side of the Atlantic.[22] Still, the Framers did not intend to recreate a royal office through Article II. Just as Article I limited the tenure and powers of Senators and Representatives, Article II defined the tenure and powers of the President. Only Article III contains an (effective) grant of authority for life by allowing federal judges to hold office during "good Behaviour,"[23] but the powers of the federal courts do not approach the ones contained in Articles I and II. Federal courts may only decide "Cases" and "Controversies."[24] They cannot raise taxes,[25] let alone order the nation to war or manage one.[26]

The other specific powers that Article II vested in the President do not give the reader the impression that the Convention of 1787 welcomed the notion of re-establishing the monarchy. Indeed, Article I went out of its way to forbid Congress from granting anyone a "Title of Nobility,"[27] so it is unlikely that the Founders would have been untroubled by a monarchical chief executive. Finally, the Framers gave Congress the power to impeach and remove the President, which is perhaps the ultimate demonstration of who is the boss.[28] Yet, despite all that, the Article II Pardon Clause certainly appears to grant the President at least the same clemency power that George III and his predecessors enjoyed. As the Supreme Court of the United States has described it, the pardon authority is

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19. *See infra* notes 127–53.

20. *See, e.g.*, PETER ACKROYD, REBELLION: THE HISTORY OF ENGLAND FROM JAMES I TO THE GLORIOUS REVOLUTION (2015); RICHARD S. KAY, THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW (2014).

21. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *270.

22. *See* RAKOVE, *supra* note 2, at 244.

23. U.S. CONST. art. III, § 1.

24. U.S. CONST. art. III, § 2, cls. 1–2.

25. U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."). Courts can decide, however, whether a tax originated in the House. United States v. Munoz-Flores, 495 U.S. 385, 389–97 (1990).

26. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War . . . ."); *id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States. . . ."); Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973); United States v. Sisson, 294 F. Supp. 515, 517–18 (D. Mass. 1968) (ruling that whether the nation is engaged in a "War" is a nonjusticiable political question).

27. U.S. CONST. art. I, § 9, cl. 8.

28. *See* THE FEDERALIST, *supra* note 7, No. 69, at 466 (Alexander Hamilton); *cf.* Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("As the District Court observed: 'Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.'").

"unlimited," and the President can exercise it for any reason or for no reason at all.[29] That might explain why Alexander Hamilton found it necessary to defend to the ratifying conventions[30] the last surviving feature of the divine right of kings.[31]

Perhaps for that reason, there has been relatively little discussion regarding the substantive standards that a President should use when making clemency decisions.[32] The bench, the bar, and the academy have focused heavily on structural or procedural reforms, rather than trying to give substantive content to the clemency judgment. Of course, that is the traditional and perfectly natural approach for lawyers to take. In America, political debates eventually morph into legal disputes, as Alexis de Tocqueville noted in the nineteenth century,[33] and legal disputes ultimately become constitutional challenges, as we have witnessed in the last century and this one.[34] The Supreme Court has generally been far more receptive to arguments that challenge the procedures that the government uses to make decisions affecting private

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29. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866) ("The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. [¶] Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. 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.").

30. *See* Austin Sarat, *Mercy, Clemency, and Capital Punishment*, 3 OHIO ST. J. CRIM. L. 273, 275 (2005) ("Perhaps clemency's anxiety-arousing status explains why, writing in 1788, Alexander Hamilton set out to explain and defend what seemed to his contemporaries something of an anomaly in America's new constitutional scheme, namely lodging the power to grant 'reprieves and pardons for offenses against the United States,' solely in the President of the United States. Unlike the President's power as commander-in-chief of the army and navy, a constitutional provision the propriety of which, in Hamilton's view, was 'so evident in itself . . . that little need be said to explain or enforce it,' the President's power to pardon was neither self-evident nor self-explanatory. The need for explanation and defense arose because granting such a power to the Chief Executive breached the boundary between the rule of law and monarchial privilege. Traditional ideas of sovereignty would be imported into a document dedicated to constructing a government of limited powers.").

31. To borrow a phrase from Sister Helen Prejean. *See* Sister Helen Prejean, *Death in Texas*, N.Y. REV. BOOKS (Jan. 13, 2005), https://www.nybooks.com/articles/2005/01/13/death-in-texas/ [https://perma.cc/X646-2WTH] (noting that, because the clemency power vests in the chief executive "absolute power over life and death," clemency "represents the last vestige of 'the divine right of kings' ").

32. There are, of course, some excellent treatments of the issue. *See, e.g.*, KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989); Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153 (2009); Chad Flanders, *Pardons and the Theory of the "Second Best,"* 65 FLA. L. REV. 1559 (2013); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303 (2000); Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281 (1993).

33. *See* ALEXIS TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 257 (Harvey Mansfield & Delba Winthrop trans. & eds., 2000) (1835 & 1840) ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question.").

34. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (constitutional challenge to political gerrymandering).

parties than to arguments disputing the government's substantive right to order society.[35] Moreover, even though the Court has been willing to regulate the trial process and post-trial decisions that affect a convicted offender's liberty,[36] the Court has been unwilling to use the Constitution to regulate the clemency process.[37] The result is that relatively few people have discussed the standard that the President should use when making clemency decisions.

Improving substantive clemency decision making is a public policy issue worth tackling. It is also no easy task. Start with the issues that should be discussed. What questions should the President ask? What standard should he or she use for making pardon or commutation decisions? What factors should the President consider? Which factors are dispositive? Which ones are critical or just worth knowing? Are admissions of guilt, atonement, compensation to victims, and rehabilitation necessary? Are they sufficient? Why does this petitioner deserve relief but not that one? Should a President forgive an offender purely as an act of mercy even though doing so poses a risk of discrimination because different Presidents might define "mercy" differently? Should a President forgive someone he knows well or would that create the appearance of cronyism? Questions such as these are no less important to answer than the structural and procedural ones that have occasioned considerable attention so far. Unfortunately, the answers to those questions are far from obvious.

In the hope of improving presidential clemency decision making, I will address the questions posed above. This Article will proceed as follows: Part I will summarize criticisms of the federal clemency process as it operates today. Part II discusses the standards that the U.S. Department of Justice Office of the Pardon Attorney has adopted for its review of clemency applications. As the President's lieutenant, the Pardon Attorney cannot constrain the authority that Article II vests in the chief executive. Nonetheless, Presidents have traditionally relied on the Pardon Attorney not only to process clemency petitions but also to make recommendations on whether someone deserves relief. The Pardon Attorney's standards, therefore, merit very serious consideration. Unfortunately, they are less than ideal. Part III will turn to a variety of different sources—such as the constitutional text, Anglo-American history of clemency, and the views of moral philosophers—that could offer the President some guidance on how he should make clemency decisions. They are only moderately helpful. Finally, Part IV discusses the longstanding dilemma faced by the law: the choice between discretion and rules. Granting a decisionmaker discretion helps to ensure that he can remedy

35. *Compare, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (rejecting the adequacy of a state's procedures for terminating welfare benefits), *with, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (refusing to second-guess a state's decision to limit welfare payments to indigent families regardless of their size).

36. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480-89 (1972) (ruling that a parolee is entitled to certain minimal procedural rights, such as written notice of the charges and a hearing at which he can be present, before his parole can be revoked); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (same, for a probationer).

37. *See*, *e.g.*, Schick v. Reed, 419 U.S. 256, 266 (1974) (refusing to read substantive limitations on the President's pardon power not express found in the Constitution); *cf.* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Solesbee v. Balkcom, 339 U.S. 9 (1950), *abrogated on other grounds by* Ford v. Wainwright, 477 U.S. 399 (1986) (all declining to impose procedural requirements on a governor's clemency decision making).

individual cases of injustice that fall outside of rules designed to capture the vast majority of cases. Rules help to ensure that a decisionmaker will not act arbitrarily by restraining how he handles individual cases. It would be possible to accommodate both concerns, but that would require a new approach to substantive presidential clemency decision making.[38] Part IV offers some suggestions as to what that approach should be.

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38. Before turning to those issues, I want to identify several related issues that are beyond the scope of this Article. It is impossible to discuss clemency without also thinking about the federal sentencing laws, particularly the drug laws, and the post-1970 increase in the federal prison population. Numerous scholars have debated whether the current federal (and state) drug laws carry unduly harsh penalties, are racially discriminatory, and have contributed to America becoming a "carceral" state. *See, e.g.*, RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006). Some scholars go a step further and say that the criminal justice system is irredeemably racist and is tantamount to a new version of Jim Crow, as seen by the imprisonment of a large number of black offenders for nonviolent drug crimes. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2012). Not everyone, however, holds that view. *See, e.g.*, MICHAEL JAVEN FORTNER, THE BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA (2017); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241(2014) [hereinafter, Larkin, *Crack Cocaine*]; Barry Latzer, *The Hard Realities of Hard Time*, CITY JOURNAL (June 9, 2017), https://www.city-journal.org/html/hard-realities-hard-time-15248.html [https://perma.cc/8THS-JK2N]; *see generally* Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 889 n.192 (2016) [hereinafter Larkin, *Revitalizing Clemency*] (collecting authorities). I will not re-debate that issue here. The second issue involves the use of clemency in its lesser known forms: expungement or sealing of convictions (for access only by law enforcement) and granting relief from the collateral consequences of a conviction so that an offender can live in public housing, vote, sit on a jury, join the military, or obtain an occupational license. *See, e.g.*, JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015); MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION (2018). Those issues are important, but do not necessarily arise under the Article II pardon process. "Ban the box" initiatives, for example, would prohibit employers from asking job applicants about convictions until the end of the employment hiring process. Congress can also address "collateral consequences" of a conviction by statute. The third issue is the use of clemency in capital cases. Historically, Presidents (and governors) were willing to excuse condemned prisoners from walking the "Green Mile." *See, e.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 54 (2002) (noting that, in eighteenth-century New York, more than half of the condemned prisoners received clemency). Nowadays, however, few chief executives grant clemency to the condemned. *See, e.g.*, Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1 (2014); Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239 (2003); Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37 (2009); William Alex Pridemore, *An Empirical Examination of Commutations and Executions in Post*-Furman *Capital Cases*, 17 JUST. Q. 159 (2000); *see generally* Paul J. Larkin Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE L. REV. 1295 (2016) [hereinafter Larkin, *Demise of Capital Clemency*]. Like almost every other issue even remotely connected with capital punishment, that one merits separate treatment. The fourth issue is the use of clemency in connection with mass murders, genocide, war crimes, or atrocities. Problems like those are so far beyond the ordinary criminal case that they require separate consideration. *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1999) [hereinafter MINOW, VENGEANCE AND FORGIVENESS]. I also do not discuss whether a President or governor should be able to excuse someone for civil liability. For a discussion on that subject, see John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467 (2015); Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661 (2016). Finally, St. Anselm famously pondered the question of how God could be both perfectly just and perfectly merciful because the two concepts can conflict. *See* St. Anselm, *Proslogion*, *in* THE PRAYERS AND MEDITATIONS OF ST. ANSELM WITH THE PROSLOGION 238, 249–50 (Benedicta Ward trans., 1973). That question, and others like it, I leave to people far smarter than I.

I. PROBLEMS WITH THE FEDERAL CLEMENCY PROCESS

Today, most substantive criticisms of the federal criminal justice system focus on the punitive nature of federal criminal statutes that went on the books over the last 40 years.[39] The drug laws receive particular condemnation.[40] Statutes tying the length of an offender's sentence to the amount of the controlled substance he sold or possessed can impose sentences that run for decades, even life.[41] Combined with an aggressive U.S. Department of Justice policy toward drug-law enforcement, those laws have contributed to a vast increase in the numbers of federal prisoners, referred to by the sobriquet of "mass incarceration."[42] Efforts to persuade Congress to soften the rigors of those drug laws so far have not fared well.[43] As a result, advocates for criminal justice reform have sought relief through the clemency process. They have found only limited success.[44]

The reason is that the federal clemency process does not work efficiently or well. Most critics of the clemency process focus on its architecture or the procedural hurdles that applicants must surmount to obtain relief. The arguments

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39. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 724–29 (2013).

40. *See, e.g.*, ALEXANDER, *supra* note 38.

41. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2006)) (amended 2010 & 2018), became law during after the emergence of "crack" cocaine in the nation's inner cities. The law imposed a mandatory minimum penalty on the distribution of crack, and the amount that triggered that penalty was 100 times less than the predicate amount of powdered cocaine. *See, e.g.*, Larkin, *Crack Cocaine*, *supra* note 38, at 241–42.

42. *See, e.g.*, BARKOW, *supra* note 38.

43. In 2010, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. That law amended the Anti-Drug Abuse Act of 1986 and reduced the 100:1 crack to cocaine ratio to 18:1, but the statute did not apply retroactively. President Obama used his clemency power in an attempt to reduce the sentences of the offenders left stranded by the prospective-only 2010 law. *See* Larkin, *Revitalizing Clemency*, *supra* note 38, at 886–87. Congress finally made the Fair Sentencing Act of 2010 retroactive by passing the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 519 (2018). For an excellent discussion of the process that lead to the enactment of the 2018 law, see Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791 (2019).

44. Then-President Barack Obama directed the Justice Department to establish the Clemency Initiative in April 2014 to review commutation applications and forward cases to him where an unduly long sentence was unjust. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 835–38 (2017). Before he left office, Obama commuted the sentences of more than 1,700 prisoners. Some commutation recipients left prison immediately, and others remain incarcerated under a shortened term. For descriptions of that initiative, see OFF. OF THE INSPECTOR GEN'L, U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT'S CLEMENCY INITIATIVE (Aug. 2018); U.S. SENT'G COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE CLEMENCY INITIATIVE 2014 (Sept. 2017). Though well intentioned, President Obama went about the process in the wrong way by trying to consider commutation petitions on a retail basis rather than by granting drug offenders a broad, amnesty-like commutation. *See* Paul J. Larkin, Jr., *"A Day Late and a Dollar Short": President Obama's Clemency Initiative 2014*, 16 GEO. J.L. & PUB. POL'Y 147 (2018) [hereinafter Larkin, *A Day Late*]; Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT'G REP. 267 (2017) [hereinafter Larkin, *Delegating Clemency*]; Margaret Colgate Love, *Evaluating Obama's Clemency Legacy: An Assessment*, 29 FED. SENT'G REP. 271 (2017). President Donald Trump discontinued the Clemency Initiative, and he has commuted few drug offenders' sentences. *See, e.g.*, Off. of the Pardon Att'y, U.S. Dep't of Justice, Commutations Granted by President Donald Trump (2017-Present), https://www.justice.gov/pardon/commutations-granted-president-donald-trump-2017-present.

ordinarily go like this: Clemency is a valuable power for Presidents to use as an ultimate corrective mechanism, a means of showing mercy to someone who has reformed, and a tool for signaling his policy preference in criminal enforcement. Nonetheless, clemency no longer serves those historic purposes. Presidents have allowed clemency to wither by using their authority infrequently,[45] episodically,[46] and arbitrarily.[47] The procedures that chief executives use when reviewing clemency petitions lack even the minimum procedural guarantees that the Constitution requires when only the termination of government welfare benefits are at stake.[48] On some occasions, chief executives granted clemency for illegitimate reasons, such as to repay old friends or to make new ones.[49]

The most serious problem with the current federal clemency system is its control by the U.S. Department of Justice. Traditionally, Presidents have relied heavily on officials at the U.S. Department of Justice—particularly the Pardon Attorney, who heads the office bearing that title—to manage the clemency process and advise how he should treat each applicant.[50] That office receives and reviews every clemency petition, collects all of the relevant files in the case, conducts whatever additional investigation is necessary, and prepares a recommendation whether the President should award the applicant relief.[51] All clemency

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45. *See, e.g.*, Kobil, *Quality of Mercy*, *supra* note 16, at 574–75; Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 453 (2009); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2013); Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 7, 2008, at B7.

46. *See, e.g.*, P.S. Ruckman Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 470 (2016) [hereinafter Ruckman, *21st Century Pardon Power*]; P.S. Ruckman Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUDIES 21, 27 (2011) (both noting that a majority of presidential clemency grants over almost the last forty years have been in the month of December or in the last year of their term in office); P.S. Ruckman Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)*, 27 PRES. STUD. Q. 251, 258 (1997) [hereinafter Ruckman, *US Clemency*] (footnote omitted) ("Interestingly, timing may contribute both to the willingness of the president to think in humanitarian terms and the willingness of the public to accept a pardon defended on such grounds. Lincoln and Johnson certainly counted on the Christmas season to soften hearts toward grants of Amnesty.").

47. *See, e.g.*, CTR. ON THE ADMIN. OF CRIM. LAW, N.Y.U. LAW SCH., THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION'S CLEMENCY INITIATIVE 6 (2018).

48. *See, e.g.*, Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889 (1981).

49. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 24 (2012); CROUCH, *supra* note 16, at 101; GOTTSCHALK, *supra* note 38, at 24; Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010); Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185 (2003) [hereinafter Love, *Pardon Paradox*].

50. For discussion of the practical operation of the federal clemency process, see, for example, Jeffrey Crouch, *The Toussie Pardon, "Unpardon," and the Abdication of Responsibility in Pardon Cases*, 38 CONG. & THE PRESIDENCY 77, 89–93 (2011); H. Abbie Erler, *Executive Clemency or Bureaucratic Discretion? Two Models of the Pardon Process*, 37 PRES. STUD. Q. 427 (2007); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172-1204 (2010) [hereinafter Love, *Pardon Power Twilight*]; Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465 (2017).

51. Ruckman, *US Clemency*, *supra* note 46, at 256 (footnotes omitted) ("The office was established by an 1891 Act of Congress to prepare cases for the president to consider. In effect, the pardon attorney

recommendations go from the Justice Department to the Office of the White House Counsel, which independently reviews every petition.[52] Only after the White House Counsel has signed off on a recommendation does it reach the President's desk.[53] That system is a sensible process for managing the paper flow, but it gives the Justice Department undue influence over the outcome. The problem is that the Justice Department successfully prosecuted every clemency applicant.[54] Since Griffin Bell was attorney general in the Carter Administration, the Pardon Attorney has reported to the deputy attorney general, rather than directly to the attorney general.[55] The deputy attorney general, however, is responsible for managing the Justice Department's criminal prosecutions, whether they are conducted by one of the Justice Department divisions with criminal law enforcement responsibility (Criminal, Tax, Antitrust, Environment, etc.) or by a U.S. Attorney's Office. By definition, the Justice Department suffers from an actual or apparent conflict of interest because it prosecuted every federal clemency applicant and has a stranglehold over the process seeking to undo a perhaps hard-won conviction or sentence. Lodging effective final authority over the Department's clemency recommendations in the Deputy Attorney General only aggravates the problem.

That is troubling. A longstanding legal principal, known by the Latin phrase "*Nemo judex in cause sua*," states that no one may be the judge in his own cause.[56] The current federal clemency process almost does precisely that by giving senior Justice Department officials the power to smother a clemency petition

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receives and reviews all applications for clemency and manages the paper flow through the remaining stages of process: investigation, preparation, consideration and action, and notification.").

52. Osler, *supra* note 50, at 483.

53. *Id*. at 484.

54. As head of the Department of Justice, the Attorney General is responsible for supervising all criminal and civil litigation involving one of the department's divisions or the 93 U.S. Attorney's Offices. *See* 28 U.S.C. §§ 501, 503 (2018) (placing in the attorney general all authority to conduct or supervise all litigation in which the federal government has an interest); *id*. at §§ 506-507A (2018) (authorizing the President to appoint a deputy attorney general, an associate attorney general, and 13 assistant attorneys general); *id*. at § 5641 (authorizing the President to appoint a U.S. Attorney for each of the 93 judicial districts).

55. Ruckman, *US Clemency*, *supra* note 46, at 256.

56. *See*, *e.g*., Thomas Bonham v. Coll. of Physicians, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610); 1 BLACKSTONE, *supra* note 21, at *91 ("[I]t is unreasonable that any man should determine his own quarrel."); THE FEDERALIST, *supra* note 7, No. 10, at 44 (James Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time . . . ."); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905–06 (2016); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–77 (2009); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428–29 (1995); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (ruling that the Due Process Clause incorporates the common law rule that a judge must recuse himself if he has "a direct, personal, substantial, pecuniary interest" in a case); Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1858); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that makes a man a Judge in his own cause . . . is against all reason and justice.").

in the cradle. Few people, including prosecutors, readily admit that they made a mistake. The Justice Department is not likely to admit that one of its own prosecuted an innocent person, erroneously decided to bring charges instead of deferring prosecution (in favor of, for example, drug treatment), committed a prejudicial error that the courts did not remedy, or urged the sentencing court to impose a punishment that was too severe. Paul Rosenzweig said it best: "[P]rosecutors, relishing their discretion, are poorly positioned to second-guess their own exercise of that power" through clemency," so "if you give the prosecutor broad authority to make decisions, you cannot be surprised when he is impressed with his own rectitude."[57] Individual cases of injustice occur when you place the clemency process in the hands of one party to a criminal prosecution—and individual cases add up.

For that reason (among others), there is a consensus that the federal clemency process needs reform.[58] Commentators, particularly in the academy, have proposed a raft of alterations.[59] Some would entirely revamp the institution seen in America for more than 200 years.[60] No President over the last 30-plus years, however, has thought that this issue needs a re-examination.

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57. Rosenzweig, *supra* note 45, at 608.

58. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Gregory Craig, Counsel to President Obama (2008–2009), Remarks at the American Constitution Society Conference on Pardons (May 10, 2012) http://www.propublica.org/documents/item/356129-greg-craigs-remarks-at-the-acs-conference-on [https://perma.cc/Z2BB-NGCK]; Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001); Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131 (2010); Daniel T. Kobil, *Reviving Presidential Clemency in Cases of "Unfortunate Guilt*," 21 FED. SENT'G REP. 160, 163–64 (2009); Larkin, *Revitalizing Clemency*, *supra* note 38, at 900–03; Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2015) [hereinafter Love, *DOJ Conflict of Interest*]; Samuel Morison, *Saving Grace: Salvaging the Pardon Advisory System*, AM. CONST. SOC'Y EXPERT F. BLOG (Dec. 12, 2011), https://www.acslaw.org/expertforum/saving-grace-salvaging-the-pardon-advisory-system/ [https://perma.cc/DL64-XZGE]; Ruckman, *21st Century Pardon Power*, *supra* note 46, at 470; Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT'G REP. 177 (2000); Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. 143 (2003). Most of my own writing fits into that category. *See, e.g.*, Larkin, *A Day Late*, *supra* note 44; Paul J. Larkin, Jr., Essay, *A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL'Y 237 (2017) [hereinafter Larkin, *Vice President and Clemency*]; Larkin, *Delegating Clemency*, *supra* note 44; Larkin, *Revitalizing Clemency*, *supra* note 38, at 834–51; Paul J. Larkin, Jr., *Reorganizing the Federal Clemency Process* HERITAGE FOUND., LEGAL MEMORANDUM NO. 206, May 31, 2017.

59. Several law schools have sponsored symposia on clemency. *See, e.g.*, *A Colloquium on the Jurisprudence of Mercy: Capital Punishment and Clemency*, 82 N.C. L. REV. 1279 (2004); Symposium, *Questions of Mercy*, 4 OHIO ST. J. CRIM. L. 321 (2007); Symposium, *Reviewing Clemency in a Time of Change*, 12 U. ST. THOMAS L.J. 411 (2016); Symposium, *From Conviction to Clemency—*Commonwealth v. Giarratano*: A Case Study in the Modern Death Penalty*, 73 WASH. & LEE L. Rev. 1119 (2016); Symposium, *Forgiveness & The Law: Executive Clemency and the American System of Justice*, 31 CAP. U. L. REV. 139 (2003); *Clemency and Pardons Symposium*, 27 U. RICH. L. REV. 177 (1993).

60. One option would be to amend the Pardon Clause and restrict the President's power. One restriction would be to empower the U.S. Senate to reject a particular grant of clemency by a two-thirds

II. THE CLEMENCY STANDARDS ADOPTED BY THE DEPARTMENT OF JUSTICE OFFICE OF THE PARDON ATTORNEY

The Justice Department Office of the Pardon Attorney has issued "standards" regarding pardons and commutations.[61] With respect to pardons, the standards provide that a pardon rests on "the petitioner's demonstrated good conduct for a substantial period after conviction and service of sentence."[62] Those standards also identify the following "principal factors" for considering a pardon application: (1) the applicant's post-conviction conduct, character, and reputation; (2) the seriousness and relative recentness of the offense(s); (3) the applicant's acceptance of responsibility, remorse, and atonement; (4) the applicant's need for a pardon; and (5) any official recommendations and reports.[63] Not surprisingly, the first factor is the most important one. As the OPA notes, "[a]n individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon."[64] Counting favorably are the applicant's "financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record."[65] The following are also relevant: the extent to which a petitioner has "accepted responsibility for his or her criminal conduct" and has made restitution to crime victims; in the case of "a prominent individual or a notorious crime," the "likely effect of a pardon" on law enforcement or the public; the "impact" of a pardon on a victim of the crime; and "a specific employment-related need for pardon, such as removal of a bar to licensure or bonding."[66] Finally, "[t]he comments and recommendations of concerned and knowledgeable officials," particularly "the [U.S.] Attorney or Assistant Attorney General whose office prosecuted the case and the sentencing judge, are carefully considered."[67]

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vote, as occurs with treaties. *See* U.S. CONST. art. II, § 2, cl. 2. Amending the Pardon Clause, however, is not a realistic option. In response to President Gerald Ford's decision to pardon Richard Nixon for any crimes that he might have committed in connection with Watergate, Senator Walter Mondale proposed an amendment to the Pardon Clause. It would have allowed Congress to overrule a clemency grant by a two-thirds vote. His proposal failed. Given that failure despite the widespread, severe, and adverse public reaction to the Nixon pardon, an action that likely cost Ford the 1976 election, any proposal to amend the Constitution today is surely a non-starter. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 457 (2009); Strasser, *supra* note 58, at 143–44; *see also* Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13 (2002).

61. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-140.112 (Apr. 2018), https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.112 [https://perma.cc/M7AE-ZLWP].

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*.

67. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-140.112 (Apr. 2018), https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.112 [https://perma.cc/M7AE-ZLWP].

The OPA commutation standards resemble its pardon standards: they are vague and, therefore, generally unhelpful. Commutation, the OPA standards note, is an "extraordinary" and "rarely granted" form of relief. [68] Historically, Presidents have commuted sentences for several reasons: an offender's punishment differed greatly from the sentences received by others for the same offense or was unduly severe; the offender was elderly or facing death; the offender had performed some "meritorious service," such as assisting the government investigate, apprehend, or prosecute others that had not already been considered in his favor.[69] Other "equitable factors" might also justify a commutation.[70] The availability of other avenues for relief is also relevant.[71] Aside from identifying grounds on which Presidents had commuted sentences in our history, the commutation standards supply no guidance to the President as to when he should grant (or when the Pardon Attorney should recommend) a reduction in the petitioner's sentence.

The OPA standards are helpful and provide some guidance on what clemency petitions might have a chance of success. Unfortunately, they do not go far enough. Consider the OPA standard for a pardon. It identifies five factors but does not identify the weight that each one has, nor does it rank them in an ordinal fashion. The last factor—viz., the views of the judge and prosecutors—is less a factor than a source of information. Some of the factors also raise curious questions. What type of "likely effect" on law enforcement matters, and why? If pardoning a clearly guilty crony might denigrate the investigative agency involved and the Justice Department, why is that factor not subsumed by the effect that a pardon would have on "the public"? An employment-related need for a pardon is a reasonable factor, but what about the person who wants only to leave his children with a clean slate? Does that count too? To me, it should. After all, "we brought nothing into this world, and it is certain that we can carry nothing out."[72] A person who has paid the price for a mistake and has kept on the right side of the law ever since should be able to hope that he can leave behind a good name for his children. Finally, any multi-factor test poses the risk of camouflaging a purely subjective, discretionary judgment with a host of objective-looking considerations. As Justice Antonin Scalia noted, "th' ol' 'totality-of-the-circumstances' test,"[73] as it is known, "is really, of course, not a test at all but an invitation to make an ad hoc judgment"[74] that can euchre the public into believing that a decision was grounded in objective-sounding factors.[75]

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68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.
72. 1 *Timothy* 6:7 (King James).
73. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).
74. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).
75. Exhibit A is the Supreme Court's opinion in *Relford v. U.S. Disciplinary Commandant*, 401 U.S. 355 (1971). The Court used a twenty-one-factor test to decide whether the military had constitutional authority to court-martial a servicemember. *Id*. at 365. Any lawyer knows that a twenty-one-factor test—

Is there a way to avoid making subjective, ad hoc clemency judgments? Part III of this Article surveys different sources of law, knowledge, and learning that could help answer that question.

III. DEVISING A STANDARD FOR PRESIDENTIAL CLEMENCY DECISION MAKING

"Forgiveness," Professor Martha Minow writes, "offers wrongdoers a fresh start; it wipes the slate clean. The legal procedure of bankruptcy does that; amnesties and pardons can, too."[76] She is correct. The difficult question is when the nation's chief executive should express its forgiveness.

There are various factors relevant to constitutional interpretation.[77] Unfortunately, as explained below, they provide us with only limited assistance in this context. The text of the Pardon Clause empowers the President to grant pardons, but it does not direct him to do so, and it offers little in the way of clues recommending how he should do so. English history is relevant, but it tells us only when the crown exercised clemency, not when an elected chief executive must or should do so. The history of the Constitutional Convention of 1787 is not illuminating, and the Supreme Court has largely stayed out of the business of defining limits on the President's use of clemency. The nation's forty-five presidents have granted pardons for a host of different reasons but often do not explain why. Their decision-making standards, to the extent that we know what they were, are sometimes so general or vague as to amount to no standard at all. Legal scholarship and the teaching of moral philosophy are potentially promising, but they generally do not offer a specific way of analyzing particular clemency petitions. Except for obvious cases—such as proven innocence or a ghastly punishment—we lack a rich or fully developed theory when presidential clemency is appropriate.

A. The Text of the Pardon Clause

The Article II Pardon Clause vests in the President "a Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment."[78] The text of the clause defines several features of that power. By vesting authority in the chief executive,[79] the only federal officer elected by the

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particularly one with no necessary and sufficient factors, and no ordinal relationship among them—is no "test" at all. To the average person, however, it looks like one.

76. MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 146 (2019) (footnote omitted) [hereinafter MINOW, LAW'S FORGIVENESS].

77. The literature on that subject is rich and ever increasing. *See, e.g.*, ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

78. U.S. CONST. art. II, § 2, cl. 1. As noted below, clemency can come in multiple forms. Unless the context specifies otherwise, I will use the term "pardon" to refer to any type of clemency.

79. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

entire nation, the clause empowers him or her to exercise clemency on behalf of the country. By comparison with the Treaty and Appointments Clauses, which require "the Advice and Consent of the Senate" for the President to act, the Pardon Clause grants the President the clemency power as a prerogative of the office. Moreover, the text expressly limits that authority in, at most, two ways. The President can grant clemency only for federal crimes, leaving the states to decide how to proceed against someone who violates their laws. And the President cannot use clemency to prevent Congress from impeaching a federal official—including himself—and removing him from office.[80] That is it; the Pardon Clause imposes no other express restraints.

Other components of Article II likewise provide little guidance regarding the reach of the Pardon Clause.[81] The most directly relevant provision is the Take Care Clause. It could bear on the reach of the Pardon Clause in either or both of two ways. The first one is by its command that the President "take Care that the Laws be faithfully executed."[82] Whatever else that clause means,[83] the argument goes, it requires him to comply with all constitutional provisions in the federal criminal code.[84] As relevant here, the Take Care Clause prohibits the President from using his clemency power to commit a crime or cover up one. He must enforce the law, not break it.[85] Yet, telling the President not to be "a crook"[86] is hardly a standard for granting clemency, or for much of anything else. Indeed,

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80. Parliament battled the crown over that issue in the seventeenth and eighteenth centuries, with Parliament emerging the victor in 1701 in the Act of Settlement, 12 & 13 Will. 3 c. 2, § 3 (Eng.) ("That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament."). *See generally* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 1–55 (1973). The Framers decided to avoid any dispute from the outset.

81. *See* Schick v. Reed, 419 U.S. 256, 263–64 (1974) (noting that limitations on the pardon power must be found in the Constitution); *cf.* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (arguing that the Constitution should be read holistically).

82. U.S. CONST. art. II, § 3.

83. *See supra* note 4 (noting the disagreement over the meaning of the Executive Power and Take Care Clauses).

84. There is a debate over the issue whether the President can refuse to enforce a law he believes is unconstitutional. *See, e.g.*, Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31–36 (1992); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 178–79 (2005); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873–74 (1994); Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1195–96 (2012); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261–62 (1994); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008). That issue is beyond the scope of this Article.

85. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013); Metzger, *supra* note 4, at 1878. For example, selling commutations would render the President subject to impeachment, removal from office, and prosecution. *See* U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); *id.* art. I, § 3, cl. 7 ("[T]he Party convicted [by the Senate] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); *cf.* United States v. Blanton, 719 F.2d 815 (6th Cir. 1983) (en banc). *Blanton* was a prosecution of former Tennessee Governor Leonard Ray Blanton (and others) for mail and tax fraud in

that injunction is implicit in the fiduciary obligation he assumed when he took the oath of office.[87] Second, the Take Care Clause might prevent the President from granting a pardon prospectively—that is, *before* the intended recipient committed an offense.[88] That issue, however, is a complicated one.[89] Regardless of how it is

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connection with the issuance of retail liquor licenses. The voir dire revealed news reports that the governor had also sold pardons. *Blanton*, 719 F.2d at 821*; see also* KEEL HUNT, COUP (2013).

86. Richard Nixon, *Question-and-Answer Session at the Annual Convention of the Associated Press Managing Editors Association*, THE AMERICAN PRESIDENCY PROJECT (Nov. 17, 1973), https://www.presidency.ucsb.edu/documents/question-and-answer-session-the-annual-convention-the-associated-press-managing-editors [https://perma.cc/AM5P-4BU7].

87. *See* U.S. CONST. art. II, § 1, cl. 6 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"); GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

88. The argument is two-fold. First, the Supreme Court's Pardon Clause decisions describe the President's authority as being limited to forgiving past conduct. *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("A pardon can only be granted for a [criminal] contempt *fully completed*.") (emphasis added); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866); *see also* CROUCH, *supra* note 16, at 9 (arguing that a President can only grant a pardon *after* a crime has been committed). Second, granting pardons *ex ante* is tantamount to a "suspension" of the criminal law, which the Take Care Clause forbids. That argument relies greatly on history. The suspension issue arose during the regency of the Stuart Kings, particularly James II, who claimed that the crown had the inherent right to suspend the operation of the law, including the ones excluding Catholics from serving in the government or the army. Parliament ultimately won that battle. Fearing execution like his father Charles I, James II fled England. As part of the Glorious Revolution that elevated James II's daughter Mary and her husband William of Orange to the throne, Parliament enacted the Bill of Rights of 1688, which prohibited the crown from suspending the law without Parliament's authorization. *See* Bill of Rights 1688, 1 W. & M. sess. 2 c. 2 (original text modernized) ("That the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal. That the pretended Power of Dispensing with Laws or the Execution of Laws by Regal Authority as it has beene assumed and exercised of late is illegal."); *see also, e.g.*, U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Article II Take Care Clause incorporates that limitation on presidential power. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 65–73 (2014) (discussing the background to the Take Care Clause); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUD. 434 (1977); Goldsmith & Manning, *supra* note 4, at 1847–51; Kent et al., *supra* note 4, at 2149–59.

89. To some extent, *every* exercise of the President's clemency power effectively suspends an act of Congress. As Judge Frank Easterbrook put it, "Pardons do frustrate the implementation of laws, but as *all* pardons do so to some degree, the existence of the pardon clause must authorize nonenforcement, at least at retail rather than wholesale." Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 909 (1989); *id.* at 907–09; *see also* Sarat, *supra* note 30, at 275 ("The idea that clemency and mercy can be given (or withheld) 'freely' as well as Blackstone's description of it as a 'court of equity,' highlights their complex and unstable relationship to law. Like all sovereign prerogative, clemency's efficacy is bound up in its very disregard of declared law. Thus, more than half a century before Blackstone, John Locke famously defined prerogative as the 'power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative. . . . [T]here is a latitude left to the Executive power to do many things of choice which the laws do not prescribe.' "). While Judge Easterbrook seems to have distinguished between the validity of individual and category-wide pardons, the President can grant pardons on either basis. Presidents have done so by granting amnesties, *see infra* note 180, and the Supreme Court has endorsed that practice. *See* United States v. Klein, 80 U.S. 128, 147 (1871) ("Pardon includes amnesty."); *see also*, *e.g.*, Jenkins v. Collard, 145 U.S. 546, 560 (1892); Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1871); United

resolved, any restriction is only temporal. The President might not be able to grant a pardon *ex ante*, but he clearly can do so *ex post*.

The remainder of Article II is even less helpful. It provides some (albeit quite limited) guidance in the exercise of some other presidential powers. The President is commander-in-chief of a state militia only when it is "called into the actual Service of the United States."[90] The President can direct the heads of executive offices to advise him "upon any Subject relating to the Duties of their respective Offices."[91] The President must "from time to time" inform Congress about "the State of the Union."[92] Congress can generally decide when it should meet,[93] but the President may "convene" one or both Houses of Congress "on extraordinary Occasions,"[94] such as when it is necessary to fund the continued operation of the army.[95] Those provisions tell a President when and how to use his other powers, not clemency.

Constitutional provisions other than Article II can limit a President's authority.[96] For example, the Article I Appropriations Clause bars the President from disbursing unauthorized funds.[97] Aside from keeping the President from treating the federal treasury as his own piggy bank, that clause bars him, without statutory authorization, from remitting a fine that an offender has already paid into the

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States v. Padelford, 76 U.S. (9 Wall.) 531, 542–43 (1869). The number of people excused therefore cannot render a President's action an abuse of his authority. Atop that, Presidents and senior law enforcement officers can empower federal agents to commit crimes (such as possessing contraband) when engaged in a legitimate law enforcement operation (such acting in an undercover capacity to infiltrate a drug trafficking organization). *See, e.g.*, U.S. DEP'T OF JUSTICE, UNDERCOVER AND SENSITIVE OPERATIONS UNIT, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS § IV.H. (Updated Mar. 8, 2017) (Nov. 13, 1992); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN L. REV. 155, 156 (2009) (footnotes omitted) ("Covert policing necessarily involves deception, which in turn often leads to participation in activity that appears to be criminal. In undercover operations, the police have introduced drugs into prison, undertaken assignments from Latin American drug cartels to launder money, established fencing businesses that paid cash for stolen goods and for 'referrals,' printed counterfeit bills, and committed perjury, to cite a few examples."). When the government authorizes a law enforcement officer (or anyone else for that matter) to engage in such conduct, the government cannot later prosecute that officer for committing that crime. *See* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 673–74 (1973); Cox v. Louisiana, 379 U.S. 559, 569–73 (1965). The difference between an *ex ante* authorization and an *ex ante* pardon therefore can appear quite Jesuitical.

90. U.S. CONST. art. II, § 2, cl. 1.

91. *Id.*

92. U.S. CONST. art. II, § 3, cl. 1.

93. U.S. CONST. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.").

94. U.S. CONST. art. II, § 3, cl. 1.

95. U.S. CONST. art. I, § 8, cl. 12 ("[The Congress shall have Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ").

96. *See supra* note 76; *see also Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1855) (noting in dicta 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).

97. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequences of Appropriations made by Law[.]").

federal treasury.[98] The Bill of Rights is also relevant—in particular, the First Amendment, the Second Amendment, the Fourth Amendment, and the Fifth Amendment Due Process Clause.[99] Those provisions grant people certain constitutional rights against the government. The President, therefore, cannot grant clemency only to people of his own political party or faith, to people who work for media outlets who do not criticize his performance, to people who have never owned firearms, to people who will allow the police to tramp through their homes or lives without good cause, or to people of only one race or sex.[100] Otherwise, the President's power is plenary.

* * * * *

Where does that leave us? The President is the sole decision-maker when it comes to clemency.[101] His role therefore is akin to Congress's position in the impeachment and removal process. In each case, the Framers granted final decision-making authority to a branch other than the Article III judiciary.[102] Moreover, neither Congress nor the federal judiciary may interfere in the President's exercise of that power; it is a prerogative of office. Yet, Article II offers the President no guidance as to whether, when, and how he should exercise its authority, other than to avoid becoming a criminal. The President can use his power for any legitimate reason—to further justice, to express mercy, to make his opinions known as to what crimes and offenders should be the focus of the federal law enforcement agencies, and so forth—or even for no reason at all. In sum, the clause empowers the President to grant clemency as he sees fit, but it does not tell him when he should see it that way.[103]

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98. *See* Knote v. United States, 95 U.S. 149, 154–55 (1877); United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1869).

99. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *id.* amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law[.]").

100. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL'Y 463, 470–71 (2019).

101. *See Harbison v. Bell*, 556 U.S. 180, 187 (2009) ("Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law.").

102. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). *See* Nixon v. United States, 506 U.S. 224, 229–36 (1993) (discussing the Impeachment Trial Clause).

103. A widely held conclusion. *See, e.g.*, Jody C. Baumgartner & Mark H. Morris, *Presidential Power Unbound: A Comparative Look at Presidential Pardon Power*, 29 POL. & POL'Y 209, 215 (2001) ("As with other provisions of the Constitution, except for the impeachment exclusion, the Framers were very general in their draft and omitted any specifics regarding the definition and use of the pardon power, the use and understanding of which would evolve over time."); Erin R. Collins, *Clemency and the Administration of Hope*, 29 FED. SENT'G REP. 263, 264 (2017) ("Clemency is a completely

Perhaps, the Supreme Court has said something useful. The next section will explore that possibility.

B. Judicial Interpretations of the Pardon Clause

There is little Supreme Court case law defining the Pardon Clause, and the few decisions that do exist describe the President's power in breathtaking terms. For example, the text authorizes the President to issue "Reprieves and Pardons." Read literally, that would limit the President to exercising only two types of relief: merely postponing the execution of a sentence or completely relieving someone of whatever disabilities a conviction imposed.[104] The Court, however, has ruled that the President can also award three other types of relief: (1) a commutation—viz., a reduction only in the sentence imposed; (2) an amnesty—viz. a category-wide form of a pardon or commutation; and (3) a remission of a fine.[105] Although the President might not be able to pardon someone for a crime he has not yet committed, that limitation disappears once someone has broken federal law. The case law makes clear that the President can intervene in the criminal process at any time: before or after the government has brought charges and before or after an offender is convicted or punished.[106] The President can even

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discretionary power; there is no 'clemency law,' no precedent we could use to interpret the [Obama Administration Clemency Project 2014] criteria."); Paul J. Haase, Note, *"Oh My Darling Clemency": Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287, 1293 (2002) ("The language of the Constitution provides no real guidance regarding the manner in which the appropriateness of a pardon should be determined."); Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 567 (2000) (describing clemency as a "largely unprincipled, almost standardless component in our justice system"); Moore, *supra* note 32, at 282 ("[T]he Framers provided no criteria for distinguishing between proper and improper uses of the pardoning power and put no constitutional limit on the president's use of that power, except to prohibit pardons in cases of impeachment."); Rosenzweig, *supra* note 45, at 597; Ruckman, *US Clemency*, *supra* note 46, at 251.

104. *See Ex parte* Garland, 71 U.S. (4 Wall.) 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."); *see also* 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).

105. *See, e.g.*, Schick v. Reed, 419 U.S. 256 (1974) (ruling that the President may reduce a capital sentence to one of life imprisonment without parole even though the latter penalty was not authorized by Congress); *Ex parte* Grossman, 267 U.S. 87 (1925) (ruling that the President may remit a criminal fine imposed for contempt of court); United States v. Klein, 80 U.S. 128, 147 (1871) ("Pardon includes amnesty."); *see generally* Larkin, *Revitalizing Clemency*, *supra* note 38, at 846–47; Knote v. United States, 95 U.S. 149, 152–53 (1877).

106. *See Ex parte* Garland, 71 U.S. (4 Wall.) at 380 (noting that the president may grant clemency "at any time after [the offense's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."); Murphy v. Ford, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975) (upholding President Gerald Ford's pardon of Richard Nixon for any and all crimes connected with the "Watergate" imbroglio even though Nixon had not been charged with any crime); United States

pardon someone after his death to remedy an unjust conviction and clear the recipient's name.[107]

At times, the Court has characterized the pardon power in the same way that the English monarchs did: a royal prerogative to be merciful. In its first discussion of the Pardon Clause, the Supreme Court, per Chief Justice John Marshall, described an award of clemency as "an act of grace,"[108] a description that the Court has reiterated in more recent times,[109] and as a way to "temper" justice with "mercy."[110] Under that theory, clemency resembles divine grace; it is the President's prerogative if, when, and how to grant it.[111] A century later, the Court took a different path. In *Biddle v. Perovich*[112] Justice Oliver Wendell Holmes recharacterized clemency as being, "not a private act of grace from an individual happening to possess power," but "the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[113] That is why, as the Court held in *Perovich*, an offender cannot refuse a sentence commutation.[114] An offender can no more refuse the President's reduction in his punishment than he could object to the sentence the trial court imposed.[115] Holmes's description, however, identifies the rationale for every commutation, not a prerequisite for its use, and therefore is not helpful as a rule

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v. Burdick, 211 F. 492, 493 (S.D.N.Y. 1914) (L. Hand) ("I have no doubt whatever that the President may pardon those who have never been convicted. The English precedents are especially pertinent.").

107. *See* Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999) (Flipper, the first black West Point graduate, had been convicted at a court-martial the Justice Department concluded was unfair); *Executive Grant of Clemency to John Arthur Johnson* (May 24, 2018) (President Donald Trump pardoned former professional boxer Jack Johnson, who died in 1946), https://www.justice.gov/pardon/page/file/1066386/download.

108. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

109. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280–81 (1998) (plurality opinion) (describing clemency as "a matter of grace").

110. *See* Cavazos v. Smith, 565 U.S. 1, 8–9 (2011) (describing clemency as "a prerogative granted to executive authorities to help ensure that justice is tempered by mercy").

111. *See* MOORE, *supra* note 32, at 282.

112. 274 U.S. 480 (1927).

113. *Id*. at 486.

114. *Id*.

115. In so ruling, the Court effectively overruled its 11-year-old decision in *Burdick v. United States*, 236 U.S. 79 (1915), which held that an offender can refuse a pardon. George Burdick was the editor of a newspaper that published stories about frauds that were under investigation by the federal government. A federal grand jury subpoenaed Burdick to testify, but he declined on the ground that his answers might incriminate him. To eliminate any risk of self-incrimination, President Woodrow Wilson pardoned Burdick for any crime he may have committed in connection with his publication of the articles. Burdick still refused to testify, claiming that he could refuse the pardon because accepting it would be an admission of guilt. The Supreme Court agreed with Burdick, ruling that, under Chief Justice Marshall's decision in *Wilson*, a pardon was a gift that a recipient could refuse. *Id*. at 89–95. *Perovich* rejected Marshall's gift rationale and therefore eliminated the rationale in *Burdick*. To be sure, *Burdick* involved a pardon, while *Perovich* involved a commutation, but that is a distinction without a difference. Moreover, if *Burdick* were a correct interpretation of the Pardon Clause, a President could not pardon an offender posthumously. Yet, Presidents have pardoned deceased offenders, and no one has argued that doing so is an abuse of his authority. *See* Jackson et al., *supra* note 107.

of decision. Injunctions like those are little better than nothing at all, most President's would likely say.

The Court did define, however, an appropriate circumstance for clemency in *Herrera v. Collins*.[116] Herrera claimed that, because he was innocent of the two murders underlying his conviction, the Eighth Amendment Cruel and Unusual Punishments Clause prohibited his execution. In the course of rejecting that claim, the Court explained that clemency is the proper remedy for a freestanding claim of innocence. As Chief Justice William Rehnquist explained, "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"—the "'fail safe' in our criminal justice system."[117] Even so, however, the *Herrera* decision offers a President little in the way of deciding whether to grant clemency. Apart from the conviction of an innocent person, *Herrera* fails to lay out what else would constitute a miscarriage of justice.

Otherwise, the Supreme Court of the United States has used extraordinarily expansive terms to characterize the clemency power. In *Wilson v. United States*, Chief Justice John Marshall spoke in almost sectarian terms when he described a pardon as "an act of grace."[118] Chief Justice Salmon Chase's pithy statement in *United States v. Klein* sums up well the Court's attitude: "To the executive alone is intrusted the power of pardon; and it is granted without limit."[119] In *Schick v. Reed*, yet another Chief Justice, Warren Burger, concluded that the pardon power "flows from the Constitution alone, not from any legislative enactments," and gives the President "plenary authority" to forgive an offender.[120] The Marshall, Chase, and Burger descriptions, however, were modest compared to what Justice Stephen Field wrote for the Court in *Ex parte Garland*:

> The 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.

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116. 506 U.S. 390 (1993).

117. *Id*. at 411–12, 415 (quoting MOORE, *supra* note 32, at 131); *see also* Kansas v. Marsh, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out."); Dretke v. Haley, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("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.").

118. 32 U.S. (7 Pet.) 150, 160–61 (1833).

119. 80 U.S. (13 Wall.) 128, 148 (1871).

120. 419 U.S. 256, 266 (1974). He also noted that the Framers of the Constitution "spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed'" by anyone else, including the courts. *Id*. at 263 (quoting 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (1911)).

> The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.[121]

It would be difficult to find a Supreme Court decision describing a different presidential power in more sweeping terms. Certainly, nothing in the canonical decision defining general presidential authority—*Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure Case*)[122]—contains any passage in the majority opinion by Justice Hugo Black,[123] or the renowned concurring opinion by Justice Robert Jackson,[124] that remotely approximates the Court's description of the imperial scope of the President's clemency authority. Indeed, the breadth of the Court's description of the President's pardon authority in *Ex parte Garland* brings to mind the way Chief Justice Marshall described some of the President's inherent powers in *Marbury v. Madison*.[125] There, he concluded that, in some instances, the President is accountable only to the nation and his own conscience when he acts.[126] Marshall specifically referred to the President's authority over foreign affairs and did not identify the pardon power as another example of that authority. Yet, given the expansive understanding of the Pardon Clause that he later endorsed in *United States v. Wilson*,[127] one that the Court reiterated in *Ex parte*

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121. 71 U.S. (4 Wall.) 333, 380 (1866). More recently, in *Cavazos v. Smith*, the Court described clemency (in the case of a governor's power) as "a prerogative granted to executive authorities to help ensure that justice is tempered by mercy." 565 U.S. 1, 8–9 (2011). For that reason, the Court added, "[i]t is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention." *Id.* at 9.

122. 343 U.S. 579 (1952).

123. *Id.* at 585–89.

124. *Id.* at 634–55 (Jackson, J., concurring).

125. 5 U.S. (1 Cranch) 137 (1803); *see also*, *e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (Thomas M. Cooley ed., 4th ed. 1873) ("Congress cannot limit or impose restrictions upon the President's power to pardon."); *cf.* Solesbee v. Balkcom, 339 U.S. 9, 12–14 (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).

126. 5 U.S. (1 Cranch) at 165–166:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

127. 32 U.S. at 160 ("The constitution gives to the president, in general terms, 'the power to grant reprieves and pardons for offences against the United States.' As this power had been exercised, from

Garland and *Schick v. Reed*, if asked Marshall might have included the Pardon Clause in that category as well.

To some extent, that is a healthy result. Just as presidents should not direct the Court how to decide a case, the Supreme Court should not order presidents when to grant clemency. To be sure, individual justices certainly can offer their personal thoughts on clemency. They are bright, savvy people, who, along with writing opinions, pen books, articles, and speeches.[128] It would have been helpful if one of them at some time had offered an opinion on how the President should make those decisions. Unfortunately, they have not.

One person might have been able to bridge the gap between law and policy. William Howard Taft was the 27th President and the 10th Chief Justice of the United States. Yet, he said little about the subject other than to offer two admonitions. One is that "[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."[129] His other statement was essentially the flip side of the first one: "The only rule that [the President] can follow is that he shall not exercise it against the public interest."[130] Sadly, that was it. Someone who could have left his successors invaluable advice how to proceed gave them little more than platitudes.

One conclusion that we can draw from the Supreme Court's discussion of clemency is that the law no longer sees clemency as an earthly version of divine charity. Put aside the secularization of society since Chief Justice Marshall described clemency in 1833 in that manner. The law has changed to reflect the practical operation of pardons and commutations in the criminal justice system. Clemency is now, as Justice Holmes wrote, a tool that chief executives can use to achieve one or more of the purposes of the criminal justice system. For instance, clemency serves an error-correction function. The purpose of the criminal process is to separate the guilty from the innocent, and the federal system likely does a better job of performing that function today than in years past. Nonetheless, we

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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."); *see* Moore, *supra* note 32, at 282 ("In 1833 [in *United States v. Wilson*], the United States Supreme Court defined a presidential pardon as a personal 'act of grace,' effectively confirming that presidential pardons fall into the category of things needing no reasoned justification.').

128. *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2011); RUTH BADER GINSBERG, MY OWN WORDS (2018); NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). One exception was Justice Anthony Kennedy, who in a speech to the American Bar Association urged lawyers to reinvigorate the clemency process. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html [https://perma.cc/LZ8N-VZWG].

129. *Ex parte* Grossman, 267 U.S. 87, 121 (1925) (Taft, C.J.).

130. TAFT, *supra* note 13, at 121.

know that, people being people, the law enforcement officers, prosecutors, and juries will make mistakes. Some guilty offenders will receive unduly harsh sentences and some defendants, though innocent, will plead guilty to avoid crushingly long terms of imprisonment.[131] Clemency can remedy such unjust results.

Those exercises of clemency, however, are not acts of mercy. Nowadays, we do not think that pardoning a wrongly convicted person or shortening an unconscionably long sentence is an act of grace. We see it as the correction of an injustice produced by a fallible system. As such, considerations of mercy do not help us decide what punishment is too severe, to say nothing of identifying those offenders who deserve to have their slates wiped clean.

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The text of the Pardon Clause was not helpful. What the Supreme Court has written about the clause also does not add much. Maybe the history of its use would be helpful. The Supreme Court has looked to the history of clemency in pre-Revolutionary England for assistance, so that is a natural place to turn next.[132] The following section will see what help it can supply.

C. The English History of Executive Clemency

Clemency has been a prerogative of the English crown since at least the seventh or eighth century.[133] A felony was deemed an *actus contra coronam et*

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131. *See, e.g.*, BARKOW, *supra* note 38; MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016).

132. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 262 (1974) ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice."); *Ex parte* Grossman, 267 U.S. at 118 (1925) (Taft, C.J.) (identifying the most relevant considerations to interpreting the Pardon Clause as being "arguments drawn from the common law, from the power of the king under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words"); *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855) ("We must then give the word [pardon] the same meaning as prevailed here and in England at the time it found a place in the constitution."); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) ("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.").

133. The earliest evidence of the royal prerogative of mercy lies during the reign of King Ine of Wessex (668–725 A.D.). Ine's successors from Alfred (871–901) to Cnut (1017–1035) carried forward that power, as did William the Conqueror. *See, e.g.*, 4 BLACKSTONE, *supra* note 21, at 401 ("[T]he king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law."); ROBERT KELHAM, THE LAWS OF WILLIAM THE CONQUEROR 63–65, 86, 88 (Gale ECCO 2010) (1799); A.J. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 209 (1925). For discussions of the early English history of clemency, see NAOMI D. HURNAND, THE KING'S PARDON FOR HOMICIDE BEFORE AD 1307 (1969); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476–77 (1977). For the later development and use of royal clemency, see, for example, J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 430–49 (1986); PHILIPPA BYRNE, JUSTICE AND MERCY: MORAL THEOLOGY AND THE EXERCISE OF LAW IN TWELFTH-CENTURY ENGLAND (2019); DANIEL DEFOE, A HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS: FROM THE REFORMATION, DOWN TO THE PRESENT TIME (Nabu

dignitatem regis—"an act contrary to the peace and dignity of the crown"—which only the king could forgive.[134] As Edward Coke explained, the crown could exercise that prerogative "either before attainder, sentence or conviction, or after, [to] forgiveth any crime, offense, punishment, execution, right, title, debt or duty, Temporal or Ecclesiastical."[135]

Kings granted clemency for a host of reasons.[136] For instance, kings often granted clemency because of the primitive state of the substantive criminal law. Through the fifteenth century, the common law deemed all homicides capital crimes, regardless of their circumstances. The common law drew no distinction between murder and excusable or justifiable homicide,[137] nor did it exempt killings attributable to actions by children or the insane.[138] Because all felonies were capital crimes,[139] the royal prerogative of mercy served as the only means of "flexibility."[140] Murderers who acted in cold blood ordinarily went to the gallows,[141] but not everyone responsible for a homicide faced the hangman; the king pardoned morally blameless parties, oftentimes on the recommendation of the trial judge,[142] to spare them from the gallows,[143] as well as defendants whom

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Press 2013) (1717); CECIL R. HEWITT, THE QUEEN'S PARDON (1978); K.J. KESSELRING, MERCY AND AUTHORITY IN THE TUDOR STATE (2003); HELEN LACEY, THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND (2009); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963); Thomas J. McSweeney, *The King's Courts and the King's Soul: Pardoning as Almsgiving in Medieval England*, 40 READING MEDIEVAL STUD. 159 (2014); Jennifer Schweppe, *Pardon Me: The Contemporary Application of the Prerogative of Mercy*, 49 IRISH JURIST 211 (2013).

134. Note, *Legal Effect of a Pardon*, 13 COLUM. L. REV. 418, 418 (1913).

135. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 233 (W. Clarke & Sons 1809) (1642).

136. *See, e.g.*, BEATTIE, *supra* note 133, at 430–49; J.H. Baker, *Criminal Courts and Procedure at Common Law*, *in* CRIME IN ENGLAND, 1550–1800, at 44–45 (J.S. Cockburn ed., Princeton Univ. Press 1977); J.A. SHARPE, CRIME IN EARLY MODERN ENGLAND, 1550–1750, at 68, 145 (1984); Grupp, *supra* note 133, at 58–62.

137. Duker, *supra* note 133, at 479.

138. *See, e.g.*, HURNARD, *supra* note 133, at vii-xiv, 68–170; Duker, *supra* note 133, at 479 (describing the need to pardon a four-year-old child "who accidentally pushed a younger child into a vessel of hot water" simply by opening a door). In 1515, Joan Clerke and her husband attacked and killed a man who had raped her. The jury found them guilty of killing in self-defense, which likely would have assured them of pardons. The general pardon statute recognized the difference between manslaughter and homicide with the Act of 1523, "which included on its list of pardonable offenses 'all felonies called manslaughter not committed or done of malice prepensed' and barred mercy for 'all prepensed and voluntary murders.' All but one of the subsequent general pardon statutes offered clemency for manslaughter." KESSELRING, *supra* note 133, at 101–02, 104.

139. Tison v. Arizona, 481 U.S. 137, 159 (1987); ALI, MODEL PENAL CODE COMMENTARIES § 210.2, at 31 n.74 (A.O.D. 1980).

140. Duker, *supra* note 133, at 479.

141. *See, e.g.*, BEATTIE, *supra* note 133, at 433–34.

142. Common law judges could grant a reprieve to allow the crown to decide whether to pardon an offender. They regularly exercised that power when they found execution an unduly severe penalty for some crimes and criminals regularly recommended that the crown pardon the condemned prisoner. *See, e.g.*, BEATTIE, *supra* note 133, at 431 ("By the late seventeenth century pardons had become a fundamental element in the administration of the criminal law. The judges submitted a 'circuit pardon' or 'circuit letter' at the conclusion of their assizes listing those they recommended, which when

a trial judge thought might have been mistakenly convicted.[144] Kings were merciful to small-scale thieves and pickpockets.[145] Before the birth of police forces as investigative agencies, the crown used pardons to assist the operation of the criminal justice system.[146]

Kings also granted clemency for reasons having nothing to do with the work of the criminal process.[147] For example, in 1377 Edward III issued pardons to celebrate his royal jubilee.[148] John I pardoned every offender in 1204 shortly after the death of his mother, Eleanor of Aquitaine.[149] Seeking to curry favor with the Almighty was a common explanation for a royal pardon.[150]

Expediency drove some pardons. Kings liberally extended mercy immediately at the outset of a war or after assuming the throne.[151] Kings granted pardons to felons willing to join the army or navy, to serve (ironically) as a local hangman, or to settle a colony, like America or Australia.[152]

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approved by the king began the process by which the pardon would be issued by the Chancery."); JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 626–28 (2009); 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 118 (1948). Wealthy prisoners retained lawyers to help draft pardon applications. PETER KING, CRIME, JUSTICE AND DISCRETION IN ENGLAND, 1740–1820, at 298, 301–04 (2000). Reasons for pardon or clemency recommendations includes the following: old age (a judge recommended a pardon for a 66-year-old-man for that reason), youth (youth was often a factor for recommending a pardon for purposes of transportation), illness (a man had his sentence reduced due to "bodily infirmity"), and economic status (judges sometimes recommended pardons due to the hardship on the defendant's family; for example, a man was recommended to be pardoned due to the "state of his family").

143. In the early Middle Ages, the crown pardoned anyone responsible for an accidental homicide. From 1498 through reign of Elizabeth I, there were 183 pardons for accidental homicides ranging from three during Henry VII's reign to 146 during the reign of Elizabeth I. *See* KESSELRING, *supra* note 133, at 96–97.

144. *See, e.g.*, BEATTIE, *supra* note 133, at 431.

145. *See, e.g.*, *id.* at 433–35 & Tbls. 8.6 & 8.7. A condemned woman discovered to be pregnant technically was entitled to receive only a reprieve until she bore her child, but, as one historian has noted, "it seems likely" such women were pardoned afterwards. SHARPE, *supra* note 133, at 68; *see also* BEATTIE, *supra* note 133, at 430–31.

146. A.T.H. Smith, *The Prerogative of Mercy, the Power of Pardon and Criminal Justice*, 1983 PUB. L. 398, 411.

147. *See* Moore, *supra* note 32, at 282 (footnotes omitted) (quoting C. HEWITT, THE QUEEN'S PARDON 20 (1978)) ("The monarchs used 'gifts of grace' to reward their friends and undermine their enemies, to populate their colonies, to man their navies, to raise money and to quell rebellions. Unusual only in the price he charged, James II sold pardons for 16,000 pounds sterling, of which he received 'one half and the other half was divided among the two ladies then most in favour.'").

148. LACEY, *supra* note 133, at 115; Ruckman, *US Clemency*, *supra* note 46, at 252.

149. McSweeney, *supra* note 133, at 171–72.

150. *Id.* at 173 ("The king was exercising his grace to earn himself time out of purgatory."); *id.* at 174 ("[A]t least in some cases, the king and his officials saw pardons as a form of alms.").

151. Duker, *supra* note 133, at 478.

152. BEATTIE, *supra* note 133, at 431–32 (footnote omitted) ("Especially after transportation was firmly established in 1718, the judges were in effect allowed an almost free hand to choose among those convicted of capital offenses who would be hanged and who sent to America for fourteen years the condition that had become by then a virtual automatic consequence of a pardon."); *id.* at 508, 513–15 & Tbl. 9.7; PAUL GRIFFITHS, LOST LONDONS: CHANGE, CRIME AND CONTROL IN THE CAPITAL CITY, 1550–

Pardons also served as a means of social control in England. Particularly during the period when hundreds of crimes were capital offenses, "much of the success of the law depended upon its being merciful as well as an object of terror."[153] That factor also might explain why more women received pardons than men did.[154]

Finally, some grants of clemency were entirely mercenary. English kings used pardons to enlarge the treasury[155] or, as in the case of James II, to pay "the two ladies then in favor."[156] As one scholar put it, "The sale of pardons was a common abuse," to the extent that "pardons requiring fees occasionally allowed for the possibility of deferred payments," which seems like an early example of buying on credit.[157]

English law eventually imposed two principal limitations on the Crown's pardon authority. In each case, the issue arose from what we would describe today as a separation of powers controversy or an issue of checks and balances. The first controversy involved impeachment. Parliament had often battled with the Crown over the question whether Parliament could impeach and remove from office a royal official whom the king had pardoned. The Act of Settlement of 1701 finally resolved that issue in Parliament's favor. The Act left intact the Crown's power to relieve an offender of criminal punishment, but stated that "no pardon under the great seal of England [shall] be pleadable to an impeachment by the commons in parliament."[158] The result was to allow the king to decide whether a government minister went to the gallows for his crime, but to enable Parliament to prevent that official from henceforth abusing the powers of his office. The other

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1660, at 431 (2008); McSweeney, *supra* note 133, at 170; Ruckman, *US Clemency*, *supra* note 46, at 252.

153. SHARPE, *supra* note 133, at 145 (footnote omitted) ("[Mercy] ensured the acceptance of the rule of law more surely than festooning the gibbets after every assize would have done."); *see also* MALCOLM GASKILL, CRIME AND MENTALITIES IN EARLY MODERN ENGLAND 292–93 (2000) ("Royal clemency was a central pillar of governance, and formalized at the ultimate judicial stage the kind of discretionary concessions which pervaded the entire legal system."); Douglas Hay, *Property, Authority, and the Criminal Law*, *in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 40–49 (Douglas Hay et al. eds., 2d ed., Pantheon Books. 1975); *see* Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1422–23 (2004). Indeed, the frequency of clemency grants during that era suggests that those who were hanged were "exceptionally unlucky," were "felt to be exceptionally wicked," or had "no local notable local to intercede for them." SHARPE, *supra* note 136, at 69.

154. *See* BEATTIE, *supra* note 133, at 436 ("Offenses and offenders could not be neatly separated. A robbery would have been differently regarded when committed by a woman or a young boy or a man or a gang, for its significance would be read in light of the threat that each posed to the security of the society. In addition, the effectiveness of hanging as an exemplary punishment depended on the offender who was providing the example. It was plainly more advisable to execute those whose death would confirm the wisdom and justice of the law rather than those whose suffering might excite pity, perhaps even hostility. Such considerations help to explain why women were treated more leniently than men by juries and if convicted were more likely to be reprieved and pardoned.").

155. Grupp, *supra* note 133, at 59; *see also* Duker, *supra* note 133, at 478.

156. Moore, *supra* note 32, at 282 (quoting C. HEWITT, THE QUEEN'S PARDON 20 (1978)).

157. Ruckman, *US Clemency*, *supra* note 46, at 252 (footnote omitted).

158. 12 & 13 Will. 3, c. 2, § 3 (1700); *see* Duker, *supra* note 133, at 487–96.

limitation was that a king could not pardon someone who transported a prisoner overseas beyond the reach of habeas corpus. That restriction protected the power of the courts to prevent unjustified detention.[159]

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What does English history teach us? On the plus side, the Crown used its power to rectify shortcomings in the definition of criminal responsibility and remedy errors that occurred at trial. Most of those problems, however, do not have much purchase today. The definitions of crimes and defenses, along with the procedures governing the criminal trial process, have evolved considerably since the days of the Norman kings. We no longer put three-year-olds at risk of execution, and we require the appointment of counsel for the defendant to help steer him through the path from arrest to sentence. On the minus side, kings used their authority for reasons of expediency that are no longer available (there are no more colonies to populate) or that we generally no longer deem acceptable (although there likely is still the occasional case of a judge offering a young offender the option of joining the military to avoid jail). Selling clemency is also a thing of the past. In fact, today it would be deemed a federal offense.[160] What the crown did not do was identify an objective methodology for making clemency decisions. Sovereigns likely decided to come up with no rationale that could detract from their ability to make decisions with complete freedom. Accordingly, while relevant (and interesting), the English history predating our Constitution is not particularly helpful for guiding the President today.

D. The American History of Executive Clemency

Clemency has always been a prominent feature of American law.[161] American colonists brought the common law with them to the New World,[162] and the possibility of receiving clemency accompanied it.[163] For example, the Virginia Charter of 1609 granted the governor "full and absolute Power and Authority to correct, punish, pardon, govern, and rule" all English subjects in the colony.[164] The crown delegated similar authority to the proprietor, the chief executive official, or the

159. *See* Schick v. Reed, 419 U.S. 256, 260 (1974). For other, less important restrictions, see Peter Brett, *Conditional Pardons and the Commutation of Death Sentences*, 20 MODERN L. REV. 131, 132–33 (1957).

160. 18 U.S.C. §§ 1341 & 1343 (2019) (mail and wire fraud); *supra* note 85.

161. *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.").

162. *See* Hurtado v. California, 110 U.S. 516, 530 (1884); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31 (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 299–300 (1998).

163. Duker, *supra* note 133, at 487–95.

164. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, OR COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3801 (2016) (Francis Newton Thorpe ed., 1909); *see also* HUGH RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 109–13 (1965).

royal governor in the other colonies.[165] Someone in the colonies always had authority to grant some form of relief.

The period between the end of the Revolutionary War and the formation of the new federal government created by the Constitution witnessed a different approach to the lodging of the clemency power. After the Revolution, states curtailed executive power by either making the governor's exercise of clemency subject to the legislature's approval or shifting the entire clemency power to the legislature.[166] The federal government took a different approach. The Articles of Confederation created no such office. Interestingly, the Articles also gave the renamed Continental Congress no clemency authority.[167]

The Framers ultimately realized that the lack of a national chief executive was a flaw in the Articles of Confederation. The Framers agreed that the new nation required a chief executive officer, and both principle models—the Virginia Plan and the New Jersey Plan—created one.[168] Neither plan, however, vested that executive with clemency authority.[169] Clemency was also the subject of scant discussion at the Constitutional Convention of 1787.[170] Alexander Hamilton and John Rutledge proposed adding a provision granting the chief executive pardon authority.[171] The Hamilton-Rutledge proposal resembled the English Act of Settlement of 1701: the chief executive could excuse someone from a crime or its punishment, but he could not prevent Congress from removing a government official from office.[172] The Convention accepted their proposal.[173]

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165. *See* DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776, at 127–32 (1974); CHRISTIN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922); Duker, *supra* note 133, at 498–500; Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1672 (2001); Ruckman, *US Clemency*, *supra* note 46, at 252 (footnote omitted) ("The general pattern in the royal colonies was to permit the governor to pardon in all cases except treason and willful murder. In the remaining, colonies, the chief executive exercised the clemency power with occasional assistance from other authorities.").

166. *See* WILLIAM WEST SMITHERS, A TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 1–10 (1909); Duker, *supra* note 133, at 500–01; Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1505–06 (2000); Ruckman, *US Clemency*, *supra* note 46, at 252. Today, governors generally have the same plenary clemency authority as the President, but a few can grant relief only upon an affirmative recommendation from a state board. *See, e.g.*, JENSEN, *supra* note 164.

167. Duker, *supra* note 133, at 500.

168. *Id.* at 501. Albeit, not in the original draft. Baumgartner & Morris, *supra* note 103, at 214.

169. Ruckman, *US Clemency*, *supra* note 46, at 253.

170. *See Ex parte* Grossman, 267 U.S. 87, 112 (1925); *see also* Duker, *supra* note 133, at 501–06; Todd David Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1229–30 (2003).

171. Duker, *supra* note 133, at 501–06. Alexander Hamilton's *Plan of Government* included an executive pardon power but required the consent of the Senate in cases of treason. 4 THE PAPERS OF ALEXANDER HAMILTON, JANUARY 1787–MAY 1788, at 207–11 (Harold C. Syrett ed. 1962), https://founders.archives.gov/documents/Hamilton/01-04-02-0099 [https://perma.cc/DK3T-TJP7].

172. Duker, *supra* note 133, at 501.

173. *Id.*

Once it had accepted the Hamilton-Rutledge proposal, the Convention spent little time debating the pardon authority.[174] The Convention did reject proposals to limit its reach. Roger Sherman moved to limit the power to grant a reprieve until the next session of the Senate and to require the Senate to concur in the granting of a pardon.[175] George Mason opposed Sherman's proposal on the ground that the Senate already would enjoy excessive authority.[176] Edmund Randolph would have exempted treason from the category of pardonable offenses.[177] James Iredell opposed the exemption for two reasons: the exemption did not exist under English law, and the likelihood of the President being involved in treason was "very slight."[178] The Convention rejected each proposal.[179] Luther Martin sought to make the pardon power a purely post-conviction authority.[180] Martin withdrew his proposal once James Wilson pointed out that a pre-trial pardon might be necessary to secure the testimony of accomplices.[181] Once those amendments were disposed of, the Convention spent no more time on the Pardon Clause and it became part of the Constitution sent to the states for their consideration.

The Pardon Clause occasioned little discussion at the state ratifying conventions.[182] The states were concerned with far bigger issues. The requisite number of states ultimately ratified the charter, and it went into effect on March 4, 1789.[183]

Since then, Presidents[184] have extended offenders clemency for a host of reasons.[185] In the words of former Justice Department Pardon Attorney Margaret

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174. *Id*. at 501–06; *see also* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Bicentennial ed. 1987); Kobil, *Quality of Mercy*, *supra* note 16, at 589–90.

175. 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419 (1911).

176. *Id*. at 627.

177. *Id*.

178. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351–52 (Paul Leicester Ford ed., 2012) (1968); *see* Duker, *supra* note 133, at 502–04.

179. 2 FARRAND, *supra* note 175, at 419, 627.

180. Duker, *supra* note 133, at 501.

181. *Id*. at 501–02.

182. *Id*. at 504; Ruckman, *US Clemency*, *supra* note 46, at 253.

183. Owings v. Speed, 18 U.S. (5 Wheat.) 420, 423 (1820); U.S. Senate, https://www.senate.gov/artandhistory/history/anecdote/days/009week_0304.htm [https://perma.cc/AT46-2Y7Z].

184. The following discussion focuses on the actions of Presidents because they possess the Article II authority. That is not to suggest that other federal government officials have not considerably added to our understanding of clemency. Some senior government officials have added notably to the discussion. *See, e.g*., Charles J. Bonaparte, *The Pardoning Power*, 19 YALE L.J. 603, 604 (1910) (former U.S. Attorney General) ("Now, the idiosyncrasies of human character and conduct are so infinitely diverse and so constantly shifting that no merely human lawgiver or judge, however wise and farseeing, could, by any possibility, so adjust the penalty to the offense as to attain this great end of punishment in every case, surely and at the least cost to the community. In the public interest, therefore, there must be some means of meeting exceptional cases, adapting the situation to changed circumstances, and sacrificing minor to attain greater results, when the attainment of both may be impracticable."); *id*. at 605 (arguing that the only legitimate grounds for clemency are innocence, an excessive punishment, satisfaction of the demands of justice, and the need to obtain testimony against other offenders); Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 328–31 (1992) (former counsel to California Governor

Love, from the Republic's early days, Presidents have issued pardons "largely out of the public eye, but with some regularity."[186]

Presidents have considered a "remarkable" range of factors.[187] For example, a common reason for a pardon was doubt about the prisoner's guilt or the fairness

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Pete Wilson and former federal judge) ("[T]he clemency process is—and should be—distinct from the judicial process. Mercy cannot be quantified or institutionalized. It is properly left to the conscience of the executive entitled to consider pleas and should not be bound by court decisions meant to do justice . . . . Granting mercy to criminals has never been a completely rational process. . . . [T]he consideration of mercy must go beyond mere rationality, allowing the decision-maker to rely on subjective factors such as experience, intuition, emotion, and introspection.") (footnotes omitted). *See also*, *e.g.*, JENSEN, *supra* note 164; SMITHERS, *supra* note 166; *see generally* Margaret Colgate Love, *Reinventing President's Pardon Power*, 20 FED. SENT'G REP. 5 (2007) (former Pardon Attorney) (hereinafter Love, *Reinventing Pardons*); Samuel T. Morrison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1 (2005) (former member at Office of the Pardon Attorney); Eric L. Mueller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288 (1993) (Assistant U.S. Attorney). For personal reflections on clemency by some former governors, see EDMUND G. (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW (1989); Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAP. U. L. REV. 139 (2003); Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971).

185. *See, e.g.*, GOTTSCHALK, *supra* note 38, at 186 (noting that Presidents and governors used the power to correct miscarriages of justice, restore an offender's civil rights, express their own policy regarding the severity of the criminal law, and manage the prison population); James D. Barnett, *The Grounds of Pardon in the Courts*, 20 YALE L.J. 131, 133 (1910); Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Any Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 86 (2019) (all Presidents but two have issued pardons; the two, William Henry Harrison and James Garfield, died shortly after assuming office, *id.* at 86 n.88); Ruckman, *US Clemency*, *supra* note 46, at 253–56; Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 140 (2001). Determining why a President granted clemency is often very difficult. Ruckman, *US Clemency*, *supra* note 46, at 256 ("[G]enerally, 'the brevity of the statements and the failure to distinguish [the] primary and secondary reasons for granting clemency' make it 'very difficult to determine the president's real reason for granting clemency in each case.'") (quoting W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 124–25 (1941).

186. Love, *Pardon Power Twilight*, *supra* note 50, at 1175; *see* George Lardner & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT'G REP. 212 (2004). As of 2001, Presidents granted 13,763 pardons and 6,325 commutations out of more than 75,000 requests, a very respectable percentage. *See* Baumgartner & Morris, *supra* note 103, at 216; Schweppe, *supra* note 133, at 214. Over the last 40 or so years, however, Presidents have granted clemency less frequently than their predecessors. Larkin, *Revitalizing Clemency*, *supra* note 38, at 854–55. There are few exceptions. Gerald Ford and Jimmy Carter granted amnesties to people who avoided the draft during the Vietnam War. *See* Proclamation No. 4313, 39 Fed. Reg. 33,293 (Sept. 16, 1974), *reprinted in* 88 Stat. 2504 (1974) (as amended by Proclamation No. 4345, 40 Fed. Reg. 4893 (Jan. 30, 1975), *reprinted in* 89 Stat. 1236 (1975)); Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977), *reprinted in* 91 Stat. 1719 (1977) (pardoning persons who may have committed any offense between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act); U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975); Kent Greenawalt, *Vietnam Amnesty—Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1 (1976); *see also supra* note 44 (describing President Obama's Clemency Initiative of 2014).

187. Ruckman, *US Clemency*, *supra* note 46, at 257. That might be an understatement with respect to Abraham Lincoln. "Lincoln pardoned individuals for serving in the military, for having spouses in the military, for having sons in the military, or for merely being 'anxious' to serve in the military. Those who enlisted early, were wounded, rose through the ranks, or performed 'perilous important duties' were rewarded. One man was pardoned for being a 'notable' recruiter. Lincoln forgave on the grounds of ignorance, provocation, inadvertence, aggravating circumstances, mitigating circumstances, acquiescence, entrapment, and malicious prosecution. Pardons were given to those who were loyal

of his trial.[188] Presidents have also been troubled by the length of some terms of imprisonment[189] or by inequalities between the sentences imposed on similarly situated confederates.[190] At a time when an ancient disability in the law disqualified a felon from testifying in court, Presidents pardoned offenders to allow them to testify for the prosecutions.[191] In other cases, Presidents relied on humanitarian considerations when granting clemency, such as their conclusion that the offender has been penitent, has reformed, and has engaged in "good conduct" since his conviction or release from custody; that an offender was young when he committed the offense; or that an offender was old, mentally disabled, seriously ill, or near death.[192] Those factors can be justified as legitimate uses of clemency as mercy because they stem from compassion and empathy for a fellow, suffering, human being. At the same time, some Presidents have been chary of clemency to reflect a "tough on crime" mentality.[193]

Yet, Presidents have also granted clemency when neither an offender's conviction nor sentence could be said to be unjust.[194] Some rationales were ones that we might hope to see, such as holiday clemencies.[195] Others were less orthodox: the offender had undergone a religious conversion, the offender would lose his crops if he were imprisoned, he enjoyed a high social status, or he promised "never to violate the law again."[196] In still other cases, Presidents concluded that the offender's conviction penalized policy differences, rather than evil conduct, or the President believed that confinement imposed an extraordinary personal

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(prior to the commission of their crimes), those who were 'anxious' to be loyal, those who had taken an oath of loyalty, and those who were willing to take such an oath. The 'remarkably good-humored disposition' of one petitioner was a plus, and the promise of a former employer to rehire another petitioner also was helpful." P.S. Ruckman Jr. & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 PRES. STUD. Q. 84, 93 (1999). Other factors were the offender's good conduct during confinement, his repentance, youth, prior good character or clean record, declining health, and confession of guilt, *id*.—the same sort of considerations that we would expect a jury or judge to consider at sentencing. The recommendations of others could also affect Lincoln. *Id*. at 93–94. That range of justifications demonstrates that Lincoln had a deeply merciful soul and that numerous considerations could elicit a compassionate response from him. *See* Love, *Pardon Power Twilight*, *supra* note 50, at 1178.

188. Moore, *supra* note 32, at 283; Ruckman, *US Clemency*, *supra* note 46, at 257.

189. *See supra* note 42.

190. *See*, *e.g*., Ruckman, *US Clemency*, *supra* note 46, at 257 (Ronald Reagan commuted the sentence of Marvin Mandel, a former governor of Maryland, because his co-defendants received parole).

191. *See, e.g*., Boyd v. United States, 142 U.S. 450, 453–54 (1892).

192. Ruckman, *US Clemency*, *supra* note 46, at 257–58.

193. *Id*. at 258 (attributing that motivation to President Ronald Reagan).

194. Clemency scholars often point to Abraham Lincoln as the epitome of a generous, forgiving chief executive. His military pardons are "the stuff of legend," but he was also charitable towards parties convicted in the civilian courts. Love, *Pardon Power Twilight*, *supra* note 50, at 1177–78; *see* Ruckman & Kincaid, *supra* note 187, at 93–95. Lincoln considered favorably factors such as an offender's youth, penitent disposition, record of good conduct, prior military service (including those wounded in battle). *See* Ruckman & Kincaid, *supra* note 187, at 93–95.

195. *See*, *e.g*., Ruckman, *US Clemency*, *supra* note 46, at 258 (George Bush pardoned Casper Weinberger on Christmas Eve 1992 as an "act of compassion," because Weinberger was 75 years old and physically ailing).

196. *Id*. (citation omitted).

hardship on third parties. The former reflected the President's attitudes toward criminal justice, while the latter were purely charitable in nature.[197] Given the elected nature of the presidency, another factor was whether there was considerable public support for clemency.[198] Some actions—to help the offender catch a boat—were, frankly, just bizarre.[199] Some Presidents granted clemency for reasons that may have benefitted themselves more than the nation.[200] Finally, there were also cases where we would deem the rationale rather ignoble today.[201] Nowadays, except for controversial cases, Presidents often do not explain why they granted clemency, and they almost never offer a reason for its denial.[202]

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Where does that leave us? Like the English kings, American Presidents have not endorsed an objective decision making process, preferring instead to leave their clemency power unfettered (which has left some grants inexplicable). Today's Presidents possess the same power that George Washington had, but

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197. *See* Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENT'G REP. 150, 151 (2000) [hereinafter Kobil, *Reasons*] (footnotes omitted) ("President [George H.W.] Bush issued a lengthy statement that justified clemency [for the Iran-Contra Case defendants] on the ground that the defendants had acted out of 'patriotism,' and had already suffered enough considering their personal anguish and 'depleted savings.' President Bush also noted that the prosecutions represented the 'criminalization of policy differences' that should have been addressed in the political arena rather than the courts. Finally, Mr. Bush characterized the pardons as being within the 'healing tradition' of clemency, likening them to President Carter's grant of amnesty to those who had avoided the Vietnam War draft, and President Andrew Johnson's pardons of those who had fought for the Confederacy."); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT'G REP. 177 (2000) (footnotes omitted) ("Ronald Reagan in 1981 pardoned two FBI agents convicted for illegal break-ins. *The New York Times* reported back then that 'Reagan once told an aide that he thought the agents were being penalized unfairly because they believed they were acting according to law.'").

198. Ruckman, *US Clemency*, *supra* note 46, at 258–59.

199. Kobil, *Reasons*, *supra* note 197, at 150 (footnotes omitted) ("Sometimes, the reasons seemed almost whimsical ('to enable the petitioner to catch steamer without delay'), or idiosyncratic, as when President Harding commuted the espionage sentence of activist Eugene Debs out of personal liking, and moved up Debs's release date so he could 'eat Christmas dinner with his wife.'").

200. *See, e.g.*, Alschuler, *supra* note 49 (criticizing President Bill Clinton's "midnight pardons"); Jeffrey Crouch, *Presidential Misuse of the Pardon Power*, 38 PRES. STUD. Q. 722 (2008) (criticizing the Iran-Contra pardons issued by President George H.W. Bush, Clinton's "midnight pardons," and President George W. Bush's commutation of Scooter Libby); James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345 (1993) (same, Iran-Contra pardons).

201. Moore, *supra* note 32, at 283 (footnotes omitted) ("A significant number of pardons, however, were granted for reasons that are clearly unacceptable today. Some of those reasons related to gender ('for the sole reason that the applicant was a woman and in order to avoid the spectacle of a woman being executed'), powerful friends ('recommendation by influential citizen'), and family connections ('respectability of prisoner's family'). All of these reasons provide unearned advantage to some felons and unfairly disadvantage others based on factors beyond their control and irrelevant to the purposes of punishment.").

202. Kobil, *Reasons*, *supra* note 197, at 150 (footnotes omitted) ("Presidents, as a rule, do not provide reasons for clemency decisions, though prior to 1931 the Attorney General's official pardon records disclosed a range of factors that supported use of the power. The reasons given at that time ranged from standard legal justifications (doubts about guilt, suspected lack of capacity, or excuse) . . . ."); Moore, *supra* note 32, at 283 n.16.

have not moved closer to the development of a systematic way of making clemency decisions.

E. The Teaching of Legal Scholarship

We next come to the legal profession. Various scholars, principally in the field of criminal justice, have discussed the integrally related subjects of punishment, clemency, and mercy.[203] Not surprisingly, they disagree about whether and when mercy is an appropriate consideration in clemency.[204] Consider these questions:

First, is mercy consistent with justice? If retribution and incapacitation were the only relevant sentencing justifications, mercy and justice would conflict. Retribution demands that an offender receive his just deserts—no more, no less—while incapacitation dictates that an offender be quarantined for whatever period is necessary to protect the public. Mercy would lighten the burden and therefore would conflict with justice. If deterrence were the rationale, mercy would have a role to play. We would measure the gain or loss in general or specific deterrence from being merciful to one specific offender at the margin. There,

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203. *See*, *e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW §§ 10.3.4–10.3.5, at 810–17 (1978); LINDA ROSS MEYER, THE JUSTICE OF MERCY (2010); WILLIAM IAN MILLER, EYE FOR AN EYE (2007); MINOW, LAW'S FORGIVENESS, *supra* note 76; Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008); Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329 (2007); Brown, *supra* note 184; David Dolinko, *Some Naïve Thoughts about Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349 (2009); Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 413 (1999); Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990); Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 4 OHIO ST. J. CRIM. L. 165 (2007); Aziz Z. Huq, *The Difficulties of Democratic Mercy*, 103 CALIF. L. REV. 1679 (2015); Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389 (2007); Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698 (2012); Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, *in* FORGIVENESS, MERCY, AND CLEMENCY 16, 23 (Austin Sarat & Nasser Hussain eds., 2006); Christopher Kutz, *Forgiveness, Forgetting, and Resentment*, 103 CALIF. L. REV. 1647 (2015); Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010); Linda Ross Meyer, *The Merciful State*, *in* Sarat & Hussain, *supra*, at 64; Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615 (2015); Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485 (1984); Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT'G REP. 309 (2016); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000); Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455 (2009); Carol S. Steiker, *Murphy on Mercy: A Prudential Reconsideration*, 27 CRIM. JUST. ETHICS 45 (2008); Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, *in* Sarat & Hussain, *supra*, at 16; Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89 (2002); Symposium, *Clemency: A Constitutional Power Moves into the Future*, 15 U. ST. THOMAS L.J. 411 (2019); Symposium, *The Role of Forgiveness in the Law*, 27 FORDHAM URB. L. REV. 1348 (2000); *see also supra* notes 38 & 58 (collecting authorities).

204. *Compare*, *e.g.*, Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004), *with, e.g.*, Misner, *supra* note 32. For an excellent and succinct summary of the issues, see *Questions of Mercy*, *supra* note 59, at 321–27.

the benefit to one person from receiving mercy, and to the public from mercy's availability, could outweigh any marginal loss in deterrence.[205]

Second, does mercy lead to sentencing inequality, arbitrariness, and discrimination because different judges and chief executives might hold very different opinions regarding punishment and the appropriate amount in each case? The choice here is between imponderables. Which outcome do we want—or fear—the most: A system that treats everyone identically to avoid discrimination, but thereby guarantees that injustices might occur because of differences among people (as with mandatory punishments)? Or a system that treats each case independently to avoid injustices, but thereby poses a risk of discrimination (as with discretionary sentencing)? Reasonable people can choose differently.[206]

Third, if mercy is a legitimate consideration, when is it appropriate, and to what extent should it soften a penalty? The relevant factors are those that a responsible sentencing system would have considered when rehabilitation was the driving justification for punishment. Has the offender admitted his guilt and atoned for the harm he has caused? Is he a novice or professional criminal? Has he already turned his life around and effectively become someone else? Given the facts of his crime, social history, and psychological make-up, can he become a "new person" or must society cast him away for its own protection?[207]

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205. My framing of the issue oversimplifies it for simplicity's sake. For example, a just sentence might be a range of months or years of incarceration, not a specific term. The U.S. Sentencing Guidelines predominantly recommend a range-based approach as just. A judge can impose a just sentence by staying within the range, but also be merciful by sentencing an offender to the minimum term of confinement the range fixes. For a discussion of some of the philosophical nuances of the "Justice vs. Mercy" debate, see, for example, Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1321–42 & n.17 (2004).

206. The question of disparity is often raised in the context of racial discrimination, particularly in capital cases. Yet, race has not played a role in clemency in capital cases since the Supreme Court upheld the constitutionality of capital punishment in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See*, *e.g.*, Larkin, *Demise of Capital Clemency*, *supra* note 38, at 1311 & nn.62–63 (collecting studies so concluding).

207. Legally, an offender can be required to admit his guilt, and even to assist law enforcement, to receive a sentencing benefit. *See*, *e.g.*, Wade v. United States, 504 U.S. 181, 185–86 (1992) (ruling that a defendant can be required to prove that a prosecutor's unwillingness to recommend leniency is the product of a discriminatory intent); Roberts v. United States, 445 U.S. 552, 558 (1980) (ruling that a defendant can be required to assist the prosecution by testifying against confederates to receive a reduced sentence); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 437 (1958); *see generally* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citation and internal punctuation omitted) ("Plea bargain flows from the mutuality of advantage to defendants and prosecutors, each with his own reasons for wanting to avoid trial. . . . By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction in charges, and thus by a fear of the possibility of a greater penalty upon conviction after a trial."). Most moral philosophers find admission of responsibility and atonement necessary for forgiveness. *See* KONSTAN, *supra* note 16, at 99 (to obtain forgiveness, one must "repudiate the act of wrongdoing together with the values that permitted it; such a repudiation 'is a step toward showing that one is not simply the "same person" who did the wrong'") (quoting GRISWOLD, *supra* note 16, at 50); MINOW, VENGEANCE AND FORGIVENESS, *supra* note 38, at 4 ("While some traditions treat forgiveness as a response to apology, repentance, acts of reparation, or acceptance of sanctions, others support forgiveness without any preconditions.") (footnote omitted). The law has traditionally punished recidivists more harshly than first-time offenders.

Kathleen Dean Moore, a philosophy professor who writes about the law and policy of clemency, has a foot in each camp. She believes that clemency is not materially different from every other tool in the criminal justice toolkit, so it, too, should be used only when the public benefits.[208] She relies on Justice Holmes's reasoning in *Biddle v. Perovich* that clemency is not the private property of the person who happens to be President, but is a governmental power given to the office of the President for the betterment of the public. From that premise, she concludes that the President acts legitimately only when he reaches a reasoned judgment that the public is better served by erasing a conviction or reducing the severity of a punishment.[209] Put succinctly, "pardons best serve the public interest when they serve justice."[210] This occurs when a person is factually innocent of a crime, when the criminal justice system miscarries at his trial, when a person is legally guilty but morally innocent of any misconduct, and when the severity of his sentence exceeds the gravity of his wrongdoing.[211] In opposition to other scholars of philosophy, Moore believes that a President should not grant clemency "when he is moved by pity or concern for the welfare of the accused."[212]

Professor Robert Misner also has a novel approach to this problem. In his article *A Strategy for Mercy*, he developed a series of factors for a chief executive to consider when incorporating mercy into punishment considerations even in the face of a strong societal desire for a punitive criminal justice system.[213] Drawing on the treatment of mercy in law, religion, literature, and philosophy, he concluded that even our retribution-oriented society should be receptive to mercy if several preconditions exist. Mercy should be limited to cases where the offender committed only a non-violent crime without a particular, identifiable victim;

See, *e.g.*, Ewing v. California, 538 U.S. 11, 24 (2003) (upholding a state "three strikes" law and noting that noting that, historically, numerous states had adopted such laws in response "to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals"); *id.* at 24–26 (collecting cases upholding recidivist statutes); United States v. Watts, 519 U.S. 148 (1997) (ruling that a sentencing judge may consider conduct underlying a charge for which the defendant was acquitted as long as the government can prove that conduct by a preponderance of the evidence); Sigler, *supra* note 203, at 466 (noting "our general intuition that an offender who has lived an exemplary life both before and after a (possibly anomalous) transgression generally deserves a less severe punishment than an unrepentant offender whose life has been dominated by corruption and vice"). Moreover, rehabilitation was the predominant goal of punishment for most of the twentieth century. *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."); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC ch. 4 (Rev. ed. 1990); Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. J. CRIM. L. 303, 309 (2013) [hereinafter, Larkin, *Parole*] ("The theory was that new medical, sociological, and psychological theories and techniques could transform a prison from 'the black flower of civilized society' into the equivalent of a hospital where prisoners would be treated and reformed, rather than punished.") (footnotes omitted).

208. Moore, *supra* note 32, at 284–88.

209. *Id.* at 284.

210. *Id.*

211. *Id.* at 286–87.

212. *Id.* at 285.

213. Misner, *supra* note 32.

where the offender did not personally profit from his wrongdoing; where a grant of mercy would not condone the offender's crime; and where the legislature has identified the grounds on which mercy is appropriate.[214]

Aside from Moore's and Misner's differing approaches, most legal discussions of justice, mercy, and the like do not offer us a framework to use when deciding whether clemency is appropriate. There is no consensus on which justification for punishment—retribution, incapacitation, deterrence, education, rehabilitation, and so forth (or some combination of them)—will best lead to just outcomes in the mine run of cases. Governments, scholars, and individuals have debated the proper role of each justification for centuries without reaching a consensus on what ordinal relationship exists among them, let alone which one is superior to the others. Regardless of whether or how the issue is resolved, debates on whether mercy is obligatory (as a form of justice) or supererogatory (as an act of grace) tell the President nothing about whether to grant a particular offender relief. Unless (as is unlikely) a President is a philosopher by training or inclination, he would not care whether he should consider clemency petitions with an eye toward justice or mercy. In fact, none of the issues mooted above would matter to him. His concerns would largely be practical ones: What policy should I adopt toward clemency petitions? What directions should I give to the Justice Department and White House Counsel's Office how they should review applications and make recommendations? How often should I place clemency decisions on my daily schedule? How should the White House Communications Office explain my analysis of clemency petitions? The rest will not matter.

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Legal scholarship, though helpful, does not get us home. It tells us that a President could treat mercy as forgiving some part of a debt an offender owes,[215] but it does not supply an objective answer to the question whether a particular sentence is within or exceeds a reasonable range. It supports the conclusion that there should be room for mercy in the criminal system,[216] but it does not tell us when or how much mercy is proper. As the result, with some potential limited exceptions, legal scholarship does not offer a President an objective methodology for decision making.

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214. *Id.* at 1309–11.

215. *See, e.g.*, Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 84 (1998). That is precisely the rationale that Justice Holmes gave in *Biddle v. Perovich* to explain why an offender cannot refuse a pardon. 274 U.S. 480 (1927).

216. Alexander Hamilton justified the pardon power on that ground. *See* THE FEDERALIST, *supra* note 7, No. 74, at 446 (Alexander Hamilton) ("The criminal code of every country partakes of so much necessary severity that that without an easy access to exceptions in cases of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."). Take capital cases. Historically, the chief executive considered all of the facts when deciding whether to carry out a sentence of death. Today the jury serves that function when deciding whether to impose a capital sentence, so presidents and governors rarely second-guess the community's judgment. *See* BANNER, *supra* note 39, at 291–92; Larkin, *Demise of Capital Clemency*, *supra* note 38, at 1337–39.

F. The Wisdom of Moral Philosophy

Western civilization has long deemed mercy one of its most revered virtues. For more than four millennia, the intellectual fruits of western society—religion,[217] ethics,[218] literature,[219] and art[220]—have celebrated and treasured the custom of granting mercy, the benefits of its receipt in this life and the next one, and the nobility of those who bestow it.[221] Their treatment of mercy and its allied

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217. *See, e.g.*, 2 *Chronicles* 7:14 ("If my people who are called by my name, humble themselves, pray, seek my face, and turn from their wicked ways, then I will hear from heaven, and will forgive their sin and heal their land."); *Psalms* 103:8 ("The Lord is merciful and gracious, slow to anger and abounding in steadfast love."); *Matthew* 5:7 (King James) ("Blessed are the merciful: for they shall obtain mercy."), 6:14–15 ("For if ye forgive men their trespasses, your heavenly Father will also forgive you: But if ye forgive not men their trespasses, neither will your Father forgive your trespasses."); *Luke* 6:36 (King James) ("Be ye therefore merciful, as your Father also is merciful."); *John* 8:2–11 (King James) ("When Jesus had lifted up himself, and saw none but the woman, he said unto her, 'Woman, where are those thine accusers, hath no man condemned thee?' She said, 'No man, Lord.' And Jesus said unto her, 'Neither do I condemn thee: go, and sin no more.' "); *Qur'an* Surah 1:1 ("In the name of Allah, the Beneficent, the Merciful."); *id.* 2–114 (113 of 114 Surahs begin with the same phrase); St. Anselm, *Proslogion*, *supra* note 38, at 238, 249–50; ANTHONY BASH, FORGIVENESS: A THEOLOGY (2015); PHILIPPA BYRNE, JUSTICE AND MERCY: MORAL THEOLOGY AND THE EXERCISE OF LAW IN TWELFTH-CENTURY ENGLAND (2019); REPENTANCE: A COMPARATIVE PERSPECTIVE (Amitai Etzioni & David E. Carney eds., 1997); CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT (2001); GEIKO MULLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION (1997); REINHOLD NIEBUHR, JUSTICE AND MERCY (1974); SOLOMON SCHIMMEL, WOUNDS NOT HEALED BY TIME (2004); RICHARD SWINBURNE, RESPONSIBILITY AND ATONEMENT (1989); Donald H. Bishop, *Forgiveness in Religious Thought*, STUD. IN COMPARATIVE RELIGIOUS, Winter 1968, at 1; Lewis E Newman, *The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition*, 15 J. RELIGIOUS ETHICS 155 (1987); Suzanne Last Stone, *Justice, Mercy, and Gender In Rabbinic Thought*, 8 CARDOZO STUD. L. & LITERATURE 139 (1996).

218. *See, e.g.*, ANTHONY BASH, FORGIVENESS AND CHRISTIAN ETHICS (2010); KONSTAN, *supra* note 16; VLADIMIR JANKELEVITCH, FORGIVENESS (Andrew Kelley ed., 2005); MINOW, VENGEANCE AND FORGIVENESS, *supra* note 38; Shawn Floyd, *Aquinas and the Obligations of Mercy*, 37 J. RELIGIOUS ETHICS 449 (2009); Meir Dan-Cohen, *Revising the Past: On the Metaphysics of Repentance, Forgiveness, and Pardon*, *in* Sarat & Hussain, *supra* note 203, at 117.

219. *See, e.g.*, WILLIAM LANGLAND, PIERS PLOWMAN (A. V.C. Schmidt trans., Oxford World's Classics Reissue ed., 2009) (1367–70); BERNADETTE MEYLER, THEATERS OF PARDONING (2019); WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2 ("Why all the souls that were forfeit once, / And He that might the vantage best have took / Found out the remedy. How would you be / If He, which is the top of judgment should / But judge you as you are? O, think on that, / And mercy then will breathe within your lips / Like man new-made."); WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 ("Though justice be they plea, consider this. / That in the course of justice, none of us / Should see salvation. We do pray for mercy, / And that same prayer doth teach us all to render / The deeds of mercy.").

220. *See, e.g.*, Rembrandt, *The Return of the Prodigal Son* (c. 1661–1669); Peter Paul Rubens, *Daniel in the Lions' Den* (c. 1614–1616).

221. *See, e.g.*, John Milton, *Paradise Lost, Book X*, *in* 2 THE WORKS OF JOHN MILTON 307 (F. Patterson ed., 1931) (one should "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.").

concepts might help the President, particularly given the strong sectarian relationship between clemency and mercy.[222]

Scholars of moral philosophy have discussed the meaning of concepts such as "retribution," "vengeance," "justice," "mercy," "forgiveness," "leniency," "charity," and "metanoia," as well as the interrelationship among them.[223] This notably includes the sometimes competing, sometimes complementary, relationship between concepts such as justice and mercy[224] or forgiveness and retribution (or revenge).[225] Those scholars have also explained how the above principles relate to sentencing decisions made by judges and clemency judgments by chief executives.[226] Consider the views of a few of them.

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222. *See* Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POL. 31 (2019). The following discussion is by no means an exhaustive discussion of what moral philosophy has to say that could be of use to clemency decision making. That would take a multi-volume treatise.

223. *See, e.g.*, JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS (Michael Hughes trans., 2001); PETER A. FRENCH, THE VIRTUES OF VENGEANCE (2001); GRISWOLD, *supra* note 16; VLADIMIR JANKELEVITCH, FORGIVENESS (Andrew Kelly trans., 2005); MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (2016); LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS (2011); DOING JUSTICE TO MERCY: RELIGION, LAW, AND CRIMINAL JUSTICE (Jonathan Rothchild et al. eds., 2012); AUSTIN SARAT, MERCY ON TRIAL (2005); QUALITIES OF MERCY: JUSTICE, PUNISHMENT, AND DISCRETION (Carolyn Strange ed., 1996); Lucy Allais, *Wiping the Slate Clean*, 36 PHIL. & PUB. AFFS. 33 (2008); Joseph Beatty, *Forgiveness*, 6 AM. PHIL. Q. (1970); Christopher Bennett, *The Limits of Mercy*, 17 RATIO 1 (2004); Cheshire Calhoun, *Changing One's Heart*, 103 ETHICS 76 (1992); David Cartwright, *Revenge, Punishment, and Mercy: The Self-Overcoming of Justice*, 17 INT'L STUD. PHIL. 17 (1985); Lawrence H. Davis, *They Deserve to Suffer*, 32 ANALYSIS 136 (1972); R.S. Downie, *Forgiveness*, 15 PHIL. Q. 128 (1965); R.A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361 (2007) [hereinafter Duff, *Mercy*]; R.A. Duff, *Justice, Mercy, and Forgiveness*, 9 ETHICS 51 (1990); Jon Elster, *Norms of Revenge*, 100 ETHICS 862 (1990); Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 L. & PHIL. 109 (1991); Alan P. Hamlin, *Rational Revenge*, 101 ETHICS 374 (1991); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RES. 281 (1985); Donald Clark Hodges, *Punishment*, 18 PHIL. & PHENOMENOLOGY 217 (1957); H.J.N. Horsbrugh, *Forgiveness*, 4 CAN. J. PHIL. 269 (1974); Stephen Kershner, *Mercy, Retributivism, and Harsh Punishment*, 14 INT'L J. APPLIED PHIL. 209 (2000); Ned Markosian, *Two Puzzles About Mercy*, 251 PHIL. Q. 269 (2013); Herbert Morris, *Murphy on Forgiveness*, 7 CRIM. JUST. ETHICS 15 (1988); William Neblett, *The Ethics of Guilt*, 71 J. PHIL. 652 (1974); Joanna North, *Wrongdoing and Forgiveness*, 62 PHIL. 499 (1987); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993); Lyla H. O'Driscoll, *The Quality of Mercy*, 21 SO. J. PHIL. 229 (1983); George Rainbolt, *Mercy: In Defense of Caprice*, 31 NOUS 226 (1997); John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958); H.R.T. Roberts, *Mercy*, 46 PHIL. 452 (1971); Jonathan Rothchild, *Dispenser of the Mercy of the Government: Pardons, Justice, and Felony Disenfranchisement*, 39 J. RELIGIOUS ETHICS 48 (2011); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness*, 56 STAN. L. REV. 1307 (2004); Joana Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94 (2016); James Sterba, *Can a Person Deserve Mercy?*, 10 J. SOC. PHIL. 11 (1979); John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 499 (2007); P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1976); *see generally* Garvey, *supra* note 205, 1323–24 n.19 (collecting authorities). On the question whether some crimes are unforgiveable, see the numerous views collected in SIMON WIESENTHAL, THE SUNFLOWER: ON THE POSSIBILITIES AND LIMITS OF FORGIVENESS (1969).

224. *See, e.g.*, JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988).

225. *See, e.g.*, Paul Lauritzen, *Forgiveness: Moral Prerogative or Religious Duty?*, 15 J. RELIGIOUS ETHICS 141 (1987).

226. *See, e.g.*, Nicola Lacey & Hannah Pickard, *To Blame or Forgive? Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. LEGAL STUD. 665 (2015).

Friedrich Nietzsche discussed the relationship between revenge, punishment, justice, and mercy in *The Genealogy of Morals*.[227] Like Thomas Hobbes,[228] Nietzsche believed that the concept of "justice" makes sense only in an organized society governed by law. In primitive societies, people, motivated by revenge, seek private redress for any wrongs they suffer.[229] With law and organized government, a new system comes into being. The law requires all to abide by its demands, one of which is respect each other's rights, which effectively places every member of the society in debt to each other.[230] The government monopolizes the legitimate use of violence to enforce those bargains[231] and assumes the responsibility to punish offenders in the pursuit of "justice," which balances the scales that become lopsided whenever someone breaches his social duties.[232]

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227. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 48–59 (Penguin Classics 2014) (1887).

228. THOMAS HOBBES, LEVIATHAN (Penguin Classics 1982) (1651).

229. NIETZSCHE, *supra* note 227, at 48–49 ("Punishment developed as a retaliation absolutely independent of any presumption of the freedom of will or the lack thereof . . . . Attaining a high degree of civilization was first necessary before the savage could begin to make those much more primitive distinctions among the concepts such as 'intentional', 'negligent', 'accidental', 'responsible', and their contraries, and apply them to the assessment of punishment."). Some commentators deride the instinct for revenge on the ground that it is a vestigial remnant of human beings' uncivilized nature and is nothing more than a reminder of their inherent barbaric nature. Yet, the desire for revenge is an intrinsic, ineradicable feature of what makes us human beings. *See* JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS 17–31 (2003) [hereinafter MURPHY, GETTING EVEN]. Society should regulate and channel that trait or else it will seek expression in socially harmful ways. *See* PAUL H. ROBINSON & SARAH ROBINSON, SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS (2018). At the same time, revenge is a legitimate justification for punishment. *See* PETER A. FRENCH, THE VIRTUES OF VENGEANCE (2001). The Supreme Court has acknowledged both that the human instinct for revenge is a legitimate rationale for punishing offenders and that the government's failure to punish the wicked corrodes the justification for transferring the power to punish from the victim to the state. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (lead opinion of Stewart, J.) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."); *id.* at 226 (White, J., concurring) (incorporating Roberts v. Louisiana, 428 U.S. 325, 355 (1976) (White, J., dissenting) ("It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere.")).

230. NIETZSCHE, *supra* note 227, at 49 (arguing that the theoretical "origin" of the relationship between injury and punishment stems from "the contractual relationship between *creditor* and *debtor*.") (emphasis in original).

231. Shakespeare made the same point in *The Merchant of Venice*. *See* Alice N. Benston, *Portia, the Law, and the Tripartite Structure of* The Merchant of Venice, 30 SHAKESPEARE Q. 367, 378 (1979) ("Portia must pursue Shylock until it is clear that he owes the court damages not only for bringing a false suit, but for violating a more fundamental law as well. The heart of a system of justice is that it provides alternatives to the bloodletting of private revenge and protects its citizens by punishing murderers.").

232. The compensation might not come in the form of money or property, but the right to inflict pain upon the offender commensurate with the injury he caused. NIETZSCHE, *supra* note 204, at 51 ("The compensation consequently consists of a claim on cruelty and a right to draw upon it."). English history from the seventh century (the earliest time when records are available) through the rule of Henry II in the eleventh century is a good example of that practice. *See* Larkin, *Lost Due Process Doctrines*, *supra* note 6, at 328–29.

Over time, society becomes more powerful, which affects the need for punishment. Just as a rich creditor would treat any one debt as posing less of a risk to his wealth than someone who is poor would, a powerful state would see any one offense as being less of a threat to the social order than a fragile state would.[233] The ruler can therefore exercise leniency toward an offender.[234] Because they need not extract compensation from an offender for every crime, the strongest societies can also be the most merciful. Clemency, therefore, is the final evolution of justice because it gives the ruler a "way of going beyond the law."[235]

Turn to Professor Jeffrie Murphy, one of the leading clemency scholars.[236] Murphy believes that actors in the criminal justice system should be concerned with achieving justice, rather than granting mercy.[237] In fact, he once went so far as to write that there "is simply no room for mercy as an autonomous virtue" to temper justice, so the system's actors should "keep their sentimentality to themselves for use in their private lives with their families and pets."[238] Yet, his

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233. NIETZSCHE, *supra* note 227, at 58 ("As it grows more powerful, the community tends to take the offences of the individual less seriously, because they are now regarded as being much less radical and threatening to the communal existence."); *id*. at 58–59.

234. *Id*. at 58 ("As the power and self-knowledge of the community increases, the penal code in turn becomes proportionately more lenient; conversely, if the community is weakened or feels threatened, then harsher penalties are enacted. The creditor has always become more humane as he has grown richer; ultimately, the extent of injury which he can endure without really suffering becomes the criterion of his wealth.") (emphasis in original).

235. *Id*. at 59 ("Justice which began with the maxim, 'everything can be paid off, everything must be paid off,' ends with the connivance at the escape of those who cannot pay to escape—it ends, like every good thing on earth, by *destroying itself*. The self-destruction of Justice: we know the pretty name it calls itself—*Clemency*! It remains, as is obvious, the privilege of the strongest, better still their way of going beyond the law.") (emphasis in original) (footnote omitted) (implicitly referring to FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (Penguin Classics ed. 2003) (1886)).

236. Professor Jeffrie G. Murphy has written extensively on the subjects under discussion. *See, e.g*., BEFORE FORGIVING: CAUTIONARY VIEWS OF FORGIVENESS IN PSYCHOTHERAPY (Sharon Lamb & Jeffrie G. Murphy eds., 2002); MURPHY, GETTING EVEN, *supra* note 229; PUNISHMENT AND REHABILITATION (Jeffrie G. Murphy ed., 3d ed. 1994); JEFFRIE G. MURPHY, PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION (2014); Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE 143 (Amitai Etzioni & David E. Carnet eds., 1997); MURPHY & HAMPTON, *supra* note 224; JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY (1979); Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 7 CRIM. JUST. ETHICS 3 (1988) [hereinafter Murphy, *Forgiveness*]; Jeffrie G. Murphy, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 FORDHAM URB. L.J. 1353 (2000); Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209 (1990); Jeffrie G. Murphy, *Mercy and Legal Justice*, 4 SOC. PHIL. & POL'Y 1 (1986).); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423 (2009) [hereinafter Murphy, *Remorse, Apology, and Mercy*].

237. *See* MURPHY & HAMPTON, *supra* note 224, at 167–74.

238. *Id*. at 174. As he summarizes: "If we simply use the term 'mercy' to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of (is reducible to a part of) justice. It thus becomes obligatory, and all the talk about gifts, acts of grace, supererogation, and compassion becomes quite beside the point. If, on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant (a part of justice)." *Id*. at 169; *see also* Murphy, *Forgiveness*, *supra* note 236, at 12. Murphy is not alone in that view. *See* MOORE, *supra* note 32; Ross Harrison, *The Equality of Mercy*, *in* JURISPRUDENCE: CAMBRIDGE ESSAYS 107, 121 (Hyman Gross & Ross Harrison eds., 1992).

understanding of "justice" overlaps with what many people would deem "mercy."[239] As Professor Carol Steiker put it, "one virtue" of Murphy's "skeptical view" of the role of mercy, is that "it embraces as justice many of the most powerful examples of lenient treatment that might also be claimed to be the product of mercy."[240] For example, Murphy doubts the sincerity of an offender's expressions of remorse at sentencing, but is less skeptical of demonstrated proof of remorse at the much later point when a chief executive considers clemency. Metanoia is possible, even if rare.[241] If it does happen, just as it is unjust to punish one person for the crimes of another, so too, it is unjust to punish the new, reformed individual for offenses the old one committed.[242]

By contrast, Alwynne Smart concludes that mercy is an "autonomous virtue" and is justified "when an offence is intrinsically less evil than another, when a person acts under provocation, and where there are extenuating circumstances such as impaired judgment coercion and ignorance."[243] Other cases justifying mercy are sometimes "where the offender has already suffered a great deal," where punishment would significantly harm third parties, and where the offense occurred long ago.[244] By contrast, mercy would be "unjustified if it causes the suffering of an innocent party, if it is detrimental to the offender's welfare, if it

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239. *See* Johnson, *supra* note 223, at 116 ("While the judge is bound to do legal justice, legal justice is not always identical with moral justice. Specifically, legal justice may fall short of moral justice in its ability to adequately distinguish between relevantly different cases. Thus, built into what it is the judge may do to effect justice is discretion. And when that discretion is exercised in order to remit or reduce a punishment which the law prescribes, the discretion is mercy."). Mandatory minimum sentences are classic examples of laws that produce moral injustices.

240. Steiker, *supra* note 203, at 16, 23; *see also*, *e.g.*, Duff, *Mercy*, *supra* note 223, at 364.

241. Murphy, *Remorse, Apology, and Mercy*, *supra* note 236, at 446–53.

242. MURPHY & HAMPTON, *supra* note 224, at 173; Murphy, *Remorse, Apology, and Mercy*, *supra* note 236, at 446–53. Jean Hampton, who engages with Murphy in a *pas de deux* in the book *Forgiveness and Mercy*, believes that we have duties to be just and merciful, which at times can conflict. MURPHY & HAMPTON, *supra* note 224, at 159.

243. Alwynne Smart, *Mercy*, 43 PHILOSOPHY 345, 348 (1968).

244. *Id.* at 349, 353–55. Smart adds several noteworthy refinements. Oftentimes we should classify as "justice" what we call "mercy." In many instances, "the law is too inflexible and unsophisticated" to account for all of the extenuating and mitigating facts and demands that an unduly severe punishment be imposed. Reducing the penalty required by the law, she argues, is ensuring justice, rather than granting mercy. *Id.* at 349, 355. Moreover, granting clemency or mercy is materially different from condoning what an offender has done. "When a man exercises mercy, what he does is acknowledge that an offence has been committed, decides that a particular punishment would be appropriate or just, and then decides to exact a punishment of lesser severity than the appropriate or just one." *Id.* at 350. A judge bestows mercy when he tells an offender "I'm letting you off lightly this time" in the hope that the offender will not repeat his illegal conduct. *Id.* In addition, a person acting from a purely utilitarian perspective would be unable to grant mercy because doing so would result in a worse cost-benefit bottom line. *Id.* at 356 ("The utilitarian has no choice; he must recommend the course of action that produces the most good, and if this means imposing a certain penalty he cannot act mercifully and impose less than that penalty. Real mercy is never a possibility for him because he must always impose, according to his ethic, the fully justifiable penalty. . . The notion of mercy seems to get a grip only on a retributivist view of punishment."). For a utilitarian, mercy would disturb any Pareto Optimal equilibrium. Finally, the passage of time *alone* would not itself be a ground for mercy, but it *and* a change in the offender's character could be. The rationale would be that the offender is no longer the same person who committed the crime. *Id.* at 358.

harms the authority of the law, where it is clear that the offender is not repentant or not likely to reform" despite acting "temporarily repentant," and where it would arbitrarily treat like cases differently.[245]

Claudia Card believed that justice, the "proper balance of rights" among persons in a political community, is a virtue possessed by some institutions, while mercy, the declination to exercise one's rights against another, is a virtue characteristic of some people, including ones invested with the prerogative to grant clemency.[246] An offender should receive mercy in two different settings. One is where "he would be made to suffer unusually more on the whole, owing to his peculiar misfortunes, than he deserves in view of his basic character."[247] The other is where "he would be worse off in this respect than those who stand to benefit from the exercise of the right to punish him (or to have him punished)."[248] Mercy's role in the criminal justice system, accordingly, is the ability of someone, like the President, to extend leniency to a particular offender without disturbing the institutional need for manageable standards of criminal liability that apply to everyone equally.[249] That approach, she believes, sensibly allows a government to "temper institutional justice" with "a chief executive's mercy."[250] We as

245. *Id*. at 350–51.

246. Claudia Card, *On Mercy*, 81 PHILOSOPHICAL REV. 182, 188 (1972).

247. *Id*. at 184; *see also, e.g*., Duff, *Mercy*, *supra* note 223, at 367–70; John Tasioulas, *Mercy*, 103 PROC. ARISTOTELIAN SOC'Y 101, 117–18 (2003); Douglas N. Husak, *Already Punished Enough*, 18 PHIL. TOPICS 79 (1990) (discussing the concept of "natural punishment"). Of course, once you make relevant considerations external to the aggravating and mitigating circumstances of the offense and offender, you open a potentially enormous range of factors to consider. For example, the criminal justice system considers the effect of a crime on its victims to be critically important when deciding an appropriate punishment. *See, e.g*., Payne v. Tennessee, 501 U.S. 808, 826 (1991) ("[T]he testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009). Even if you try to limit your review to ones related to the crime, given the pliable nature of the concept of proximate cause, as Palsgraf v. L.I. R.R. Co., 162 N.E 99 (N.Y. 1928), illustrates, the number might still be overwhelming. Does that mean we should never consider such external factors? No, but it does mean that, once we start down that road, there will be some line-drawing problems that might have no objective justification, and we will need to decide whether we can accept that result.

248. Card, *supra* note 246, at 184 (emphasis omitted). As Card explained: "The basic point of mercy seems to lie in the recognition that, in the absence of 'cosmic justice,' some of those whom a socially just community would have the right to punish may be unusually more 'sinned against than sinning,' either by other persons or, metaphorically speaking, by fate. . . . There seems to be no feasible institutional remedy for this state of affairs in the form of additional rules governing liability to punishment, which would not have the effect of seriously undermining the common purposes for which punishment is instituted. A partial remedy is found, however, in the exercise of mercy." *Id*. at 185.

249. *Id*. at 190 ("Mercy, then, has a place where there is no feasible way of granting to those who are less fortunate in the undeserved suffering they endure a *right* to more lenient treatment without seriously undermining the goal of social security in which they likewise have an interest.") (emphasis in original).

250. *Id*. at 191 ("When we temper (institutional) justice with mercy in deciding how to treat the offender, we consider not only facts about his offense but also facts about his character and suffering which may not be revealed simply by looking at his offense. Thus, we take a broader view of his situation than we took in establishing our initial justification for punishing him."). Card also would answer the conundrum first posed by St. Anselm—How can perfect justice, which would punish each

a society do so when we empower someone, like the President, to "consider not only the facts about his offense but also facts about his character and suffering which may not be revealed simply by looking at his offense."[251] In essence, we authorize the President to revisit sentences by considering all of the surrounding facts and circumstances.

Nigel Walker finds it more useful to focus on the chief executive's motivation for reducing a punishment than to resolve the debate among Murphy, Smart, and Card. Compassion is a legitimate reason for mercy.[252] Some motivations—such as personal gain, favoritism, and whimsy—are altogether improper.[253] Other justifications for clemency—such as releasing prisoners early to relieve prison overcrowding—are neither laudatory nor illegitimate; they are just examples of expediency in the guide of clemency.[254] Many rationales—such as awarding relief for post-sentencing meritorious conduct unrelated to the crime (for example, saving the life of a prison guard during an uprising)—are on the border between justice and mercy.[255]

The difference of opinion among scholars of moral philosophy parallels the disagreement among members of the legal academy. For example, most scholars of either discipline would likely believe that mercy is a legitimate consideration at sentencing or clemency. These individuals also would likely encourage a President to seek guidance from scholars of jurisprudence and philosophy on the issue when mercy is appropriate.

Not everyone, however, finds those discussions useful. University of Pennsylvania Law School Professor Stephen Morse, for example, does not see much practical value for the criminal justice system in philosophical treatments of theoretical concepts such as mercy. As he has noted, the literature on justice and mercy "is sparse, and scholars rarely agree."[256] Philosophers also do not "provide definitional and conceptual clarification" of mercy, he maintains, which

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offender according to his "just deserts," and perfect mercy, which would soften the punishment that justice demands, coexist?—by concluding that mercy is "a virtue of persons rather than of the institution of punishment," while "justice" is a virtue of social institutions," existing when there is "a proper balance of rights among persons participating in them." *Id*. at 188 (footnote omitted); *see id*. at 189 ("Part of the answer, then, to the question, 'How is mercy related to justice in the practice of punishing?' is that mercy is an expression of justice as the virtue of persons who have the right to punish, but not an aspect of the social or legal justice of the institution by which they get that right."). Compare Card's view with the one expressed by Henry Fielding. *See* HENRY FIELDING, THE HISTORY OF TOM JONES, A FOUNDLING 98 (1749) ("Master Blifil fell very short of his companion in the amiable quality of mercy; but as he greatly exceeded him in one of a much higher kind, namely, in justice: in which he followed both the precepts and example of Thwackum and Square; for though 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.").

251. Card, *supra* note 246, at 191.

252. Nigel Walker, *The Quiddity of Mercy*, 70 PHILOSOPHY 27, 32 (1995).

253. *Id*. at 32.

254. *Id*. at 32–33.

255. *Id*. at 33–34.

256. Morse, *supra* note 203, at 1507.

renders them of only limited practical help.[257] Exhortations to temper justice with mercy are valuable when made by Pope Francis or John Milton,[258] he acknowledges, "but when a lawyer asks us to adopt it as a guiding principle, we are entitled to ask for more than uplifting sentiments."[259] Of course, some scholars of moral philosophy have a similar attitude towards the legal profession's treatment of issues like justice, mercy, and forgiveness, so perhaps neither philosophy nor the law has an advantage over other disciplines, even when the issue concerns a subject that should be within either one's wheelhouse.[260]

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The bottom line is this: Moral philosophy has a role to play, albeit a limited one. Whether or not a President has a duty or absolute freedom to grant clemency, there is a benefit from distinguishing between justice and mercy, if for no other reason than the former is obligatory regardless of what we say about the latter. Moreover, philosophy identifies some people who should and should not receive mercy, as well as some factors a President should consider, such as the effects of punishment and clemency on third parties. Nonetheless, while philosophy may help sharpen or analysis, it does not completely fill in the gap that the text, history, and judicial interpretations of the Pardon Clause have left for us when deciding whether to grant particular clemency petitions.

IV. NEGOTIATING THE DIFFICULT CHOICE BETWEEN DISCRETION AND RULES

The Framers trusted the President with a broad, unreviewable clemency power for two reasons. The first is that clemency can only reduce the severity of a punishment. The second is that the Framers assumed that any President would exercise his authority, in the words of Alexander Hamilton, with "circumspection," "scrupulousness," and "caution."[261] 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."[262]

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257. *Id.*

258. POPE FRANCIS, THE CHURCH OF MERCY (2014); Milton, *supra* note 221.

259. Morse, *supra* note 203, at 1507.

260. See KONSTAN, *supra* note 16, at 170 (emphasis in original) (footnotes omitted):

> There is no denial that forgiveness is widely perceived as an urgent matter these days, not to say much in vogue. From the legal movement known as restorative justice, which seeks to overcome the resentment between criminal and victim as a way of healing both, and the truth and reconciliation commissions that attempt to sublimate the deep resentment resulting from violent social repression, to more individualistic psychotherapies and religious counsels that promise peace with oneself or with God, forgiveness has recommended itself as a specially profound, moral, and effective way of rising above bitterness and resolving conflict. That the demand to grant forgiveness may be coercive, the preconditions for eliciting it may be faked, its efficacy in assuaging rage may be overestimated, and, finally, the very concept may depend on assumptions that are philosophically incoherent—all this is reasonably well known and points to the possibility that we are dealing here with notion that serves a particular ideological function in today's world.

261. THE FEDERALIST, *supra* note 7, No. 74, at 446 (Alexander Hamilton).

262. *Ex parte* Grossman, 267 U.S. 87, 111 (1925).

Unfortunately, circumspection, scrupulousness, and caution can lead to inaction. This is particularly likely when there is an alternative to clemency, such as parole or compassionate release.[263] Inaction will also occur when a President sees clemency as all cost and no benefit, because of his fear that a recipient will commit new, post-release crimes, generating a torrent of adverse public and media criticism and proving that no good deed goes unpunished.[264] In those settings,

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263. Parole became available in the federal system through the Federal Parole Act of 1910, ch. 387, 36 Stat. 819 (1910). Parole took some of the clemency burden off the President. Larkin, *Revitalizing Clemency*, *supra* note 38, at 866. In 1984, Congress created the U.S. Sentencing Commission and directed it to create a mandatory sentencing guidelines system. Once those guidelines went into effect, parole was to disappear on a prospective basis. The Supreme Court upheld the constitutionality of the guidelines sentence system in Mistretta v. United States, 488 U.S. 361 (1989), over several separation of powers challenges, but in United States v. Booker, 543 U.S. 220 (2005), the Court ruled that a mandatory guidelines system violated a defendant's Sixth Amendment Jury Trial Clause rights. I have argued that the Supreme Court's decision in *Booker* required that the federal parole laws go back into effect because it was clear that Congress would never have abolished parole if the Sentencing Guidelines were only discretionary. Larkin, *Parole*, *supra* note 207. So far, no court has considered the issue. Compassionate release traditionally was a means of allowing a terminally ill prisoner to die outside the prison walls. Initially, a district court could not grant a prisoner's application for compassionate release unless the federal Bureau of Prisons (BOP) moved in court for release. *See*, *e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 38, at 907–12. In response to criticisms that the BOP's reluctant use of its authority lead several prisoners to die before the applications were processed, Congress revised the procedures in the First Step Act of 2018, § 603(b), Pub. L. No. 115-391, 132 Stat. 519 (2018), to allow a prisoner to apply in district court without the BOP's prior authorization. Paul J. Larkin, Jr., *The Future of Presidential Clemency*, 16 U. ST. THOMAS L.J 399, 415 (2020).

264. *See, e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 38, at 878–80 (footnotes and citation omitted):

> 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. As Professor Marie Gottschalk has noted, 'Released long-time prisoners do not pose a major public threat, but they do pose a potential risk to political careers.' . . . The result is to deter Presidents from exercising clemency in cases where extending mercy is justified on the merits but may be politically costly. In most cases, Presidents see little benefit of any type—electoral, professional, or personal—from extending criminals mercy, and they fear major political blowback if an offender granted clemency commits a horrific crime afterwards. Witness what happened to then-Presidential Candidate Michael Dukakis in 1988. Add in the fact that society today demands perfection; one failure can tar a clemency program that has a world-class success rate. Accordingly, unless the President can generate considerable goodwill from organizations supporting a clemency initiative, he may decide that the potential political harm outweighs the potential human and penological benefit.

The same is true of compassionate release decisions. 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, 499–500 (2007) ("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); Larkin, *Revitalizing Clemency*, *supra* note 38, at 911–12 ("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. After all, some terminally ill inmates are still at risk of reoffending (think offenders who distribute child pornography). The BOP also might have the view that other inmates may be legally

especially for a first-term President, the temptation to forego being merciful can be overwhelming.

Worse than inaction is abuse of the clemency power. President Bill Clinton was twice guilty of that crime. He offered conditional commutations to members of a Puerto Rican terrorist group, possibly to persuade the Puerto Rican community to vote for his wife Hillary, who was campaigning for the U.S. Senate, and for Vice President Al Gore, who was running for U.S. President.[265] Later, during his last 24 hours in office, Clinton "grant[ed] pardons and commutations the same way that a drunken sailor on shore leave spends money."[266] Some clemency recipients or their representatives had White House "connections" or had contributed to the Clinton's party or presidential library. One recipient, Marc Rich, was a fugitive from justice. Granting clemency to someone who shows such disrespect for the criminal justice system is an insult to everyone who walks the straight and narrow. More recently, President Trump seems to use his clemency power only when a family member, a friend, an acquaintance, or *Fox News* highlights what one or the other believes is an appealing case for mercy.[267] The average person cannot be faulted for believing clemency is available to him or her only on the far side of the River Styx.

For decades, lawyers have brought procedural challenges to different aspects of the criminal justice system, particularly the pretrial, trial, and appellate processes. One reason for that strategy is that at times the system was—and to some extent still is[268]—riddled with flaws.[269] Atop that, lawyers are trained to make arguments that will persuade courts, and it is generally easier to persuade a judge that one of the president's lieutenants erred than it is to convince a court that it

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ineligible for compassionate release because they were sentenced to life imprisonment (think murderers) or may be realistically ineligible given the nature of their crimes and the adverse public reaction to word of their release (think violent criminals). The BOP may also believe that the projected cost savings are ephemeral and, given its limited resources and the likely prospect that most prisoners will try to snooker government physicians and administrative personnel into ill-advised release decisions, the game is not worth the candle.") (footnotes omitted).

265. *See, e.g.*, Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1484 (2000) ("The President defended his decision in terms of 'equity and fairness,' but it was widely criticized as a thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife's expected Senate candidacy.") (footnotes omitted).

266. Larkin, *Revitalizing Clemency*, *supra* note 38, at 881; *see also, e.g.*, Alschuler, *supra*, note 49; Love, *Pardon Power Twilight, supra* note 50; Louis Fisher, *The Law: When Presidential Power Backfires: Clinton's Use of Clemency*, 32 PRES. STUD. Q. 586 (2002); P.S. Ruckman, Jr., *The Pardoning Power: The Other Civics Lesson, or Clinton's Clemency Caper in Context*, Annual Mtg. of the So. Pol. Sci. Ass'n (2001), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.610.2531&rep=rep1&type=pdf [https://perma.cc/DJA4-HG3C].

267. *See, e.g.*, Beth Reinhard, *Most Trump Clemency Grants Bypass Justice Dept. and Go to Well-Connected Offenders*, WASH. POST (Feb. 3, 2020), https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959_story.html [https://perma.cc/7MGJ-U267].

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

269. *See* Larkin, *Revitalizing Clemency*, *supra* note 38, at 833–40.

may review the president's exercise of an Article II power. The number of cases where the president has lost a battle over the exercise of an express power is relatively miniscule.[270] Moreover, as explained above, the Supreme Court has all but abandoned recognizing any limitation on the president's Pardon Clause authority.[271] Accordingly, no one should be surprised that most criticisms of federal clemency focus on structural and procedural defects.[272]

Underlying what little discussion that has occurred, moreover, also seems to be a fatalistic attitude toward the possibility of developing standards that could improve the president's decision making.[273] The experience of the last 40 years justifies that pessimism. No president has articulated a thoughtful clemency philosophy or devised a systematic approach to guide the use of that power or that he directed the Justice Department to incorporate into its clemency recommendations. Some presidents have engaged in cronyism; others seem disinterested in the matter. The result is that clemency decision making is desultory, leaving us with the distinct impression that many of the people who receive relief do not deserve it, while many people who deserve it never have a fair shot at getting it.

Devising a useful standard or philosophy for making clemency decisions poses a difficult problem in law, policy, and politics. Start with the legal and political aspects of that undertaking. The task forces us to address the ancient conundrum of choosing between the antipodes of unchanneled discretion and inflexible rules by devising an approach that fits comfortably somewhere between those poles. Throughout the twentieth century, the trend in the criminal justice system has always been to reduce discretionary judgments in favor of greater reliance on rule-based decisions. The law has imposed greater and greater restrictions on the

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270. For every case where a President has lost, *see, e.g.*, Medellin v. Texas, 552 U.S. 491 (2008); Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952); Burdick v. United States, 236 U.S. 79 (1915), there are more that he has won, *see, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018); Zivotofsky *ex rel*. Zivotofsky v. Kerry, 135 S. Ct. 2076 (2016); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Biddle v. Perovich, 274 U.S. 480 (1927).

271. *See supra* text accompanying notes 105–30.

272. Much of my own writing on clemency fits into this category, so I am as guilty as everyone else. *See, e.g.*, Larkin, *Delegating Clemency*, *supra* note 44; Larkin, *Revitalizing Clemency*, *supra* note 38.

273. Some scholars of philosophy have gone even further. They have argued that, given the prevalence of severe punishments in today's criminal codes, our historical commitment to clemency or mercy has weakened or disappeared and that any talk of any such commitment is hypocritical. *See, e.g.*, MURPHY, GETTING EVEN, *supra* note 229, at 3–4 ("Because, perhaps, much of society pays at least lip service to Judeo-Christianity, that society also pays at least lip service to the idea that forgiveness is an important moral virtue. And yet Americans generally seem to support unusually harsh mechanisms of criminal punishment—for example, America is the only Western democracy that retains capital punishment and tends to impose prison sentences of a length and severity that most Western democracies find excessive. To what degree, if at all, are those punitive practices consistent with our professed commitments to such values as love, mercy, and forgiveness?"); ALEX TUCKNESS & JOHN M. PARRISH, THE DECLINE OF MERCY IN PUBLIC LIFE (2015). I am not that pessimistic. It is common, however, for people to support the general availability of a harsh punishment that they would find inappropriate in a particular case. *See* BARKOW, *supra* note 38, at 109 (noting that "while a majority of residents in Ohio favored a "three strikes" law as a general matter, only a small minority supported the law's mandated life sentence when confronted with specific factual scenarios that would trigger the sentence.") (footnote omitted).

discretion of an actor, whether a government official (such as a parole board[274]) or a private party (such as a juror[275]) in order to avoid arbitrary decision making. The best example in the federal system is the Sentencing Reform Act of 1984,[276] which required federal district courts to use mandatory sentencing guidelines to channel their traditionally unlimited sentencing discretion.[277]

Clemency stands out as an exception to that development.[278] No president has devised anything even approaching what the Sentencing Reform Commission did for the federal district courts: namely, establish sentencing guidelines to inform and channel their discretion. Congress could adopt purely discretionary clemency guidelines to assist the president in making decisions, and some Presidents might find them helpful.[279] Yet, Article II, not a statute, grants the President the clemency power, so Congress cannot dictate how he must use it.[280]

Politics, of both the inter-branch and partisan varieties, also would become an issue. Few presidents would be willing to let Congress tell them how to exercise the last remaining attribute of royalty they possess. Fewer still would likely be willing to appear to capitulate to Congress for fear of losing perceived political strength for use in other battles. Even fewer still would do so when the opposing political party holds a majority in both houses of Congress. The upshot is this: Any effort for clemency reform must overcome considerable gravitational forces. It must persuade an audience of one that assuming restraints on his discretion serves the public and him.

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274. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480–90 (1972) (ruling that the Due Process Clause requires the state to afford a parolee a hearing before revoking his parole and returning him to prison).

275. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188–95 (1976) (lead opinion) (ruling that the use by a jury at the sentencing stage of a capital case of a series of aggravating and mitigating factors can alleviate the arbitrariness forbidden by the Eighth Amendment under Furman v. Georgia, 408 U.S. 238 (1972)).

276. Pub. L. No. 98-473, Ch. II, 98 Stat. 2031 (codified as amended at 18 U.S.C. § 3551 and 28 U.S.C. §§ 991–98 (2019)).

277. *See* Mistretta v. United States, 488 U.S. 361, 367–68 (1989).

278. Professor Thomas McSweeney described the nature of that problem well:

> Pardons occupy an ambiguous space in this story of ever more rational law. On the one hand, pardons can act as a safety valve. When the law fails to do justice, some official is empowered to pardon the person whom the law, in its rigidity, would convict unjustly. Pardons can thus promote justice by fixing those anomalous situations where the legal system fails. On the other hand, pardons have the potential to reintroduce the irrelevancies that the law seeks to purge from decision-making. Pardons require no justification. In the thirteenth century, the king could pardon a killer for any reason or no reason. He could pardon a killer because that killer had powerful supporters or because he had agreed to serve in one of the king's wars, reasons that had no bearing on his culpability and this had no legal significance. When misused, pardons can represent the failure of a rational system of law.

McSweeney, *supra* note 133, at 159 (footnote omitted).

279. *See* U.S. CONST. art. I, § 8, cl. 18 ("[Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

280. *See supra* notes 118–27 and accompanying text. Congress's guidelines would not be a "law" as we know it because they cannot have any operative effect.

Two options come to mind. One is for the president or Congress to create a commission with the charter to advise the president how to exercise his clemency power. Numerous scholars have recommended that the president or Congress establish a formal clemency board reporting directly to the president that would replace the Office of the Pardon Attorney and make clemency recommendations in each case.[281] I have recommended that the president use an informal clemency advisory board chaired by the vice president.[282] Yet, it might be even more important for whatever advisors he uses to develop a standard that the *president* should use when he receives their recommendations. That is likely to demand considerable thought and debate by members of the bench, profession, and academy before there is any consensus as to what that recommended approach should be.

In the meantime, perhaps the president should simply ask himself these questions: First, is the applicant innocent? Second, was the trial so error-ridden that a reasonable person would lack confidence in the accuracy of the result? Third, if not, and if the offender is still in custody, is his term of imprisonment unconscionably long? Fourth, if not, is there some overriding, matter of state that demands a prisoner's release, such as an exchange for an American held in prison elsewhere? Fifth, if none of those conditions applies, has the applicant turned his life around and become a new person? Sixth, is there some other compelling reason to be merciful? If the president asks these questions, he will at least be focusing on appropriate factors in a reasoned, structured decision making process that will both reaffirm the moral legitimacy of his decisions and persuade the public that clemency is not just a reward for the rich and shameless.

As I have said, devising an objective standard or decision-tree to make clemency decisions is a difficult undertaking, one that no president has managed. This Article is already long enough without trying to add that project to it. I will attempt it in a future work.

CONCLUSION

Most of today's scholarship focuses on the treatment of clemency petitions before they reach the president's desk. That is valuable, but it is no less important to offer the president guidance as to how he should review those petitions once they are in his hands. The clemency standards developed by the Office of the Pardon Attorney identify certain factors that any president should consider when deciding whether to forgive an offense or reduce a sentence. Nevertheless, they rely too heavily on a Gestalt "totality of the circumstances" judgment of the type that common law judges sitting in equity would make when deciding whether to grant equitable relief. A superior approach would be for the president or Congress to establish a commission to review the type of aggravating and mitigating factors he should consider when reviewing pardon and commutation requests and give them weight and an ordinal ranking. The result would be a set

281. *See, e.g.*, Barkow & Osler, *supra* note 58.
282. *See* Larkin, *Vice President and Clemency*, *supra* note 58.

of clemency guidelines that the president could use. They could help make the decision a more objective process than the one now in play.

Perhaps Solomon had the wisdom to know how to make clemency decisions without guidelines. Perhaps Abraham Lincoln had the generous spirit necessary to understand human frailty and to forgive another's fault. Perhaps Gerald Ford had the political courage to place the nation's interests above his own. Unfortunately, we have not elected a Solomon, a Lincoln, or a Ford as president in quite some time, so we need to offer the people we do choose a way to act responsibly and humanely. The legal community has failed the presidency, and we need to correct our mistake.