Buffalo Law Review

Volume 70 | Number 1 Article 1

2-25-2022

Focusing Presidential Clemency Decision-Making

Paul J. Larkin Jr.
The Heritage Foundation

Buffalo Law Review

VOLUME 70 JANUARY 2022 NUMBER 1

Focusing Presidential Clemency Decision-Making

PAUL J. LARKIN, JR.†

ABSTRACT

The Article II Pardon Clause grants the President authority to award clemency to any offender. The clause contains only two 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 plenary. The clause authorizes the President to grant clemency as he sees fit, but the clause does not tell him when he should feel that way.

Historically, Presidents have generally used their authority for legitimate reasons, such as freeing someone who was wrongfully convicted, who is suffering under an unduly

†John, Barbara & Victoria Rumpel Senior Legal Research Fellow, The Heritage Foundation; M.P.P. George Washington University, 2010; J.D. Stanford Law School, 1980; B.A. Washington & Lee University, 1977. The views expressed in this Article are the author's own and should not be construed as representing any official position of The Heritage Foundation. I am grateful to Albert W. Alschuler, Rachel E. Barkow, Megan Cairns, GianCarlo Canaparo, Jeffrey Crouch, Roy T. Englert, Alex Kozinski, Margaret Colgate Love, John G. Malcolm, Stephen Marzen, Mark Osler, Ellen S. Podgor, Caleb Redmond, and Zack Smith for helpful comments on an earlier iteration of this Article. Cooper Conway, Lucas Drill, and Alexis Huggins provided invaluable research assistance. Any errors are mine.

onerous punishment, or who deserves to be forgiven. Nevertheless, no President—nor the Department of Justice Pardon Attorney, who is ostensibly responsible for managing the clemency process—has ever recommended a rigorous standard for use when making clemency decisions. The Pardon Attorney has compiled a list of relevant factors, which is quite useful, but that list does not identify which factors are necessary and sufficient, nor does it assign those factors particular weights or an ordinal relationship. The result is that a President is left to act like a chancellor in equity by relying on his subjective assessment of the "totality of the circumstances."

This Article offers a way to make clemency decisions in a reasonable, orderly manner that would systematize and regularize the Pardon Attorney's recommendation process and presidential decision-making. Pardons and commutations differ from each other in material ways, and Presidents should analyze them separately. In the case of pardons, Presidents should answer a series of questions—an algorithm, if you will—that would guide them when deciding whether to forgive an offender. In the case of commutations, Presidents should make decisions on a category-by-category basis, rather than try, in effect, to resentence each offender. Together, those approaches would help Presidents make objectively based decisions that are consistent with longstanding rationales for punishment and the purposes of the criminal justice system. The hope is that, in so doing, Presidents will be able act justly and persuade the public that the clemency system is open to all, not merely to the President's financial or political allies, cronies, supporters, or friends. The focused approaches suggested here should help Presidents create the fact and appearance of objectivity in clemency decision-making.

CONTENTS

INTRODUCTION

Throughout history, every polity has used a penal code to prevent, as Thomas Hobbes put it, *bellum omnium contra omnes*—"the war of all against all."[1] At the same time, nations have traditionally recognized a need for a mechanism to correct the mistaken conviction of an innocent party or the imposition of an unjust punishment. Historically, that tool has been executive clemency.[2] The

1. THOMAS HOBBES, LEVIATHAN 80 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

2. Formal recognition of executive clemency dates to the Code of Hammurabi in Mesopotamia, one of the earliest legal codes. JEFFREY P. CROUCH, THE PRESIDENTIAL PARDON POWER 10–11 (2009). Greek and Roman rulers exercised that power. *See generally, e.g.*, DAVID KONSTAN, BEFORE FORGIVENESS: THE ORIGINS OF A MODERN IDEA (2010); MELISSA BARDEN DOWLING, CLEMENCY AND CRUELTY IN THE ROMAN WORLD (2006); CHARLES L. GRISWOLD, ANCIENT FORGIVENESS: CLASSICAL, JUDAIC, AND CHRISTIAN (2011); Adriaan Lanni, *Transitional Justice in Ancient Athens*, 32 U. PA. J. INT'L L. 551 (2010). The earliest English, Scottish, and Irish kings did too. *See, e.g.*, ROBERT KELHAM, THE LAWS OF WILLIAM THE CONQUEROR 63–65, 86, 88 (2010) (1799); A.J. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I, at 205 (Reissue ed. 2009) (1925). *See generally* NAOMI D. HURNAND, THE KING'S PARDON FOR HOMICIDE BEFORE AD 1307 (1969). The English Crown has regularly exercised the clemency power since then. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *389–402 (William Draper Lewis ed., Philadelphia, Rees Welsh & Co. 1902) (1769); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 233 (William S. Hein Co. 1986) (1642). *See generally* DANIEL DEFOE, A HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS: FROM THE REFORMATION, DOWN TO THE PRESENT TIME (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).

The Crown delegated similar authority to the proprietor, the chief executive official, or the royal governor in the other colonies. DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776, at 127–32 (1974); HUGH RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 109–13 (1965); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 498–500 (1977). After the Revolution, state legislatures often shared the clemency power with governors or controlled its exercise. Today, governors generally have the same plenary authority with regard state offenses as the President enjoys with respect

constitutions of every state and most foreign nations authorize some agency to award it,[3] and the Pardon Clause of the US Constitution vests that power in the President.[4] From the time that George Washington first held that office until recently, Presidents have regularly exercised their clemency power.[5]

Clemency has become an important public policy issue over the last few years. One reason is that contemporary criticisms of the federal criminal justice system have largely focused on the punitive nature of federal criminal statutes that went on the books over the last five decades.[6] The federal drug laws have faced particular condemnation. By tying the length of an offender's sentence to the amount of the controlled substance he or his co-conspirators sold or

---

to federal offenses, but a few can grant relief only upon an affirmative recommendation from a state board. *See infra* note 62.

3. *See, e.g.*, CHRISTIN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922); ANDREW NOVAK, COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE (2015).

4. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."). Unless the context specifies otherwise, I will use the term "pardon" to refer to any form of clemency.

5. *See, e.g.*, Duker, *supra* note 2, at 511–16. *See generally* CROUCH, *supra* note 2; Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010) [hereinafter Love, *Pardon Twilight*]. Recently, Presidents have granted clemency either during the Christmas period or their last year in office. 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*]; P.S. Ruckman, Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUD. 21, 27 (2011) [hereinafter Ruckman, *Seasonal Clemency*] (both noting that a majority of presidential clemency grants over almost the preceding forty years have been in the month of December or in the last year of their term in office); *see also* Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 854–55 (2016) [hereinafter Larkin, *Revitalizing Clemency*].

6. *See generally, 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); MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

possessed, those statutes can impose sentences that run for decades or even life, regardless of the charged conduct.[7] Combined with an aggressive US Department of Justice policy toward drug-law enforcement, until recently those laws have contributed to a vast increase in the numbers of federal prisoners that, along with the increased state prison population, goes by the sobriquet of "mass incarceration."[8] Efforts to persuade Congress to soften the rigors of the drug laws so far have met only limited success.[9] As a result, individual prisoners, with the encouragement and assistance of advocates for criminal justice reform, have sought relief through the clemency process.

---

7. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841), became law 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 one hundred times less than the predicate amount of powdered cocaine. *See, e.g.*, Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241, 241–42 (2014) [hereinafter Larkin, *Crack Cocaine*].

8. *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). The qualifier "until recently" is important because the total number of federal state prisoners declined from 2014 to 2019. E. ANN CARLSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019 1 (2020) ("The imprisonment rate fell 3% from 2018 to 2019, and 17% from 2009 to 2019."); *id.* at 1–2 ("The total prison population in the U.S. declined from 1,464,400 at year-end 2018 to 1,430,800 at year-end 2019, a decrease of 33,600 prisoners. This was the largest absolute population decline since year-end 2015. The 2% decline in the prison population marked the fifth consecutive annual decrease of at least 1%. At year-end 2019, the prison population was the smallest since 2002 (1,440,100) and had declined 11% from its all-time peak of 1,615,500 prisoners in 2009."). The tide has turned.

9. In 2010, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.). That law amended the Anti-Drug Abuse Act of 1986 and reduced the 100:1 crack 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. Larkin, *Revitalizing Clemency*, *supra* note 5, at 886–87. Congress made the Fair Sentencing Act of 2010 retroactive in the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 519 (2018) (codified at 21 U.S.C. § 841). For an excellent discussion of the provenance of that law, see generally Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791 (2019).

The federal clemency process is not likely to lead them to the Promised Land, however, for three reasons. The first one is that, since 1980, only one President has found clemency a valuable tool for displaying mercy, softening individual punishments, or reformulating criminal justice priorities.[10] President Barack Obama was that exception. In his last two years in office, he commuted the sentences imposed on more than 1,700 drug offenders.[11] Obama's actions, however, were atypical. Neither his four immediate predecessors—Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush—nor his immediate successor—Donald Trump—used the clemency power to soften the rigors of the federal sentencing laws on anything other than a limited, episodic basis.[12]

---

10. This is a commonly voiced criticism. *See, e.g.*, Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 608 (2013). *See generally* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Larkin, *Revitalizing Clemency*, *supra* note 5; Love, *Pardon Twilight*, *supra* note 5.

11. *See* Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 835–38 (2017). In 2014, Obama directed the Justice Department to establish the Clemency Initiative 2014 to review commutation applications and forward cases to him where a sentence was unjust. Before he left office, Obama commuted the sentences of more than 1,700 prisoners. Some recipients left prison immediately; other prisoners are still in custody but are scheduled to leave prison earlier than their original sentence required. For descriptions of that initiative, see generally OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT'S CLEMENCY INITIATIVE (2018); U.S. SENT'G COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE CLEMENCY INITIATIVE 2014 (2017). Though well intentioned, President Obama went about the process in the wrong way. Rather than considering commutation petitions on a retail basis, Obama should have granted drug offenders a broad, amnesty-like commutation and let district courts decide what exact term of imprisonment each offender should serve. *See generally* 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); Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT'G REP. 267 (2017) [hereinafter Larkin, *Delegating Clemency*]. The Justice Department discontinued the Clemency Initiative 2017 when Donald Trump became President.

12. For statistics regarding the frequency of clemency grants by those Presidents, see OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CLEMENCY STATISTICS, https://www.justice.gov/pardon/clemency-statistics (Oct. 26, 2021).

The second explanation for clemency's desuetude is even more troubling. Historically, Presidents have relied heavily on the clemency recommendations of the US Department of Justice.[13] The Department, however, suffers from an actual or apparent conflict of interest because it successfully prosecuted every applicant and is unlikely to view clemency applications neutrally.[14] Yet, no recent President, not even Obama, has displayed any interest in reforming the federal clemency process.

There is also a third flaw in the current process, one that becomes apparent when the President receives a petition: the President has little guidance as to what he should do with it. I do not mean that clemency applications go directly from an offender to a President's desk without review by a host of advisors at the Justice Department and White House

13. Particularly the Pardon Attorney, who heads of the Office of Pardon Attorney, which manages the clemency recommendation process. For discussion of the operation of the federal clemency process, see Love, *Pardon Twilight*, *supra* note 5, at 1172–1204. *See generally* Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465 (2017) [hereinafter Osler, *Fewer Hands, More Mercy*].

14. *See, e.g.*, Rosenzweig, *supra* note 10, at 608 ("[P]rosecutors, relishing their discretion, are poorly positioned to second-guess their own exercise of that power through the mechanism of clemency," so "if you give the prosecutor broad authority to make decisions, you cannot be surprised when he is impressed with his own rectitude."). Numerous commentators have criticized the federal clemency process on that ground. *See, e.g.*, Barkow & Osler, *supra* note 10; Gregory Craig, Couns. 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; 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, 90 (2015) [hereinafter Love, *DOJ Conflict of Interest*]; Samuel Morison, *Saving Grace: Salvaging the Pardon Advisory System*, AM. CONST. SOC'Y BLOG (Dec. 12, 2011), http://www.acslaw.org/acsblog/saving-grace-salvaging-the-pardon-advisory-system. Aggravating that problem is that the Pardon Attorney reports to the Deputy Attorney General, who is responsible for managing all federal criminal prosecutions by the department or US Attorney's Office. *See* 28 U.S.C. §§ 506–507A (authorizing the President to appoint a deputy attorney general); *id*. § 5641 (authorizing the President to appoint a US Attorney for every judicial district, ninety-three in all).

Counsel's Office.[15] Numerous people—far too many, according to some critics[16]—have the opportunity to review, comment on, or, as a practical matter, torpedo a clemency application before the President sees it. No, the problem is that neither American law nor custom has defined an objective standard or approach that a President should use once a clemency petition lands on his desk *with* the advice of his lieutenants.

How should a President analyze clemency petitions? What evidence should he consider? What factors? Should he make a *gestalt* judgment based on the totality of the circumstances? Should he define necessary and sufficient conditions for clemency? Should he rank relevant factors in an ordinal manner? What weight should he give to the Justice Department's recommendations? Does it matter what supporters say, and who they are, or does that favor the wealthy and well connected? What about victims' opinions of the applicant's crimes? Should public opinion matter? What risk of making the wrong decision should the President be willing to bear (and in which direction)? I could multiply the questions, but there is no need. Any person worthy of being President should want to make right decisions, and a President with any quantum of humility (asking for a *normal* amount of humility from someone who becomes President would be an exercise in futility) should be willing to listen to advice. The goal of this Article is to offer some recommendations that Presidents would find useful.

Now is a propitious time for clemency reform. There has been little slack in the amount of criticism levelled at the

15. Of course, some Presidents, with the help of some government officials, have allowed applicants to bypass the established clemency process and submit applications directly to the President. Bill Clinton permitted applicants to end-run the Justice Department, and the pardons that he issued during his last days in office stand as an example of the mistakes that Presidents make when they allow that to happen. *See, e.g.*, Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1136–37 (2010).

16. *See generally* Osler, *Fewer Hands, More Mercy*, *supra* note 13.

number of people held in America's prisons. The President could use his clemency power to address that problem with regard to the federal prison population without the need for legislation, an undeniable benefit in a time of serious political polarization. There is a consensus that the clemency process needs repair, in part because several recent Presidents have granted relief in questionable cases.[17] A new administration began in 2021, offering the promise of a different approach to old problems that still need solving. Perhaps most important because of its recency is the widespread criticism that, throughout his time in office, former President Donald Trump used clemency to advance his own political interests[18] and, particularly during his final weeks in office, acted "[l]ike a Borgia pope trading indulgences as *quid pro quos* with his corrupt cardinals"[19] by

17. *See* Paul J. Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 HARV. J.L. & PUB. POL'Y 763, 764–65 n.3 (2021).

18. As one scholar put it, "'[o]ther presidents have occasionally issued abusive, self-serving pardons based on insider connections,' Harvard Law School professor Jack Goldsmith, who has tracked Trump's pardons and commutations, said via email. 'Almost all of Trump's pardons fit that pattern. What other presidents did exceptionally, Trump does as a matter of course.'" Michael Kranish, *Trump Vowed to Drain the Swamp. Then He Granted Clemency to Three Former Congressmen Convicted of Federal Crimes.*, WASH. POST (Dec. 23, 2020), https://www.washingtonpost.com/politics/trump-pardon-hunter-collins-stockman/2020/12/23/dc2ff8e0-4538-11eb-975c-d17b8815a66d_story.html; *see also, e.g.*, Rebecca Ballhaus & Byron Tau, *Trump Issues 26 More Pardons, Including to Paul Manafort, Roger Stone*, WALL ST. J. (Dec. 24, 2020, 12:10 AM), https://www.wsj.com/articles/trump-issues-26-more-pardons-including-to-paul-manafort-roger-stone-11608769926; Editorial Board, *Trump Corrupted the Presidential Pardon. Biden Must Repair It.*, N.Y. TIMES (Dec. 23, 2020), https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html; Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. TIMES (Dec. 24, 2020), https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html. Trump also granted clemency infrequently. JOHN GRAMLICH & KRISTEN BIALIK, PEW RSCH. CTR., SO FAR, TRUMP HAS GRANTED CLEMENCY LESS FREQUENTLY THAN ANY PRESIDENT IN MODERN HISTORY (2020). Together, those criticisms bring to mind the old joke about a restaurant's poor cuisine: the food doesn't taste very good, and the portions are too small.

19. Steven G. Calabresi & Norman L. Eisen, *The Problem with Trump's Odious Pardon of Steve Bannon*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/opinion/trump-bannon-pardon.html.

rewarding friends and loyalists.[20] Indeed, one commentator has recommended repealing the Pardon Clause via a constitutional amendment.[21]

President Joe Biden displayed interest in criminal justice reform during his years in the Senate, having shepherded through the Senate the Violent Crime Control and Law Enforcement Act of 1994.[22] He also took a step

---

20. *See, e.g.*, BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 116–25 (2020); Peter Baker, *For a Defeated President, Pardons Are an Expression of Grievance*, N.Y. TIMES (Dec. 24, 2020), https://www.nytimes.com/2020/12/24/us/politics/trump-pardon-power.html; David Cohen, *Sen. Toomey: Trump Going Too Far with Pardons*, POLITICO (Dec. 27, 2020, 9:30 AM), https://www.politico.com/news/2020/12/27/toomey-trump-pardons-450759; Editorial Board, *Trump's Pardons—Good, Bad, and Ugly*, WALL ST. J. (Jan. 20, 2021, 6:15 PM), https://www.wsj.com/articles/trumps-pardonsgood-bad-and-ugly-11611184527; Editorial Board, *Trump Corrupted the Presidential pardon. Biden Must Repair It.*, N.Y. TIMES (Dec. 23, 2020), https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html; Jack Goldsmith & Matt Gluck, *Trump's Circumvention of the Justice Department Clemency Process*, LAWFARE (Dec. 29, 2020, 1:49 PM), https://www.lawfareblog.com/trumps-circumvention-justice-department-clemency-process; Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. TIMES (Dec. 23, 2020), https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html; Annie Karni, *President Trump Grants Pardon to Conrad Black*, N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2019/05/15/us/politics/conrad-black-pardon.html; Michael Kranish, *Trump Vowed to Drain the Swamp. Then He Granted Clemency to Three Former Congressmen Convicted of Federal Crimes*. WASH. POST (Dec. 23, 2020), https://www.washingtonpost.com/politics/trump-pardon-hunter-collins-stockman/2020/12/23/dc2ff8e0-4538-11eb-975c-d17b8815a66d_story.html; Margaret Colgate Love, *Are Trump's Pardons a Blessing in Disguise?*, LAWFARE (Dec. 29, 2020, 5:17 PM), https://www.lawfareblog.com/are-trumps-pardons-blessing-disguise; Bernadette Meyler, *Trump's Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92, 94 (2020); Tim Naftali, *Trump's Pardons Make the Unimaginable Real*, ATLANTIC (Dec. 23, 2020), https://www.theatlantic.com/ideas/archive/2020/12/how-abuse-presidential-pardon/617473/; Frances Robles, *Outside Trump's Inner Circle, Odds Are Long for Getting Clemency*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/us/pardons-trump.html; Paul Rosenzweig, *Trump's Pardon of Manafort Is the Realization of the Founders' Fears*, ATLANTIC (Dec. 23, 2020), https://www.theatlantic.com/ideas/archive/2020/12/problem-pardons-was-clear-start/617397/.

21. Andrew C. McCarthy, *Repeal the Pardon Power*, NAT'L REV. (Jan. 7, 2021), https://www.nationalreview.com/magazine/2021/01/25/repeal-the-pardon-power/.

22. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended at

toward reform during his first week in office by directing the Attorney General not to re-sign contracts with private prisons[23] and does not lack for reform arguments and options to consider. He might be willing to rethink the entire subject.

To be sure, President Biden has not made clemency reform an immediate priority. Issues such as deciding on how to staff up his administration, how to deal with the Covid-19 pandemic, how to respond to the economic dislocation that it has caused, foreign policy issues, and related subjects have naturally occupied most of his attention to date. At some point, however, he will be under pressure from supporters interested in criminal justice reform to reduce the number of federal prisoners, and he can do so unilaterally by using his clemency authority. He could also remedy the flaws afflicting the clemency system in the hope that his new mechanism will endure after he leaves office. The result is that he will need to decide whether to reconsider the clemency process from scratch, as numerous commentators have argued, tinker around the edges of the system in place, or just stumble through in much the same manner as his predecessors.

Part I will summarize the current difficulty of making clemency decisions in an objective, even moderately rigorous manner, because the different potential sources from which

---

scattered sections of 12, 18 & 42 U.S.C.). Ironically, some commentators have criticized Biden for his role in seeing to the enactment of that law on the ground that it became "one of the cornerstone statutes that accelerated mass incarceration." Ed Chung et al., *The 1994 Crime Bill Continues to Undercut Justice Reform—Here's How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019), https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/; *see also, e.g.*, Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU BLOG (June 4, 2019, 2:30 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis. Biden has walked back from his earlier views. *See* Rafael A. Mangual, *Soft on Crime*, CITY J., Winter 2021, https://www.city-journal.org/biden-soft-on-crime.

23. Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14,006, 86 Fed. Reg. 7,483 (Jan. 29, 2021).

a President could seek advice unfortunately provide little assistance. Parts II and III set forth a decision-making process that the President can use. Part II addresses pardons. It proposes that the President use a decision-tree approach. The President should ask a series of questions when deciding whether to forgive a convicted defendant: Is he or she innocent, factually, legally, or morally (distinct but related concepts, as I will explain below)? Has he admitted his wrongdoing, atoned for any harms he caused, and undergone metanoia? Would pardoning him bring the criminal justice system into disrepute? Is there a "reason of state"—such as a foreign prisoner exchange—that justifies a pardon? Part III turns to commutations. Deciding whether to shorten a sentence, and, if so, by how much, is a very different inquiry from deciding whether to exonerate someone. With regard to commutations, the President should make decisions on a category-wide basis rather than a case-by-case basis. For example, he should decide whether to commute all capital sentences or all sentences of life without parole, rather than resentence each individual prisoner. Finally, Part IV addresses the issue whether the President should have an additional group that I will label "extraordinary cases"—viz., cases that fall outside of the questions and categories noted above but have some striking feature that justifies relief. I think that there should be such a category. The difficulty is keeping what should be only a narrow exception from swallowing the rest of the rule and leading to results that are, or appear to be, entirely arbitrary.

I. THE DIFFICULTY OF DECIDING WHEN TO GRANT CLEMENCY

A. *The Text of the Pardon Clause*

The Pardon Clause of Article II of the Constitution provides that "[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."[24] The simple text seems straightforward. Because the Framers knew English history and the common law,[25] the text strongly suggests the Framers intended to grant the President the same power that the Crown could exercise to temporarily stay the imposition of a punishment (a reprieve) or to completely excuse someone from all criminal responsibility (a pardon).[26]

---

24. U.S. CONST. art. II, § 2, cl. 1.

25. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) ("The colonists brought the principles of Magna Carta with them to the New World . . . ."); Kerry v. Din, 576 U.S. 86, 91 (2015) (plurality opinion) ("Edward Coke['s] Institutes 'were read in the American Colonies by virtually every student of law . . . .'" (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967)); Alden v. Maine, 527 U.S. 706, 715 (1999) (noting that Blackstone's "works constituted the preeminent authority on English law for the founding generation"); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31 (1992). That knowledge is particularly important in the case of the Pardon Clause. *See* 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.").

26. *See, e.g.*, 4 BLACKSTONE, *supra* note 2, at *397 ("[O]ne of the great advantages of monarchy in general[,] above any other form of government[, is] that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved . . . ."); *id*. 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."); COKE, *supra* note 2, at 233 (stating that 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"); *Ex parte* Garland, 71 U.S. 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

By expressly granting that power to the nation's chief executive, the Pardon Clause makes clemency a prerogative of the office[27] and protects it against restriction by the other branches (particularly Congress).[28] As the Supreme Court of the United States summarized in *United States v. Klein*, "To the executive alone is intrusted the power of pardon; and it is granted without limit."[29]

That description, however, is an overstatement.[30] The

---

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* Larkin, *Revitalizing Clemency*, *supra* note 5, at 846–47; *cf.* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 153 (2015) ("The absence of an explanation of the [commander-in-chief's] office's contours suggests that the Framers drew upon prevailing conceptions of what it meant to be a commander in chief.").

27. A prerogative, to John Locke's thinking, was "the Power of doing publick good without a Rule." JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT, § 166, at 396 (Peter Laslett ed., 1960) (1689).

28. *See, e.g.*, *Schick*, 419 U.S. at 266 ("[T]he power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."); *Ex parte* Garland, 71 U.S. at 380 ("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.").

29. 80 U.S. (13 Wall.) 128, 147 (1872); *see also, e.g.*, 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."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873) (1833) ("Congress cannot limit or impose restrictions on the President's power to pardon."); *cf.* Cavazos v. Smith, 565 U.S. 1, 9 (2011) (The Court, referring to a governor's clemency power, stated: "It 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.").

30. And an understatement. The President can commute a prisoner's sentence without pardoning his crime. *See, e.g.*, *Schick*, 419 U.S. at 260; Biddle v. Perovich, 274 U.S. 480, 487 (1927).

text of the Pardon Clause limits the President's authority in (at least) two ways. As a recognition of the federalist nature of our country, the clause allows the President to grant offenders relief only for federal offenses, leaving the states free to decide how to punish anyone who violates their own laws, including whether and when to grant someone clemency.[31] The President also cannot use his Pardon Clause power to prevent Congress from exercising its Article I authority to impeach and remove a federal official from office.[32] The President can keep an official out of jail, but he cannot leave him or her in power.

In addition, a few other constitutional provisions are relevant.[33] The Take Care Clause directs the President to

---

31. That exception enables a state to treat a pardoned federal crime as a prior conviction for purposes of a state recidivist statute even though a pardon absolves an offender from all federal liability. Carlesi v. New York, 233 U.S. 51, 59 (1914). The American colonies and states have always had a clemency power, which has been lodged, traditionally but not uniformly, in a chief executive. *See, e.g.*, GREENBERG, *supra* note 2, at 127–32; RANKIN, *supra* note 2, at 109–13; Duker, *supra* note 2, at 498–500. *See generally* JENSEN, *supra* note 3; WILLIAM WEST SMITHERS, A TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA (1909); CAROLYN STRANGE, DISCRETIONARY JUSTICE: PARDON AND PAROLE IN NEW YORK FROM THE REVOLUTION TO THE DEPRESSION (2016). For personal reflections on clemency decisions 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); Robert L. Ehrlich, Keynote Address, *Pardons and Commutations: Observations from the Front Lines*, 9 U. ST. THOMAS L.J. 669 (2012); Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971).

32. 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."); *id.* § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy and Office of honor, Trust, or Profit under the United States . . . .").

33. *See Schick*, 419 U.S. at 266 (noting that other constitutional provisions can limit the President's Pardon Clause authority); *cf.* Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing that the Constitution should be read holistically when construing recurrent or cognate terms in the Constitution in parallel or related provisions).

ensure that "the Laws [are] faithfully executed."[34] Recent scholarship argues that this clause imposes on the President fiduciary obligations, which require him to comply with all constitutional provisions in the federal criminal code.[35] At a minimum,[36] that responsibility forbids the President from using his clemency power to commit or cover up a crime.[37] The President also cannot remit a fine or forfeitures of funds that have been deposited into the federal treasury without

---

34. U.S. CONST. art. II, § 3.

35. *See generally* GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL'Y 463 (2019). *Cf.* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). As is common in public policy, not everyone agrees with that thesis. *See generally, e.g.*, Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020); John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on "*A Great Power of Attorney*": Understanding the Fiduciary Constitution* by Gary Lawson and Guy Seidman, 17 GEO. J.L. & PUB. POL'Y 407 (2019); Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL'Y 373 (2019); Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J.L. & PUB. POL'Y 441 (2019). That debate is interesting, but not important here.

36. The Take Care Clause might implicitly bar the President from granting pardons *prospectively*, at least on a large-scale basis. That is, he might not be able to immunize a category of people beforehand for committing a federal offense. Doing so might constitute a "suspension" of the federal criminal law that the Take Care Clause directs him to enforce and that only Congress can authorize. It is far from obvious, however, that the Take Care Clause forbids such "anticipatory" pardons. *See infra* note 108.

37. Congress could impeach and remove from office a President who sold commutations, and the Justice Department could prosecute him or her for doing so. *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 and Punishment, according to Law."); *cf*. United States v. Blanton, 719 F.2d 815, 819 nn.6–7 (6th Cir. 1983) (en banc) (prosecution of former Tennessee Governor Leonard Ray Blanton (and others) for mail and tax fraud in connection with the issuance of retail liquor licenses in which the voir dire revealed news reports that the governor had also sold pardons). *See generally* KEEL HUNT, COUP (2013).

statutory authorization, because the Appropriations Clause denies the President the right to treat the federal treasury as his own piggy bank.[38] Other constitutional provisions are relevant too. The First Amendment, for example, forbids the President from denying clemency to someone who otherwise deserves it simply because he or she belongs to a faith tradition different from his or her own.[39]

Otherwise, the Constitution does not constrain the President. He 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. He can also use it for no reason at all and might even be able to grant clemency for a reason we would find unjustified (at least if he keeps his mouth shut). In short, the Pardon Clause empowers the President to grant clemency as he sees fit. The problem is that it does not tell him when he should feel that way.[40]

---

38. U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequences of Appropriations made by law . . . ."); *see* Knote v. United States, 95 U.S. 149, 154–55 (1877); United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1869).

39. *See, e.g.*, 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."); Leib & Shugerman, *supra* note 35, at 470–71.

40. *See, e.g.*, 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."); Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 133 (2010) ("Executive clemency['s] . . . flexible and broad nature allows the president and state governors to pardon or commute sentences at will . . . ."); 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"); Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 282 (1993) [hereinafter Moore, *Good and Sufficient Reasons*] ("[T]he Framers provided no criteria for distinguishing between proper and improper uses of the pardoning power and put no

B. *Non-Textual Sources of Guidance*

If the President were to look elsewhere for guidance, he would find little.[41] The Supreme Court has discussed clemency on but a few occasions,[42] and its decisions do not say much that a President would find helpful. In *Herrera v. Collins*,[43] the Court described the pardon power as a "'fail safe' in our criminal justice system"—the "historic remedy for preventing miscarriages of justice where the judicial process has been exhausted" but a convicted defendant can prove his innocence.[44] Proof of innocence has always been the

constitutional limit on the president's use of that power, except to prohibit pardons in cases of impeachment."); Rosenzweig, *supra* note 10, at 597.

41. For a lengthy discussion of other potential sources, see Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451 (2020) [hereinafter Larkin, *Guiding Clemency*]. This section draws on that treatment.

42. The Pardon Clause has been the subject of relatively few Supreme Court decisions. For cases discussing issues arising in connection with presidential clemency, see, for example, *Harbison v. Bell*, 556 U.S. 180 (2009); *Schick v. Reed*, 419 U.S. 256 (1974); *Biddle v. Perovich*, 274 U.S. 480 (1927); *Ex parte Grossman*, 267 U.S. 87 (1925); *Burdick v. United States*, 236 U.S. 79 (1915); *Jenkins v. Collard*, 145 U.S. 546 (1892); *Hart v. United States*, 118 U.S. 62 (1886); *Young v. United States*, 97 U.S. 39 (1877); *Knote v. United States*, 95 U.S. 149 (1877); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869); *In re Armstrong's Foundry*, 73 U.S. (6 Wall.) 766 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855); *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833). For cases discussing issues arising in connection with gubernatorial clemency, see, for example, *Cavazos v. Smith*, 565 U.S. 1 (2011); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Herrera v. Collins*, 506 U.S. 390 (1993) (in the interest of full disclosure, I was one of the lawyers who represented the United States in *Herrera*); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Solesbee v. Balkcom*, 339 U.S. 9 (1950).

43. 506 U.S. 390 (1993).

44. *Id*. at 411–12, 415 (quoting KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)); *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

archetypical case of an injustice that clemency can and should rectify.[45] A case with irrefutable proof that the applicant is innocent—perhaps because newly discovered evidence, such as DNA test results, proves that someone else committed the crime—is an easy case for a pardon.[46]

Yet in *Herrera*, aside from the fact that defendant could not establish his own innocence,[47] the Court told the

clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.").

45. *See, e.g.*, *Herrera*, 506 U.S. at 411–12; U.S. DEP'T OF JUSTICE, 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 73 (1939); EDWIN MONTEFIORE BORCHARD, CONVICTING THE INNOCENT (2012) (1932).

46. Of course, that assumes a prisoner can obtain DNA evidence. A prisoner has no constitutional right to demand that the government subject evidence to DNA testing. *See* Dist. Att'y's Off. for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 74–75 (2009) (rejecting that claim). The well-known Innocence Project has obtained test results for some prisoners, see *infra* note 80, but its funds only go so far.

47. *Herrera*, 506 U.S. at 417–19. Leonel Herrera was convicted of murdering one police officer and pleaded guilty to murdering a second one. One night late in September 1981, Herrera was transporting marijuana by car. He came across and killed Texas Department of Public Safety Officer David Rucker on a stretch of highway about six miles east of Los Fresnos, Texas. Herrera sped away from the scene of the crime in the direction of Los Fresnos. Unaware of Herrera's first murder, Los Fresnos Police Officer Enrique Carrisalez saw Herrera speeding and, together with his partner, Officer Enrique Hernandez, stopped Herrera. Officer Carrisalez approach Herrera's vehicle while Officer Hernandez remained in the patrol car. As Officer Carrisalez approach Herrera, Herrera opened his door, exchanged a few words with Carrisalez, and then shot Carrisalez in the chest. Officer Hernandez witnessed the shooting from their patrol car and identified Herrera as the slayer. While hospitalized and before succumbing to his wound, Carrisalez gave a declaration that Herrera had shot him. There was also physical evidence tying Herrera to the murder. When arrested, Herrera had a handwritten letter on him strongly suggesting that he was responsible for killing Rucker. The car Herrera was driving was registered to his "live-in" girlfriend. Herrera's Social Security card was found alongside Rucker's patrol car. Blood matching Rucker's type (Type A) and differing from Herrera's (Type O) was found on Herrera's blue jeans and wallet. *Id.* at 393–95 & n.1. Eight years after his trial and in his second state habeas corpus petition, Herrera claimed that he was innocent. To support that claim, Herrera offered "the affidavits of Hector Villarreal, an attorney who had represented petitioner's brother, Raul Herrera, Sr., and of Juan Franco Palacious, one of Raul, Senior's former cellmates. Both individuals claimed that Raul, Senior, who died in 1984, had told them that he—and not [Herrera]—had killed Officers Rucker and Carrisalez." *Id.* at 396. Herrera never explained why he waited so long—and, in particular, until after

President very little about when he should grant clemency. Most cases that reach the Oval Office do not involve claims of innocence. Approximately 97 percent of federal defendants plead guilty,[48] which, legally speaking, is an admission of the factual elements of the crime.[49] Cases like *Herrera* would be outliers in the federal system. Instead, the petitioner ordinarily is someone who has completed his sentence and seeks forgiveness because he has admitted his crime, atoned for its harms, and turned his life around, or is a prisoner who asks only that the chief executive lighten the burden of his sentence.[50] *Herrera* says nothing about what a President should do in those cases: ones where the applicant is indisputably guilty but instead seeks forgiveness or mercy.

Biddle v. Perovich is the only other potentially helpful Supreme Court decision.[51] *Perovich* is helpful because it recharacterized clemency decisions from being an example of magisterial "grace," as Chief Justice John Marshall had once described it,[52] to a far more prosaic judgment that a court's

---

the allegedly responsible party had died—before offering his evidence of innocence. Herrera also never explained why, if he was innocent, he pleaded guilty to the murder of Officer Rucker. *Id.* at 417–19.

48. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012).

49. *See* Class v. United States, 138 S. Ct. 798, 804 (2018) ("The plea of guilty is, of course, a confession of all the facts charged in the indictment, and also of the evil intent imputed to the defendant." (citation omitted)); Menna v. New York, 423 U.S. 61, 62 n.2 (1975) ("[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.").

50. *See, e.g.*, Love, *Pardon Twilight*, *supra* note 5, at 1175–93, 1204–08.

51. 274 U.S. 480 (1927).

52. In the Court's first discussion of the Pardon Clause, Chief Justice John Marshall described an award of clemency as "an act of grace, proceeding from the power intrusted with the execution of the laws," *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833), a description that the Court has reiterated in more recent times, see, for example, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81 (1998) (plurality opinion). If that description of clemency were correct, then it would be the President's prerogative to decide when, to whom, and how to grant it, and no one could persuasively claim to be entitled to receive it. MOORE, *supra* note 44, at 282. Today, however, we disallow the federal government, including the President, from discriminating against individuals on certain grounds, such as race, religion, political affiliation, and the like. The *Wilson* characterization is

judgment or punishment was unnecessary or excessive. As Justice Oliver Wendell Holmes explained, a pardon is "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."[53] That is why, as the Court held in *Perovich*, an offender cannot refuse a commutation: it is not a gift he can decline.[54] Holmes's description, however, identifies the justification for clemency or a description of what it entails, not a prerequisite for its grant. *Perovich* states the issue posed by every clemency petition, but it does not help the President decide whether he serves the public by granting clemency to *this* applicant. An exhortation to serve the public is little better than nothing at all.

The Supreme Court's other Pardon Clause decisions do not assist a President make individual clemency judgments. The Court has avoided identifying a useful standard for clemency decision-making on the ground that it is beyond the proper role for federal courts.[55] Instead, the Court has limited itself to using extraordinarily expansive terms to describe the President's Pardon Clause authority. For example, *United States v. Klein* described the President's pardon power as being "without limit,"[56] but, as I have explained, that description is incorrect.[57] The Court's 1974 decision in *Schick v. Reed* stated that the President's clemency power "flows from the Constitution alone, not from

---

therefore archaic.

53. Biddle v. Perovich, 274 U.S. 480, 486 (1927).

54. *Perovich* involved a commutation, not a pardon, but the Court's rationale applies to all forms of clemency.

55. *See* Cavazos v. Smith, 565 U.S. 1, 8–9 (2011) (describing clemency (in a state case) as "a prerogative granted to executive authorities to help ensure that justice is tempered by mercy" and noting that "[i]t is not for the Judicial Branch to determine the standards for this discretion.").

56. 80 U.S. (13 Wall.) 128, 148 (1872). The Court's description in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867), of the pardon power as being "unlimited," suffers from the same flaws.

57. *Supra* text accompanying notes 29–39.

any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."[58] Descriptions like those are useful if the issue is whether Congress or the courts have trespassed on the President's authority. They are not helpful to a President trying to decide whether a particular John or Jane Doe should receive relief.

Now we turn to history and tradition. Clemency is the law's version of mercy, and it has a history almost as old.[59] The English Crown has regularly exercised that power since the days of the early kings,[60] and they handed the power off to colonial governors in America.[61] The states have had a clemency power since their origin (although they disagreed

58. 419 U.S. 256, 266 (1974).

59. *See, e.g.*, *Genesis* 4:11–16 (describing the Mark of Cain); *Matthew* 27:15–23 (describing Pontius Pilate's decision to pardon Barabbas during Passover); William W. Smithers, *The Use of the Pardoning Power*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 62 (1914) (The clemency power "has never been overlooked . . . since the dawn of history."). The Code of Hammurabi in Mesopotamia, one of the earliest legal codes, has a provision for clemency. CROUCH, *supra* note 2, at 10–11. Greek and Roman rulers, as well as the earliest English, Scottish, and Irish kings, exercised that power. For discussions of clemency in the days of the Greek and Roman Empires, see generally KONSTAN, *supra* note 2; DOWLING, *supra* note 2; GRISWOLD, *supra* note 2; Lanni, *supra* note 2. For a discussion of clemency in the pre- and early common law days of England, see KELHAM, *supra* note 2, at 63–65, 86, 88. *See generally* HURNAND, *supra* note 2; ROBERTSON, *supra* note 2.

60. *See, e.g.*, 4 BLACKSTONE, *supra* note 2, at *397; COKE, *supra* note 2, at 233; J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 430–449 (1986); J.H. Baker, *Criminal Courts and Procedure at Common Law*, *in* CRIME IN ENGLAND, 1550–1800, at 44–45 (J.S. Cockburn ed., 1977); J.A. SHARPE, CRIME IN EARLY MODERN ENGLAND, 1550–1750, at 68, 145 (1984). *See generally* HEWITT, *supra* note 2; KESSELRING, *supra* note 2; LACEY, *supra* note 2; C.H. ROLPH, THE QUEEN'S PARDON (1978); Grupp, *supra* note 2; McSweeney, *supra* note 2.

61. *See generally* Duker, *supra* note 2. 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. 7 FRANCIS NEWTON THORPE, 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 3800–01 (2016) (1909). The Crown delegated similar authority to the proprietor, the chief executive official, or the royal governor in the other colonies. GREENBERG, *supra* note 2, at 127–32; RANKIN, *supra* note 2, at 109–13; Duker, *supra* note 2, at 498–500.

over which branch of government should possess it).[62] As noted above, the Framers vested that power in the President,[63] and, beginning with George Washington,

---

62. *See, e.g.*, *In re* Flournoy, 1 Ga. 606, 607 (1846); State v. Alexander, 76 N.C. 231, 231 (1877); Diehl v. Rodgers, 32 A. 424, 426 (Pa. 1895); JENSEN, *supra* note 3; STRANGE, *supra* note 31; SMITHERS, *supra* note 31. After the Revolution, state legislatures often shared the clemency power with governors or controlled its exercise. 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. Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1505–06 (2000).

63. Clemency was the subject of little discussion at the Convention of 1787. Duker, *supra* note 2, at 501–06; *see also Ex parte* Grossman, 267 U.S. 87, 112 (1925); 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). The Framers agreed that the new nation required a chief executive officer, and both basic models—the Virginia Plan and the New Jersey Plan—created one. Neither plan, however, vested that executive with clemency authority. Alexander Hamilton and John Rutledge proposed adding a provision granting the chief executive pardon authority. 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 the Congress from removing a government official from office. The Convention accepted their proposal. Once it had accepted the Hamilton-Rutledge proposal, the Convention spent little time debating the pardon authority. Duker, *supra* note 2, at 501–06. 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. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419 (Max Farrand ed., 1911) [hereinafter FARRAND]. George Mason opposed Sherman's proposal on the ground that the Senate already would enjoy excessive authority. *Id.* Edmund Randolph would have exempted treason from the category of pardonable offenses. *Id.* at 626. James Iredell opposed the exemption for two reasons: the exemption did not exist under English law, and the likelihood of the President committing treason was "very slight." PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351–52 (Paul Leicester Ford ed., 2012) (1968)); *see* Duker, *supra* note 2, at 502–04. The Convention rejected each proposal. *See* 2 FARRAND, *supra*, at 419, 626. Luther Martin sought to make the pardon power a purely post-conviction remedy. Martin withdrew his proposal once James Wilson pointed out that a pre-trial pardon might be necessary to secure the testimony of accomplices. Duker, *supra* note 2, at 501–02.

The Pardon Clause also occasioned little discussion at the state ratifying conventions. *Id.* at 505; *see also, e.g.*, THE FEDERALIST No. 74, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."); 4 BLACKSTONE, *supra* note 2, at *401 ("[T]he king may

Presidents until recently used it often.[64]

Nonetheless, no sitting or former President has created a useful set of principles, or even a "go-by," for his own use or for successors.[65] Our fifth President adopted the Monroe Doctrine, Abraham Lincoln issued the Emancipation Proclamation, and Woodrow Wilson had his Fourteen Points, but no President has seen fit to offer a comprehensive and objective approach to clemency. Presidents have granted clemency for good reasons—such as distrust in the accuracy of a conviction, belief that a sentence is too punitive, and the need to reward exemplary conduct—as well as some bad ones—such as payback to cronies.[66] Even William Howard

---

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.").

64. *See, e.g.*, CROUCH, *supra* note 2, at 40–45, 55–56; Duker, *supra* note 2, at 511–16; Love, *Pardon Twilight*, *supra* note 5; Ruckman, *21st Century*, *supra* note 5, at 470; Ruckman, *Seasonal Clemency*, *supra* note 5, at 27; *see also* Larkin, *Revitalizing Clemency*, *supra* note 5, at 854–55.

65. One made, at best, a passing effort. *See infra* note 67.

66. Some Presidents have abused their authority. Bill Clinton was twice guilty of that offense. He offered conditional commutations to members of a Puerto Rican terrorist group very possibly to persuade the Puerto Rican community to vote for his wife Hillary, who was campaigning for the US Senate, and for Vice President Al Gore, who was running for President. *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. REV. 1483, 1484 (2000) [hereinafter Love, *Merciful*]. 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." Larkin, *Revitalizing Clemency*, *supra* note 5, at 881. Oftentimes, clemency recipients had White House connections or had contributed to the President's party or Presidential library. One recipient, Marc Rich, was a fugitive from justice. *See* Alschuler, *supra*, note 15, at 1168 ("In 1215, the Magna Carta declared, 'To no one will we sell, to none will we deny or delay, right or justice.' In the administration of President Bill Clinton, the charter's pledge was broken." (footnote omitted)); Love, *Pardon Twilight*, *supra* note 5. Other Presidents have come under fire as well. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 24 (2012) ("Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-Presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich."); Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUSTON L. REV. 883, 883–87 (1992) (criticizing George H.W. Bush's Iran-Contra pardons); Jeffrey Crouch, *Presidential Misuse of the Pardon Power*, 38 PRESIDENTIAL STUD. Q. 722, 722, 731 (2008) (criticizing George

Taft—who was the 27th President before he became the 10th Chief Justice and therefore had a unique perspective on clemency—never offered a useful approach. He just repeated what Justice Holmes wrote in *Perovich*, which was not helpful.[67]

Moreover, although Presidents rely on the Justice Department's advice in individual cases, Presidents have not directed the Justice Department to devise a recommended decision-making process. The Office of the Pardon Attorney (OPA) has drafted standards for its use in making pardon and commutation decisions, and those standards identify a variety of factors relevant to any clemency decision.[68] Nonetheless, the OPA standards do not focus the President's judgment in the same manner as a decision tree would. The standards leave the President with the burden of making a totality of the circumstance's judgment. Some current or former Justice Department officials involved in the clemency process have offered their opinions on general principles that Presidents should use.[69] General principles are a good

H.W. Bush's Iran-Contra pardons, Clinton's "midnight pardons," and President George W. Bush's commutation of the sentence imposed on Scooter Libby); James N. Jorgensen, *Federal Executive Clemency Power: The President 's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 345–46 (1993) (criticizing George H.W. Bush's Iran-Contra pardons). Trump might have set a new, higher bar for abuse. *See supra* notes 18–20 and accompanying text.

67. *See Ex parte* Grossman, 267 U.S. 87, 121 (1925) (Taft, C.J.) ("Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 121 (2011) (1925) ("The only rule that he [viz., the President] can follow is that he shall not exercise it against the public interest.").

68. *See* JUSTICE MANUAL tit. 9, § 9-140.112 (Apr. 2018).

69. *See, e.g.*, U.S. DEP'T OF JUSTICE, 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDONS (1939); Charles J. Bonaparte, *The Pardoning Power*, 19 YALE L.J. 603 (1910) (former US Attorney General); Margaret Colgate Love, *Reinventing President's Pardon Power*, 20 FED. SENT'G REP. 5, 5 (2007) [hereinafter Love, *Reinventing Pardons*] (former Pardon Attorney); Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 1 (2005) (Attorney-Advisor within the Office of the Pardon Attorney at time of publication); *cf.* Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. Rev. 327, 327 (1992) (former counsel to California Governor Pete Wilson at publication, and now a former federal judge).

starting point, but when it comes to considering specific cases, they are not a helpful decision-making tool.

Does legal scholarship offer the President much assistance? Again, the answer is, "No." Most recent scholarship has focused on the structure of the clemency process or the hurdles that applicants must overcome to obtain relief.[70] Some scholars have addressed the substantive aspects of clemency and, for example, have urged the President to be more merciful in his decisions than the occupants of the White House have been over the last 40 years.[71] Even scholars, however, have not proposed an

---

70. *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW §§ 10.3.4–10.3.5, at 810–17 (1978); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89 (2002). *See generally* MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (2019) [hereinafter MINOW, LAW'S FORGIVENESS]; 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); David Dolinko, *Some Naive 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. ON 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*, 2 OHIO ST. J. CRIM. L. 165 (2004); 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 36 (Austin Sarat & Nasser Hussain eds., 2006); Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485 (1984) (reviewing NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982)); Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455 (2007); Carol S. Steiker, *Murphy on Mercy: A Prudential Reconsideration*, 27 CRIM. JUST. ETHICS, No. 2, Summer/Fall 2008, at 45; Carol Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, *in* Sarat & Hussain, *supra*, at 16, 23; *see also supra* note 14 (collecting authorities criticizing the Justice Department's role in the clemency process).

71. *See generally* 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); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303 (2000). Kathleen Dean Moore's works are particularly thoughtful. *See, e.g.*, MOORE, *supra* note 44; Moore, *Good and Sufficient Reasons*, *supra* note 40.

objective decision-making approach, let alone anything similar to what the US Sentencing Commission developed to implement the Sentencing Reform Act of 1984:[72] a grid combining aggravating and mitigating factors of an offense with the criminal history of the offender to generate a range of months of imprisonment.[73]

Another possibility is scholarship in the field of moral philosophy. Western religion, ethics, literature, art, music, and philosophy have celebrated and treasured the virtue of mercy.[74] Scholars and artists have discussed the meaning of

---

72. 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).

73. *See* U.S. SENT'G COMM'N, SENTENCING GUIDELINES 407 (2018) (Sentencing Table). Initially mandatory, the Sentencing Guidelines are now merely advisory. *See* United States v. Booker, 543 U.S. 220, 246 (2005).

74. For religion and ethics, see, for example, *Matthew* 5:7 (the Beatitudes: "Blessed are the merciful: for they shall obtain mercy."); *John* 8:2–11 ("'Neither do I condemn thee: go, and sin no more.'"); ANTHONY BASH, FORGIVENESS AND CHRISTIAN ETHICS (2010); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998) [hereinafter MINOW, VENGEANCE AND FORGIVENESS]; GEIKO MULLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION (1997); REINHOLD NIEBUHR, JUSTICE AND MERCY (1974). For literature, see, for example, WILLIAM LANGLAND, PIERS PLOWMAN (Oxford World's Classics Reissue ed. 2009) (1367–70); John Milton, *Paradise Lost*, Bk. X, in THE COMPLETE POEMS (Penguin Classics ed. 1999); WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2; WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1. For art, see, for example, Rembrandt, *The Return of the Prodigal Son* (c. 1661–1669); Peter Paul Rubens, *Daniel in the Lions' Den* (c. 1614–1616). For music, listen to Lin Manuel Miranda, *It's Quiet Uptown*, YOUTUBE (Feb. 20, 2017), https://www.youtube.com/watch?v=vjEoOeXId1k (from the musical *Hamilton*). For moral philosophy, see, for example, CHARLES L. GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION (2d ed. 2007); CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT (2001); 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); Lucy Allais, *Wiping the Slate Clean*, 36 PHIL. & PUB. AFFS. 33 (2008); Joseph Beatty, *Forgiveness*, 7 AM. PHIL. Q. 246 (1970); Christopher Bennett, *The Limits of Mercy*, 17 RATIO 1 (2004); 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);

concepts such as "justice," "mercy," "forgiveness," "leniency," "charity," and "metanoia," as well as the interrelationship among them, such as the sometimes competing, sometimes complementary relationships between "justice and mercy" or "forgiveness and clemency."[75] Unfortunately, most of the discussion of those concepts takes place at the 30,000-foot level and would not help a President make decisions in individual cases.

C. *The Need for an Objective Approach*

Where does that leave us? The text of the Pardon Clause gives little guidance on how the President should exercise the authority it confers. The other traditional, potential

---

R.A. Duff, *Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS 51 (1990) (reviewing JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988) and MOORE, *supra* note 44); Jon Elster, *Norms of Revenge*, 100 ETHICS 862 (1990); Alan P. Hamlin, *Rational Revenge*, 101 ETHICS 374 (1991); Donald Clark Hodges, *Punishment*, 18 PHIL. & PHENOMENOLOGICAL RSCH. 209 (1957); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RSCH. 281 (1985); H.J.N. Horsbrugh, *Forgiveness*, 4 CAN. J. PHIL. 269 (1974); Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109 (1991); Stephen Kershnar, *Mercy, Retributivism, and Harsh Punishment*, 14 INT'L J. APPLIED PHIL. 209 (2000); John Kleinig, *Mercy and Justice*, 44 PHILOSOPHY 341 (1969); Ned Markosian, *Two Puzzles About Mercy*, 63 PHIL. Q. 269 (2013); William Neblett, *The Ethics of Guilt*, 71 J. PHIL. 652 (1974); 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. 352 (1971); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004); James Sterba, *Can a Person Deserve Mercy?*, 10 J. SOC. PHIL. 11 (1979); Nigel Walker, *The Quiddity of Mercy*, 70 PHILOSOPHY 27 (1995).

75. *See, e.g.*, Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 188 (1972); Alwynne Smart, *Mercy*, 43 PHIL. 345, 348 (1968). *See generally, e.g.*, JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988) [hereinafter MURPHY & HAMPTON]; FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Penguin Classics 2014) (1887); Douglas N. Husak, *"Already Punished Enough,"* 18 PHIL. TOPICS 79 (1990); Nicola Lacey & Hanna Pickard, *To Blame or Forgive? Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. LEGAL STUD. 665 (2015); Paul Lauritzen, *Forgiveness: Moral Prerogative or Religious Duty?*, 15 J. RELIGIOUS ETHICS 141 (1987); P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1976).

sources of guidance also do not give a President the specificity he needs. The question is what approach, if any, should guide and focus a President's decision-making.

Pardons and commutations differ greatly from each other. Pardons raise definitional issues and epistemological problems. What does it mean to be "innocent"? Is that merely a factual matter (for example, the offender was in Miami when the car was stolen in Pittsburgh)? Can it also be legal (for example, he was convicted of a crime that is not a legally chargeable offense because the underlying statute is unconstitutional or his conduct is no longer a crime due to an intervening, retroactive change in the law)? Can innocence also be moral (for example, he was convicted of a crime requiring only proof of negligence or of a strict liability offense, one requiring no proof of any intent to break the law or commit harm)? Commutations, by contrast, start from the premise that the offender is guilty; the question is whether his punishment is unduly severe. The result is that commutation petitions raise line-drawing problems. When is enough, enough? Where exactly to draw the line between a reasonable and unreasonable punishment is a difficult question to answer, and reasonable people can greatly disagree over where that line should be.

I propose separate and different approaches for pardon and commutation decisions. Neither approach relies on a "totality of the circumstances" standard. In the case of pardons, on a petitioner-by-petitioner basis, the President should ask the following questions: *First*, is the petitioner innocent? *Second*, if not, was the offense(s) of conviction an isolated act or episode in an otherwise law-abiding life? *Third*, if so, has the offender admitted his guilt, atoned for his conduct and its harms, and reformed his errant ways? *Fourth*, if so, would a pardon bring the criminal justice system into disrepute? *Fifth*, regardless of the answer to the first four questions, is there a statecraft justification for a pardon, such as the need to end a rebellion, restore social order, or heal a nation's wounds? That proposed approach for

the case of pardons differs materially from the one that works best in the case of commutations, which I explain in Part III. There, I recommend that the President use a category-wide approach in connection with commutation decisions, rather than make case-by-case judgments. He should decide what maximum punishment is permissible for particular categories of offenses and should not take up the business of resentencing individual offenders. But first up is the recommended approach for pardons.

II. AN ALTERNATIVE APPROACH TO PARDON DECISION-MAKING: A QUESTION-BASED APPROACH

A. *Is the Applicant Innocent?*

When a President or governor pardons someone on the ground that he was wrongfully convicted, the traditional explanation is that the clemency recipient was factually innocent of the crime. That situation is often called the classic "miscarriage of justice."[76] Yet, the question whether someone is "innocent" has more than one answer to it.[77] There are three aspects to that concept, and they raise distinct issues.

---

76. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 415 (1993) ("Executive clemency has provided the 'fail safe' in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." (citation omitted) (quoting MOORE, *supra* note 44, at 131)).

77. In the ordinary case, someone seeking a pardon on innocence grounds has already been convicted, so the presumption of innocence is long gone, and the burden is on the applicant to establish that fact. *Herrera*, 506 U.S. at 399–400 ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. . . . Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law of two brutal murders." (citation omitted)).

1. Factual Innocence

The first question is an obvious one. The government may not criminally punish someone unless and until it proves his guilt beyond a reasonable doubt.[78] The criminal justice system has adopted numerous procedural safeguards against the prospect of convicting the innocent,[79] but no system this side of the River Styx is perfect. For example, a post-trial DNA test result might prove that the defendant was not the offender.[80] A critical prosecution eyewitness may recant his in-trial identification of the defendant.[81] The government might not have disclosed exculpatory evidence to the defendant before the trial finished.[82] Or evidence can prove that a suspect falsely confessed.[83] A person who was in Salt Lake City when a bank was robbed in New York City is factually innocent of that crime.[84] Clemency has been "the historic remedy"—the "fail safe"—to prevent "miscarriages of justice," and the conviction of an innocent person is the

78. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991); *In re* Winship, 397 U.S. 358, 361 (1970).

79. *See, e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 5, at 857–62.

80. The Innocence Project has used DNA evidence to prove that numerous offenders were wrongly convicted. *See, e.g.*, BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 160–62 (2003).

81. Scholars have argued that eyewitness identifications are far less reliable than the average person believes. *See, e.g.*, Laura Engelhardt, *The Problem with Eyewitness Testimony*, Commentary, 1 STAN. J. LEGAL STUD. 25, 29 (1999). *See generally* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996).

82. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 675, 694 (2004); Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order at 1, *In Re* Special Proc., 842 F. Supp. 2d 232 (2012) (No. 09-0198), 2012 WL 858523.

83. That counterintuitive result happens more often than the average person knows. *See, e.g.*, Adam Cohen, *Why Innocent Men Make False Confessions*, TIME (Feb. 11, 2013), http://ideas.time.com/2013/02/11/why-innocent-men-make-false-confessions [https://perma.cc/J3BP-WF3L]; Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty [https://perma.cc/9F8B-K9R3].

84. Assuming that he had no involvement in the planning the crime or aiding in its commission.

archetypical example.[85] Presidents should readily pardon anyone who can make that showing.

It is not always the case, however, that a clemency applicant can *prove* his innocence. It could be that he can only raise a reasonable doubt as to his guilt. Maybe he can show only that the process was corrupted by the prosecution's reliance on a jailhouse snitch whose veracity and reliability are dubious at best.[86] Perhaps he can demonstrate that the plea bargaining process effectively coerced him to plead guilty to avoid continued pretrial incarceration, to avoid the risk of an unduly punitive mandatory minimum sentence after conviction, or to avoid seeing a family member charged with a crime.[87] In other words, a President will need to decide what degree of confidence he will demand that only factually guilty offenders will be convicted. That is a critical function of the

---

85. Herrera v. Collins, 506 U.S. 390, 415 (1993); MOORE, *supra* note 44, at 131.

86. *See, e.g.*, ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 60 (2009).

87. *See generally, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); LYNCH, *supra* note 6; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); John C. Coffee, Jr., "*Twisting Slowly in the Wind": A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, 226 ("In some cases, 'non-zero-sum' bargaining . . . provides a considerable risk of truth distortion. . . . Since this pretrial time must be credited against the sentence imposed, an innocent defendant may find that he has already served his sentence and can obtain virtual immediate release by pleading guilty. In contrast, a protestation of innocence may result in continued pretrial confinement. In this 'Catch-22' world in which confession leads to release more quickly than does innocence, the prosecutor has the same leverage over the innocent as he does over the guilty." (citations omitted)); *id.* at 227–28 (noting "the not infrequent case where the prosecutor threatens to prosecute relatives or the spouse of a defendant if the defendant does not cooperate and/or plead guilty. Here, because the injury to his relatives may be perceived by the defendant as a more serious loss than his own conviction, the pressure can be sufficiently truth distorting to result in a plea of guilty even when the probability of conviction is relatively low. . . . When the prosecutor threatens either an enhanced penalty or the indictment of others who are of concern to the defendant, he is raising the cost of trial, and this can be truth distorting." (citation omitted)).

clemency process, because it allows the President to "set the tone" for federal criminal prosecutions and, by example and moral suasion, offer governors a standard that they also should use.[88]

2. Legal Innocence

The above hypothetical is an example of "factual" innocence: the prisoner did not commit the physical acts necessary to commit the crime of robbery.[89] That category, however, is not exhaustive. There also are instances in which a person can be "legally" innocent of a crime. He might have committed all of the acts necessary to break the law, along with the intent to do just that, but would be legally innocent nonetheless.

How would that be possible? In at least two ways it could. Perhaps the circuit courts of appeals have read a criminal statute more broadly than its text permits, and the Supreme Court does not correct their error before a defendant is convicted under what turns out to be a mistaken interpretation of the law.[90] Given the limited number of federal cases that the Supreme Court reviews each year, there is a risk that an erroneous interpretation could prevail for years before the Court corrects it. In fact, given the number of instances over the past few decades in which the Court has rejected the Justice Department's unduly aggressive construction of various federal criminal laws, there is far more than a mere "risk" that some people have

88. Obama, *supra* note 11, at 812 ("Presidencies can exert substantial influence over the direction of the U.S. criminal justice system. Those privileged to serve as President and in senior roles in the executive branch have an obligation to use that influence to enhance the fairness and effectiveness of the justice system at all phases.").

89. For Latin fans, the term is "*actus reus*." WAYNE R. LAFAVE, CRIMINAL LAW (5th ed. 2010).

90. *See, e.g.*, Bailey v. United States, 516 U.S. 137, 143 (1995) (rejecting view of every regional circuit as to the issue whether mere "possession" can ever amount to the "use" of a firearm).

been found guilty of conduct that was not a crime.[91]

Or perhaps the statute creating the offense is unconstitutional.[92] A classic example would be someone convicted under an unconstitutionally vague statute—that is, a law whose contours are so indecipherable that no reasonable person would have known what precise conduct is forbidden.[93] For example, people who speak loudly while using cell phones in confined places (such as elevators, buses, and subways) are, to use the vernacular, "annoying," but the legislature cannot make it a crime to "annoy" someone else because that term is too nebulous to afford adequate notice

---

91. *See, e.g.*, Kelly v. United States, 140 S. Ct. 1565, 1574 (2020); Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019); McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016); Bond v. United States, 572 U.S. 844, 866 (2014); Skilling v. United States, 561 U.S. 358, 411 (2010); Cleveland v. United States, 531 U.S. 12, 26–27 (2000); Jones v. United States, 529 U.S. 848, 857 (2000); United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 411, 414 (1999); McNally v. United States, 483 U.S. 350, 358 n.8, 360 (1987).

92. The concept of legal innocence follows logically from three settled doctrines. One is the "Rule of Legality," the principle that no one can be convicted of committing a crime without a pre-existing law prohibiting that conduct. *See generally, e.g.*, Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937). The second principle is that an unconstitutional statute has no legal effect and therefore cannot justify a criminal conviction or punishment. Norton v. Shelby Cnty., 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *see, e.g.*, Johnson v. United States, 576 U.S. 591, 603 (2015). The third principle is that the Ex Post Facto Clauses prohibit new criminal laws from being applied retroactively. *See* U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

93. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2323 (2019) ("In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."). *See generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PENN. L. REV. 67 (1960).

of what is forbidden.[94] Those people have clearly done what social mores deem irritating, but the law does not allow them to be convicted of that crime, so they are legally innocent. A President could pardon anyone convicted of such a crime even if he had pleaded guilty to it or the courts had rejected his vagueness claim.[95]

3. Moral Innocence

The third category would be cases in which the petitioner was "morally" innocent. That conclusion would be appropriate in two situations. The first one is the scenario described by the Reverend Martin Luther King, Jr., in his 1963 *Letter from a Birmingham Jail*: namely, conviction of someone under a morally unjust law, "a code that is out of harmony with the moral law."[96] Fortunately, the racial

---

94. *See* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (holding that the term "annoying" in a criminal law is unconstitutionally vague). Closely related is the situation in which a court adopts an unforeseeably broad interpretation of a criminal law. The text of a statute may be clear, but if the courts interpret it in an unforeseeable manner, the result is not materially different from a case where the statute is unduly vague. In each case, the law winds up reaching conduct that no reasonable person would have thought was a crime. *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.").

95. A person can be "legally" innocent even if he pleaded guilty. A guilty plea ordinarily concedes the facts charged against a defendant, but not the constitutionality of the government's effort to bring a criminal prosecution. *See* Class v. United States, 138 S. Ct. 798, 805 (2018) (ruling that a guilty plea does not bar a defendant from challenging the constitutionality of the underlying statute creating the offense of conviction); Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (ruling that a guilty plea does not waive a Double Jeopardy Clause claim raising the claim that "the charge is one which the State may not constitutionally prosecute"); *cf.* Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion) (holding that the rule against retroactive application of new constitutional decisions on federal habeas corpus would not apply if the new decision "places certain types of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" (citation and internal punctuation omitted)).

96. As King explained it in his letter:

One may well ask, "how can you advocate breaking some laws and obeying

segregation against which he protested is no longer an explicit part of the nation's codes. Yet there is another

---

others?" The answer is found in the fact that there are two types of laws: There are just and there are unjust laws. I would be the first to advocate obeying just laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority. To use the words of Martin Buber, the great Jewish philosopher, segregation substitutes an "I-it" relationship for the "I-thou" relationship, and ends up relegating persons to the status of things. So segregation is not only politically, economically and sociologically unsound, but it is morally wrong and sinful. Paul Tillich has said that sin is separation. Isn't segregation an existential expression of man's tragic separation, an expression of his awful estrangement, his terrible sinfulness? So I can urge men to disobey segregation ordinances because they are morally wrong.

Let us turn to a more concrete example of just and unjust laws. An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote. Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters and there are some counties without a single Negro registered to vote despite the fact that the Negro constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?

. . . .

We can never forget that everything Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. But I am sure that if I had lived in Germany at the time I would have aided and comforted my Jewish brothers even though it was illegal. If I lived in a communist country today where certain principles dear to the Christian faith are suppressed, I would openly advocate disobeying these anti-religious laws.

MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail*, STANFORD UNIV. RSCH. & EDUC. INST., http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf (last viewed Jan. 22, 2021).

category of crimes that is out of step with the historic Anglo-American division between moral and immoral conduct: strict liability offenses.

Strict liability offenses outlaw an act without requiring proof of any accompanying mental state, let alone the type of mental state that the law has historically used to identify parties who are morally blameworthy or "evil." Historically, the criminal law required the government to prove that someone acted with a "guilty mind" or "evil intent" to prevent someone morally blameless from being convicted.[97] "*Actus non facit reum nisi mens sit rea*" means that a crime consists of "a vicious will" and "an unlawful act consequent upon such vicious will."[98] For example, mistakenly taking someone else's umbrella rather than your own does not make you a thief. For theft, the government must prove that you intended to permanently deprive someone else of his property.[99] A mistake of fact as to your ownership of the umbrella is a complete defense.

Beginning in the nineteenth century, legislatures decided to use the criminal law to police potentially harmful business activities.[100] At first, strict liability offenses were

---

97. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250–52 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." (footnotes omitted)).

98. *See* Francis Bowes Sayre, *Mens Rea*, 45 HARV L. REV. 974, 974 (1932). In most cases moral, legal, and factual guilt entirely overlap. Someone who commits a crime that has existed since the common law—murder, rape, robbery, and a few others—committed the prohibited acts with an "evil intent." LAFAVE, *supra* note 89.

99. *See, e.g.*, *Morissette*, 342 U.S. at 260–61 ("State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses." (footnote omitted)).

100. *See, e.g.*, Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and*

few in number, minor in nature, and punishable by no more than a fine. Today, however, there are numerous strict liability statutes, to say nothing of implementing agency regulations, many of them which expose an unwitting offender to imprisonment. Known as "public welfare offenses" or "strict liability crimes," those statutes use the criminal law to regulate conduct that has become of concern since the advent of the Industrial Revolution, the growth of urbanization, and the interdependence characteristic of modern-day life.[101] Criminal justice scholars have long criticized reliance on the criminal law to police conduct that is not morally blameworthy.[102] Nonetheless, some politicians have continued to defend such laws on the putative ground that sacrificing morally blameless individuals is necessary to avoid "undermin[ing] public safety" and "harm[ing] progressive goals."[103] At the same time, Congress likes having strict liability offenses available. Because they are crimes rather than mere civil infractions, federal agents can enforce them, obviating the need to create a new cadre of civil inspectors that lack the nimbus possessed by officers with

---

the Cruel and Unusual Punishments Clause, 37 HARV. J.L. & PUB. POL'Y 1065, 1079–1101 (2014) [hereinafter Larkin, *Strict Liability*].

101. *See id*. at 1074–79.

102. *See id*. at 1079–81, 1081 n.46.

103. Obama, *supra* note 11, at 829 n.89. In addition, the Supreme Court (albeit, often in dicta) routinely voices, without any discussion or analysis, the old saw that "[i]gnorance of the law is no defense." *See, e.g.*, Shaw v. United States, 137 S. Ct. 462, 468 (2016); McFadden v. United States, 576 U.S. 186, 192 (2015); Elonis v. United States, 575 U.S. 723, 734–35 (2015); Bryan v. United States, 524 U.S. 184, 195 (1998); Ratzlaf v. United States, 510 U.S. 135, 149 (1994); Cheek v. United States, 498 U.S. 192, 199 (1991); United States v. Int'l Mins. & Chem. Corp., 402 U.S. 558, 563 (1971); Lambert v. California, 355 U.S. 225, 228 (1957); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Armour Packing Co. v. United States, 209 U.S. 56, 85 (1907); Reynolds v. United States, 98 U.S. 145, 167 (1878) ("Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law."); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. . . ."); The Joseph, 12 U.S. (8 Cranch) 451, 454 (1814). For addicted Latin fans, the phrase is "*Ignorantia legis neminem excusat*."

badges and guns.[104] As the result, strict liability offenses often misuse the criminal law for what should be an ordinary civil violation.

That's not just my opinion. The Supreme Court criticized criminal liability without fault long ago,[105] and more recently has gone out of its way to avoid construing federal criminal laws as creating strict liability offenses.[106] Numerous criminal law scholars, such as William Blackstone, Lon Fuller, H.L.A. Hart, Herbert Packer, Herbert Wechsler, and numerous others, condemn strict liability offenses.[107]

---

104. *See* Larkin, *Strict Liability*, *supra* note 100, at 1112–16.

105. *See* Felton v. United States, 96 U.S. 699, 703 (1877) ("But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."). Then-contemporaneous state cases reflect the same judgment. *See, e.g.*, People v. Harris, 29 Cal. 678, 681 (1866) ("It is laid down in the books on the subject that it is a universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea*." (citation omitted)); State v. King, 86 N.C. 603, 606–07 (1882); State v. Carson, 2 Ohio Dec. Reprint 81, 82–83 (Ohio Ct. Common Pleas 1859): Miller v. People, 5 Barb. 203, 203–04 (N.Y. Sup. Ct. 1849).

106. *See* Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) ("Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent. In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct. We normally characterize this interpretive maxim as a presumption in favor of scienter, by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission." (internal quotations and citations omitted)); *see also, e.g.*, Elonis v. United States, 575 U.S. 723, 740 (2015); McFadden v. United States, 576 U.S. 186, 195 (2015); Carter v. United States, 530 U.S. 255, 269 (2000); Staples v. United States, 511 U.S. 600, 605–07 (1994); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524 (1994); Liparota v. United States, 471 U.S. 419, 425–27 (1985); United States v. U.S. Gypsum Co., 438 U.S. 422, 436–37 (1978); Morissette v. United States, 342 U.S. 246, 250–51 (1952). That presumption is why the Supreme Court has read criminal statutes to contain a mens rea element.

107. *See, e.g.*, 4 BLACKSTONE, *supra* note 2, at *21; LON L. FULLER, THE MORALITY OF LAW 77 (1964) ("Strict criminal liability has never achieved

Accordingly, a President could reasonably decide that strict liability offenses are so out of line with historic Anglo-American criminal law doctrines that he should use his clemency power to pardon every offender who was convicted of such a crime or who can establish that no one would have known that the conduct charged against him was a crime.[108]

---

respectability in our law."); H.L.A. HART, *Negligence,* Mens Rea*, and Criminal Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY 136, 152 (H.L.A. Hart ed., 2d ed. 2008) ("strict liability is odious"); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 130–31 (1968); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952). *See generally* Larkin, *Strict Liability*, *supra* note 100, at 1079 n.46 (collecting authorities). As Oxford University Professor Jeremy Horder put it, the law "has failed to adapt its moral thinking to modern circumstances." JEREMY HORDER, EXCUSING CRIME 276 (2004).

108. Issuance of a pardon for every person convicted of a strict liability offense would raise the question whether the President has effectively "suspended" the effect of such laws, in violation of his duty under the Take Care Clause to enforce the law. *See, e.g.*, Howell v. McAuliffe, 788 S.E. 2d 706, 720–24 (Va. 2016) (ruling that governor's executive order granting voting rights to all formerly imprisoned felons violated the state constitutional provision against "suspension" of the law); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUD. 434, 440 (1977); Larkin, *Guiding Clemency*, *supra* note 41, at 467 n.88; *cf.* 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 Stuart Kings in England (particularly James II) claimed that the Crown had the inherent right to suspend the operation of any law that Parliament enacted. Parliament ultimately won that battle, enacting 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 been assumed and exercised of late is illegal."). The Article II Take Care Clause incorporates that limitation on presidential power. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 65–73 (2014) (discussing the background to the Take Care Clause). This is not the place to offer a complete answer to that question, but I will make two points.

First, to some extent, *every* exercise of the President's clemency power effectively defeats the implementation of 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. RSRV. L. REV. 905, 909 (1999); *see also* Austin Sarat, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J.

CRIM. L. 273, 275 (2005) [hereinafter Sarat, *Mercy*] ("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. Numerous Presidents have done so, Larkin, *Guiding Clemency*, *supra* note 41 (collecting cases), and the Supreme Court has repeatedly endorsed that practice, see *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872) ("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, 155 (1871); United States v. Padelford, 76 U.S. (9 Wall.) 531, 542–43 (1869). The number of people excused therefore cannot matter.

Second, 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. (2017); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN L. REV. 155, 156 (2009) ("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." (footnotes omitted)). That practice, which is widely used today by law enforcement agencies of all shapes and sizes, see *id.* at 163, was unknown to the English criminal law in the seventeenth century, when the English Crown's suspension of the law prompted Parliament to forbid the king from suspending the law without Parliament's authorization. To be sure, the Supreme Court has not specifically addressed the relationship between the Pardon and Suspension Clauses. But it has considered numerous cases involving the use of undercover officers, and it has never suggested that this practice "suspends" the operation of the federal criminal code. *See, e.g.*, United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963). On the contrary, the Court has held that, when the government authorizes a law enforcement officer (or anyone else for that matter, such as an informant) to engage in such conduct, the government cannot later prosecute that officer for committing that crime. *See, e.g.*, United States v. Pa. 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 to commit a crime for which the defendant is immune from prosecution and an *ex*

Doing so would avoid the risk that a morally blameless party could violate a law that neither he nor any reasonable person would have known existed.[109] In my opinion, the President should use his clemency power to pardon every such offender.[110] Regardless, there will be occasions where a person is found or pleads guilty to conduct that is not morally objectionable. Those cases would be instances of moral innocence.

B. *Was the Offense of Conviction an Isolated Act or Episode in an Otherwise Law-Abiding Life?*

The law and philosophy of clemency have always placed limits on the chief executive's forgiveness. It is not a defense to a crime that John or Jane had a disadvantaged upbringing (e.g., he had only one parent (or none), he grew up in a poor or crime-ridden neighborhood, he went to low-quality schools, and so forth). Society can place crimes like murder,

---

ante pardon for the future commission of that crime is like the difference between dusk and twilight.

109. Precedent exists for that practice. English kings used their clemency powers to spare morally blameless parties from the gallows or prison because reasonable criminal law defenses were unavailable. *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 116–17 (2020). Presidents and governors have done the same. Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law*, 15 GEO. J.L. & PUB. POL'Y 651, 664 (2017) [hereinafter Larkin, *Pardoning Mistakes*]. Clemency would also serve the purposes of the criminal law. Because "compliance presupposes knowledge," Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 400, a pardon would remedy the grossly unfair result that the modern-day federal criminal code requires more knowledge of the law than can be demanded of the average person. *See* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 345–69 (2018). A pardon would also return to prominence the foundational proposition, ignored (but implicitly rejected) by strict liability's advocates, that the criminal law should prefer the release of ten guilty parties to the wrongful conviction of one. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 456 (1895); 4 BLACKSTONE, *supra* note 2, *358. Accordingly, the President should forgive morally innocent parties no less than the factually or legally innocent ones.

110. Larkin, *Pardoning Mistakes*, *supra* note 109, at 663–68.

rape, robbery, burglary, and heroin trafficking out of bounds for everyone, even for people who did not grow up in Sutton Place or Beacon Hill.[111] In fact, it is especially important to enforce the law in neighborhoods where large numbers of people are tempted to break it, because the law-abiding residents in those neighborhoods suffer the most when crime is rampant.[112]

Nonetheless, in some cases a person who committed but one crime, or had but one criminal episode, in an otherwise law-abiding life is the type of person society should be willing to consider forgiving. Otherwise, as Hannah Arendt once noted, we would be forever frozen in time by one moment in

---

111. American criminal law has never recognized a "severe environmental depredation" defense, a defense that is also (and more colorfully) known as the "rotten social background" defense. *See, e.g.*, FLETCHER, supra note 70, at 801; Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703, 704 (1996) (stating that the only abuse excuse for which a defendant may use evidence of past victimization to negate legal responsibility is the insanity defense); Morse, *supra* note 70, at 1489 ("The reason we do not excuse most disadvantaged criminals (or other persons whose criminality can be causally explained) is not our lack of sympathy for their unfortunate backgrounds, or our failure to recognize that social disadvantage is a powerful cause of crime, as it surely is. Rather, we hold most disadvantaged defendants responsible because they possess minimal rationality and self-control. A disadvantaged defendant 'driven crazy' by his life circumstances will be excused because he is crazy, not because he is disadvantaged or because his behavior was caused." (footnote omitted)); Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in Defenses of Coercive Indoctrination and "Rotten Social Background,"* 2 ALA. C.R. & C.L. L. REV. 53, 54 (2011); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 82 (2011); *cf.* United States v. Alexander, 471 F.2d 923, 959 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (coining the term "rotten social background").

112. *See, e.g.*, FRANKLIN ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 170 (2013) ("Violent crime is one of the most regressive taxes operating in the United States, with almost all of its negative effects concentrated among low-income minority groups and residential areas. The dark-skinned poor pay twice for high rates of violent crime—with rates of victimization many times higher than middle-income white and Asian groups and with rates of imprisonment vastly higher than non-minority populations. So large declines in serious crimes should generate double benefits."); Paul J. Larkin, Jr. & David Rosenthal, *Flight, Race, and* Terry *Stops:* Commonwealth v. Warren, 16 GEO. J.L. & PUB. POL'Y 163, 206–16 (2018).

our past.[113] Of course, that decision is a complicated one. Numerous factors are relevant, such as what that crime was—viz., the type of crime and its surrounding context (Usama bin Laden's mass murder versus Dr. Samuel Mudd's treatment of the fractured leg of John Wilkes Booth); the reason why the offender committed the crime (Bernie Madoff's greed versus Jean Valjean's need to feed his family); the number and nature of the person(s) injured by the crime (theft from the "widows and orphans" fund versus theft from Bill Gates); the presence or absence of violence (engaging in torture and murder versus fibbing about your income); the age and status of the person who committed the crime (a capo in the Gambino Family who masterminds a continuing criminal drug enterprise versus a teenager who takes a car for a "joy ride"); and the host of other aggravating and mitigating factors that society considers relevant at sentencing.[114] A mass murderer should not qualify for a pardon regardless of how repentant he is about his 100th homicide. Someone arrested before releasing ricin on a crowded New York City subway car is in the same moral category as someone who completed that crime even though the police foiled his plot before he killed or injured any straphangers. Someone who spent decades laundering money for the Sinaloa Cartel also does not count. Not only were his offenses numerous over a lengthy period, but his crimes fueled the violence that the cartels wreak on society.

---

113. HANNAH ARENDT, THE HUMAN CONDITION 237 (1958) ("Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.").

114. *See, e.g.*, 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); Pepper v. United States, 562 U.S. 476, 487–90 (2011); ANDREW ASHWORTH, SENTENCING AND PENAL POLICY 168–69 (1983); C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 146–50 (1987); NIGEL WALKER, AGGRAVATION, MITIGATION AND MERCY IN ENGLISH CRIMINAL JUSTICE (1999).

What I have in mind as the classic case is someone who got into a fistfight in a bar while drunk or at high school after receiving an insult; who was convicted of, or pleaded guilty to, assault years ago; and who has kept his nose clean ever since.[115] I would also consider eligible someone who committed a very small number of crimes over a limited period long ago, but who since then has straightened up and now flies right. Indeed, the case of St. Paul of Tarsus shows us that there might even be room for someone who participated in a seriously violent act but since then has undergone a true personal moral reformation.[116]

By contrast, an offender with multiple convictions, particularly for well-planned crimes of violence or fraud, or who, to use the vernacular, has a "rap sheet as long as my arm," is far more physically or financially dangerous and morally reprehensible than someone who committed an offense only once, long ago, and never broke bad again. For more than a century, American law has imposed enhanced punishment on recidivists and has permitted sentencing courts to consider other crimes an offender committed even if he was not convicted of them.[117] At the same time,

---

115. *See* Ehrlich, *supra* note 31, at 675 ("Some of these cases are very easy, particularly in Maryland. We have a lot of people who need pardons because they want to qualify for federal employment. So you get in a fistfight in Ocean City, Maryland, when you're seventeen, and you're forty-eight years old and you need national security clearance for [the National Security Agency], and you can't get it. They're easy.").

116. *Compare, e.g.*, *Acts* 7:58–9:2, *with, e.g.*, *id.* 9:3–31; *Romans* 1:1–16:27; 1 *Corinthians* 1:1–16:24. My Exhibit A would be Georgetown Law Center Professor Shon Hopwood, as good an example of metanoia as there could be. *See, e.g.*, SHON HOPWOOD, LAW MAN: MEMOIRS OF A JAILHOUSE LAWYER (2d ed. 2017); *Shon Hopwood*, Geo. L. Ctr., https://www.law.georgetown.edu/faculty/shon-hopwood/ (last visited Jan. 22, 2022).

117. *See, e.g.*, Ewing v. California, 538 U.S. 11, 24 (2003) (upholding a state "three strikes" law and 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, 157 (1997) (ruling that a sentencing judge may consider conduct underlying a charge for which the defendant was acquitted as

American society is willing to forgive someone who slipped up once or twice and who is truly repentant.[118] Those judgments are sensible ones, and they complement each other. A President should be free to make them.

C. *Has the Offender Admitted His Guilt, Atoned for His Conduct and its Harms, and Reformed His Errant Ways?*

The criminal law began to consider the rehabilitation of offenders an important goal in the nineteenth century. Indeed, the earliest juvenile detention facilities were called "reformatories," because their goal was the transformation of the offender's character through repentance.[119] The criminal justice system became more punitive during the last three decades of the twentieth century than it had been for the first seven.[120] Nonetheless, the system did not completely forswear any consideration of rehabilitation. Rehabilitation of offenders was the rationale for the creation of "penitentiaries" in the nineteenth century,[121] and it served as the primary, if not exclusive, goal of punishment from late

---

long as the government can prove that conduct by a preponderance of the evidence); United States v. Grayson, 438 U.S. 41, 55 (1978) (ruling that a trial judge may consider at sentencing his conclusion that the defendant committed perjury when testifying at trial even though he was not convicted of or charged with that offense).

118. *See* Sigler, *supra* note 70, at 466 (noting "our general intuition that an offender who has lived am 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").

119. *See* Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 307–10 (2015) [hereinafter, Larkin, *Parole*].

120. *See* Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 31–32 (2013) [hereinafter Larkin, *Early Release*].

121. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 219–30 (3d ed. 2005); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC ch. 4 (rev. ed. 1990); Larkin, *Parole*, *supra* note 119, at 309 ("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)).

in that century to the last few decades of the twentieth.[122]

The American public still believes in the possibility of redemption and is willing to give reformed offenders a second chance. As Professors Francis Cullen and Cheryl Lero Jonson have written, "the belief that a core function of prisons should be rehabilitation is woven deeply into the nation's cultural fabric. This belief in reforming offenders may become frayed at times, but it is durable enough to avoid becoming fully unraveled."[123] Reflecting that belief, the Second Chance Act of 2007 authorizes grant programs to help offenders start a new life after release.[124]

As relevant here, two questions arise. Can the law demand that an offender prove his rehabilitation as a condition of eligibility for clemency? And as partial proof of rehabilitation, can the law require that an offender demonstrate repentance by honestly admitting his crimes, atoning for his wrongdoing, and turning his life around?[125] The answer to each question is, "Yes." The institution of plea-bargaining rests on the proposition that a defendant can be

---

122. *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."). The Sentencing Reform Act of 1984 (SRA) bars a district court from considering at sentencing the defendant's prospects for rehabilitation. 18 U.S.C. §§ 3562(a), 3563(a)(4), 3563(b)(9), 3563(b)(11), 3583(c)–(d); 28 U.S.C. § 994(k); Tapia v. United States, 564 U.S. 319, 332 (2011). The Federal Bureau of Prisons may consider that factor when deciding where a prisoner should be housed and what potentially rehabilitative programs he should enter. 18 U.S.C. §§ 3621(b), 3621(e)–(f), 3624(f); *Tapia*, 564 U.S. at 330–31.

123. FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 29 (2012).

124. Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified at 42 U.S.C. §§ 17501–55); *see* Larkin, *Early Release*, *supra* note 120, at 33 & n.191.

125. For an excellent definition of "repentance," see Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 147 (Amitai Etzioni & David E. Carney eds. 1997): "Repentance is the remorseful acceptance of responsibility for one's wrongful and harmful actions, the repudiation of the aspects of one's character that generated the actions, the resolve to do one's best to extirpate those aspects of one's character, and the resolve to atone or make amends for the harm that one has done."

denied leniency at sentencing if he refuses the government's offer of a reduced sentence in exchange for pleading guilty and demands a trial. In 1978, the Supreme Court expressly upheld that practice in *Bordenkircher v. Hayes*.[126] The Supreme Court has ruled that a defendant can be required to accept responsibility for his crimes, even to assist the government to prosecute other offenders, as a condition for the receipt of a benefit at sentencing.[127] Moreover, the government can place on a convicted offender the burden of showing that he has been rehabilitated and no longer is the same person who broke the law.[128] Indeed, the United States Sentencing Commission has promulgated Sentencing Guidelines that allow for a reduction in a sentence only "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense."[129] If a sentencing judge can make that demand at the front end of the punishment process, it follows then that the President can demand that an offender demonstrate repentance as a condition of eligibility for clemency.[130]

---

126. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Plea bargaining 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 of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial." (citations and internal quotations omitted)).

127. *See, e.g.*, 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); 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); *see also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 437 (1958).

128. That conclusion follows logically from the principle that a properly convicted defendant "is eligible for, and the [sentencing] court may impose, whatever punishment is authorized by statute for his offense" as long as that penalty is neither cruel and unusual nor based on an arbitrary ground, such as race. Chapman v. United States, 500 U.S. 453, 465 (1991).

129. U.S. SENT'G COMM'N, GUIDELINES MANUAL § 3E1.1 (Nov. 1, 2018).

130. There is also philosophical and religious support for that conclusion. *See* Jacob Neusner, *Repentance in Judaism*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE, *supra* note 125, at 60, 61 ("God forgives sinners who atone and

That conclusion aligns with the expectations of the public. The average person likely would find it reasonable for victims to demand confession and repentance as a prerequisite to their private forgiveness of someone else, as well as to the President's official forgiveness of someone on behalf of the nation.[131] Public confessions of wrongdoing display respect for the dignity of victims and, if sincere, can be a first step toward an offender's rehabilitation.[132] As

---

repent, and asks of humanity that same act of grace—but no greater. For forgiveness without a prior act of repentance not only violates the rule of justice but also humiliates the law of mercy, cheapening and trivializing the superhuman act[.] The role of the sinner is to repent."); *see id.* (describing repentance as "the critical center of the moral transaction" involving forgiveness). To be sure, philosophers have debated whether forgiveness is possible in the absence of confession and repentance, and they have come down on both sides of that issue. A majority (or a considerable minority), however, sees confession and repentance as necessary conditions for forgiveness. *See, e.g.*, *Luke* 23:34; *Matthew* 6:15; GRISWOLD, *supra* note 74, at 49–51; KONSTAN, *supra* note 2, at x, xi, 6–7, 10, 59 (defining the modern understanding of forgiveness as "a response to an offense that involves a moral transformation on the part of the forgiver and forgiven and a complex of sentiments that include sincere confession, remorse, and repentance"); Cheshire Calhoun, *Changing One's Heart*, 103 ETHICS 76, 76 (1992); Aurel Kolnai, *Forgiveness*, 74 PROC. ARISTOTELIAN SOC'Y 91, 97 (1974); Lauritzen, *supra* note 75, at 144–49; Norvin Richards, *Forgiveness*, 99 ETHICS 77, 87 (1988). *See generally* MINOW, VENGEANCE AND FORGIVENESS, *supra* note 74, 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)).

131. *See* KONSTAN, *supra* note 2, 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 74, at 50)); MINOW, VENGEANCE AND FORGIVENESS, *supra* note 74, at 17 (While discussing atrocities, she stated: "Forgiveness is a power held by the victimized, not a right to be claimed. The ability to dispense, but also to withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing. Even an individual survivor who chooses to forgive cannot, properly, forgive in the name of other victims. To expect survivors to forgive is to heap yet another burden on them." (footnote omitted)).

132. *See* Anastasia Moloney, *Ex-Child Soldiers in Colombia Face Their Tormentors*, CHRISTIAN SCI. MONITOR (Feb. 23, 2015), https://www.csmonitor.com/World/Making-a-difference/Change-Agent/2015/0223/Ex-child-soldiers-in-Colombia-face-their-tormentors (remarks of Maria Eugenia Morales, a senior Colombian official, in the context of the public confession of guilt for recruiting child soldiers by a former member of the United Self-Defense Forces of Colombia:

Jeffrie Murphy put it, "In having a sincere change of heart," the offender "is withdrawing his endorsement from his own immoral past behavior; he is saying, 'I no longer stand behind the wrongdoing and want to be separated from it; I stand with you in condemning it.'"[133]

A public admission of responsibility also enables a President to decide whether a clemency applicant is truly sorry for his conduct and has genuinely turned his life around or just regrets being caught. A public confession of guilt offers a trial judge the opportunity to decide at sentencing whether an offender's statement is an honest expression of guilt and remorse or merely a sham uttered in the hope of receiving a lighter punishment. So, too, a later public confession gives the President a basis for deciding whether an admission of responsibility as part of a request for mercy is genuine or counterfeit. Non-admissions of guilt (or evasive admissions of guilt) are common. Witness the number of people (frequently in politics) who confess only that "mistakes were made," which, by using the passive voice, is more a deflection than an admission of

---

"Public apology ceremonies are an important step toward reconciliation because the perpetrators recognize their responsibility for the damage they've caused, and it brings dignity to victims and contributes to their healing." (footnote omitted)).

133. Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 7 CRIM. JUST. ETHICS 3, 7 (1988); *see also, e.g.*, Amitai Etzioni, *Introduction*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE, *supra* note 125, at 1, 9 ("Those who seek repentance must first of all show *true remorse* as a way of paying homage to (i.e., recognizing the legitimacy of) both the mores they have violated and the fellow members of the community whom they have offended. Without this evidence, the community will not validate the offenders' claim of being ready to abandon their deviant conduct, mend their ways, and seek a return to membership in the community. Furthermore, those who are not remorseful are viewed as if they offended the community twice: once in whatever offense they have committed and, second, in their refusal to acknowledge that mores were violated."); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, *in* THE PASSIONS OF LAW 170 (Susan A. Bandes ed., 1999) ("[R]emorse involves a change of heart, and alteration of character."); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 40 (2003) ("[Repentance] represents a changing of the self, a disassociation from the blameworthy self, that transforms the defendant into someone who is not just less dangerous, but who is 'better.'").

responsibility.[134] The explanation for the prevalence of those false utterances is simple: genuine expressions of wrongdoing are powerful evidence of metanoia, which provides a strong case for clemency, but the price is admitting responsibility, which scares off most people. That fact invites clemency applicants to manufacture sham or shady admissions of responsibility. It is an example of the aphorism that hypocrisy is the tribute that vice pays to virtue.[135] Given that risk, a President is entitled to demand that an applicant proves his worthiness for the forgiveness that clemency symbolizes by a public confession of guilt and demonstrable proof of repentance.

Granting an offender clemency in the absence of such proof can also poison the public effect of presidential leniency. Consider the likely public reaction to a grant of clemency to someone—say, a leader of ISIS—who not only refuses to renounce and repent for his admittedly serious crimes, but also is adamant about the legitimacy of his actions and defiantly vows to renew his assaults on individuals, the government, and society if he were ever to

---

134. *See* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY (rev. ed. 2008) (describing the phrase as a "passive-evasive way of acknowledging error while distancing the speaker from responsibility for it"); Mark Memmott, *It's True: "Mistakes Were Made" Is the King of Non-Apologies*, NPR (May 14, 2013, 1:59 PM), https://www.npr.org/sections/thetwo-way/2013/05/14/183924858/its-true-mistakes-were-made-is-the-king-of-non-apologies (noting that Presidents Bill Clinton, George W. Bush, Ronald Reagan, Ulysses Grant, and others have all used that phrase).

135. *See* Harold O.J. Brown, *Godly Sorrow, Sorrow of the World: Some Christian Thoughts on Repentance*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE, *supra* note 125, at 31, 34 ("Genuine repentance is rare, and sham or expedient repentance is common. True repentance is so valuable it invites counterfeits, and counterfeit repentance is common enough to make people suspicious of all repentance. The value of repentance depends not on intensity of feeling, but on sincerity and genuineness. History tells us of many 'grand penitents,' but also bears witness to many hypocrites and frauds."); John Lyden, *From Sacrifice to Sacrament: Repentance in a Christian Context*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE, *supra* note 125, at 43, 43 ("American society does not seem to be one that encourages repentance. Many criminals, politicians, and other public figures seem generally unable to acknowledge, let alone apologize for transgressions.").

be released. The public reaction would be outrage, ranging from people who doubt the wisdom of the President's decision to ones who assume that he either has lost his mind or accepted a bribe in money or political support. Proof lies in the furor that resulted when Gerald Ford pardoned Richard Nixon, who had never publicly apologized for any illegal or improper conduct.[136] Remember that clemency is an official governmental action that affects the public's attitude toward the criminal justice system. Many would see clemency for the unrepentant as condoning the wrongdoer's actions, which would undermine the necessary social commitment to law-observance. The President should always consider this potential adverse effect of clemency on the public when considering individual petitions.

Pardoning the unrepentant is perilously close to condoning his or her actions.[137] Forgiveness of the genuinely penitent is not. Whether in private relations or in the clemency process, forgiveness is not tantamount to condonation,[138] which the criminal justice system must

---

136. *See* CROUCH, *supra* note 2, at 3–4, 25–26, 95, 108–11, 140–42. Witness also the public reaction when Bill Clinton commuted the sentences of Puerto Rican terrorists. *See* Love, *Merciful*, *supra* note 66, at 1484 ("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)); *see also* Nancy A Youssef, *Trump Intervenes in War Crimes Cases Against Three U.S. Military Members*, WALL ST. J. (Nov. 15, 2019, 10:13 PM), https://www.wsj.com/articles/trump-intervenes-in-war-crimes-cases-against-three-u-s-military-members-11573865140 ("Retired Marine Gen. Charles C. Krulak, former commandant of the Marine Corps, said the integrity of military justice is vital to maintaining adherence to American ideals among troops. Mr. Trump's intervention 'betrays these ideals and undermines decades of precedent in American military justice that has contributed to making our country's fighting forces the envy of the world,' he said.").

137. Kolnai, *supra* note 130, at 95 ("Condonation means that Fred is clearly aware of Ralph's wrongdoing, insult, offense, or viciousness and *per se* disapproves of it but deliberately refrains from any retributive response to it.").

138. Joanna North, *Wrongdoing and Forgiveness*, 62 PHILOSOPHY 499, 500 (1987) ("What is annulled in the act of forgiveness is not the crime itself but the distorting effect that this wrong has upon one's relations with the wrongdoer and perhaps with others.").

steadfastly avoid. Condonation would undercut the ability of the criminal justice system to substitute public justice for private vengeance; it would signal political weakness or favoritism to the offender; and it would represent moral indifference to the plight of his victims.[139] No chief executive should accept those outcomes, and the Pardon Clause does not require him to do so.

In sum, clemency is appropriate for someone who recognizes the error of his ways, who both publicly and sincerely renounces past illegal conduct, who tries to offset the harms from his crimes, and who seeks forgiveness.[140] By sincerely acknowledging and renouncing past wrongdoing—admitting the commission of a crime and expressing remorse for it—a person can divorce himself from his act and prove that he is someone "new."[141] At a minimum, a President can reasonably so conclude.

---

139. Kolnai, *supra* note 130, at 97–98 (noting that condonation of wrongdoing "is an intrinsically bad thing" and threatens to foster it, rather than eradicate it); *id.* at 103 (also observing that forgiving someone who has not undergone a change of heart can "encourage him to persist in his line of wrongdoing with which he appears to have got away so cheaply"); *id.* at 105 ("[W]here depravity and malice hold sway they may all too easily draw nurture from a good-natured approach and batten on forgiveness.").

140. Remember the story of the Prodigal Son. *Luke* 15:11–32. There, a son, who left home and led a profligate life, returned to his father, and confessed to him, saying "I have sinned against heaven, and in thy sight, and am no more worthy to be called thy son." *Id.* 15:21. Overjoyed that his son had both returned home and expressed repentance, the father forgave him, exclaiming that, "for this my son was dead, and is alive again; he was lost, and is found." *Id.* 15:24.

141. *See* Calhoun, *supra* note 130, at 81 ("In breaking the connection between her wrongdoing and her true self, the reformed person ceases to be an appropriate object of resentment."); Murphy, *supra* note 133, at 7 ("There are various ways in which the proper divorce can come about, but the clearest way in which a wrongdoer can sever himself from part wrong is through sincere *repentance*. In having a sincere change of heart, he is withdrawing his endorsement from his own immoral past behavior; he is saying 'I no longer stand behind the wrongdoing and want to be separated from it; I stand with you in condemning it'.").

D. *Would a Pardon Bring the Criminal Justice System into Disrepute?*

The next question looks in a different direction than the others. Rather than focusing on the potential recipient, it asks what effect a pardon would have on the public and the administration of justice. That is an important consideration for every President to have in mind. A pardon may resemble an act of personal forgiveness, but it is not.[142] As Justice Holmes wrote, it is the government's formal decision not to exact the full measure of punishment that the law allows.[143] When issuing a pardon, the President acts as a government official, and his decision to grant clemency has legal and practical effects on both the recipient and the public.[144] The President has the obligation to consider the effect of his decision on the enforcement of the criminal law.[145] Not only must a President refrain from selling pardons and dispensing them to friends and allies like Christmas presents, but he must also exercise his authority in a responsible manner to give the appearance he is acting impartially. Like it or not, the President must consider the effect that a pardon will have on the public and its attitude toward the criminal justice system.

Start with the victims of federal offenses.[146] For much of

---

142. Speaking after the work of the post-Apartheid South African Truth and Reconciliation Commission, Archbishop Desmond Tutu defined forgiveness as follows: "Forgiveness means abandoning your right to pay back that perpetrator in his own coin, but it is a loss that liberates the victim." DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 272 (1999).

143. Biddle v. Perovich, 274 U.S. 480, 486 (1926); *supra* text accompanying note 53.

144. *See* Horsbrugh, *supra* note 74, at 270.

145. *See* U.S. CONST. art. II, § 3 (Take Care Clause).

146. Each state outlaws common law offenses such as murder, rape, robbery, burglary, which have immediate and obvious victims. The problem is more complicated in the case of federal offenses. Unlike the states, Congress does not possess a general "police power," so Congress must tie legislation to one or more provisions of Article I. *See* United States v. Lopez, 514 U.S. 549, 566 (1995). A variety of federal crimes—such as defrauding a private party by using the mail

our history, we relegated victims to the status of Victorian Era children: people who should be seen but not heard.[147] Thankfully, that era is behind us. No federal court may ignore the interests of victims,[148] and the President should not either. Although he cannot avoid the responsibility that comes with the need to make clemency decisions in the public interest—as one-time President and one-time Chief Justice William Howard Taft explained—he should ensure that victims have the opportunity to be heard.[149]

The President also needs to consider the effect of clemency on the public, a requirement that is at least implicit in the opinions of Chief Justice Taft and Associate Justice Holmes. Public perception that the criminal law and the system that enforces it are illegitimate can lead the public to become reluctant (and in some cases to refuse altogether) to assist law enforcement or to comply with the laws

---

or violent crimes committed on federal property—have direct victims too, but many—such as defrauding the federal government or cybercrimes against government facilities—do not. Other federal offenses—such as drug trafficking—might have only a small number of direct victims (for example, people shot by drug dealers), but have a very large number of indirect victims (for example, innocent residents of neighborhoods infested with rival drug-trafficking gangs). *See* STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 11 (1993) ("Under prohibition, the innocent suffer at every turn. The users of illegal drugs do not bear even a fraction of the economic and social costs of their drug use; the nonuser bears a large portion: in unsafe streets, overcrowded, expensive prisons, diluted law-enforcement resources, hospital emergency rooms filled beyond capacity and inner cities becoming unlivable.").

147. *See* Larkin, *Crack Cocaine*, *supra* note 7, at 281–94.

148. *See* Scott Campbell et al. Crime Victims' Rights Act, 18 U.S.C. § 3771; The Victims of Crime Act of 1984, 42 U.S.C. § 10601 (2019); Morris v. Slappy, 461 U.S. 1, 14 (1983) ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims."); *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (rejecting a per se rule against the introduction of victim impact statements at the sentencing stage of capital cases); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649–50 (1976).

149. *See generally* Jill Stauffer, *A Hearing: Forgiveness, Resentment and Recovery in Law*, 30 QUINNIPIAC L. REV. 517 (2012) (arguing that survivors need to be heard and that others need to listen).

themselves.[150] Clemency is not exempt from that risk.[151] Public belief that clemency is a reward, not for average people who have admitted their wrongdoing, turned their life around, and asked for forgiveness, but for political cronies, financial supporters, long-time friends, individuals with political connections, and the *haute monde* will corrode public respect for the law. It will generate the belief that criminal law ostensibly serves as a broad, facially neutral protection for the public, but that the criminal justice system implementing that law contains escape hatches available only to the powerful, rich, or anointed. We have already seen that (quite justifiable, in my opinion) reaction in the case of clemency grants made by former Presidents Clinton and George W. Bush.[152] Other examples are Trump's decision to pardon former sheriff Joe Arpaio's conviction for criminal contempt for violating a federal court order prohibiting the unlawful treatment of prisoners and suspected illegal aliens,

---

150. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (2006) (concluding that people generally follow the law because they respect it, not because they fear it); PETER C. YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 9 (1991) ("As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant."). Cheshire Calhoun's remarks in the case of forgiving an unrepentant party for private wrongdoing are directly on point:

> Culpable wrongdoers are the problem. For them, not responding resentfully may seem to send a condoning message: 'the act was not wrong', or 'wrongdoing will not be penalized', or 'I am not the other's moral equal, so that in this case the act does not count as moral mistreatment'. In sending any one of these messages, one fails to prevent repetitions and may well encourage them. As a result of doing nothing to improve the wrongdoer's character, both oneself and others remain at risk of future mistreatment. Worse yet, the condoning messages might have a wider audience. All who witness the lack of resentment may take it as a green light to misbehavior.

Calhoun, *supra* note 130, at 84 (footnote omitted).

151. *See, e.g.*, MINOW, LAW'S FORGIVENESS, *supra* note 70, at 128–36.

152. *See, e.g.*, BIBAS, *supra* note 66, at 24; Alschuler, *supra* note 15, at 1168 ("In 1215, the Magna Carta declared, 'To no one will we sell, to none will we deny or delay, right or justice.' In the administration of President Bill Clinton, the charter's pledge was broken." (footnote omitted)); Love, *Pardon Twilight*, *supra* note 5, at 1212.

as well as the slew of pardons he issued to political loyalists as he was walking out the door.[153]

To be sure, *any* grant of clemency poses some risk of encouraging misconduct if it gives the public the impression that the law favors the rich, well connected, or powerful interests in society, and we certainly do not want to encourage that belief. Some grants of clemency, however, are more likely to engender that suspicion than others. Public cooperation is essential if the criminal law is to be effective, and public respect for the criminal justice system is critical for the public to cooperate with the police and prosecutors. Because there is no erasing a clemency grant issued for the wrong reasons, and little corrective for a public attitude that one or more grants were corruptly motivated, a President must be especially careful to avoid leaving the public with the impression that he acted with favoritism in mind.

Does that mean the President should never pardon someone who worked in his administration or someone he knows personally? No. A President should not leave a conviction in place if the applicant is innocent or deserves a pardon because he has paid his debt to society and has reformed.[154] At the same time, the President must demonstrate to the public that he will pardon *anyone* who fits into those categories, not merely the people who have benefitted, supported, or befriended him. He must prove that clemency is available, to quote former Justice Department Pardon Attorney Margaret Love, for "ordinary people."[155] He must persuade people he will never meet, who have never helped him, who will never be in a position to assist him, and who, in fact, voted against him, that he is willing to forgive what they did too.

---

153. *See supra* notes 18–20 and accompanying text.

154. The same point holds true in the case of commutations. A President also should not allow someone to endure an unconscionable punishment, because a prior relationship between him and her might suggest that he granted clemency for an illegitimate reason.

155. Love, *Pardon Twilight*, *supra* note 5, at 1175.

To prove that he is a person of character, the President must use his or her clemency power regularly, not just at Christmas, and widely, not just for celebrities. To persuade the average person that he or she matters, the President must award relief to average people and must do so often. Once or twice is a faux display of generosity of spirit. Regularly doing so demonstrates sincerity. If the President does that, he will be able to explain the occasional grant of relief to someone whom he does know without arousing public ire that he rewards only friends.

E. *Is There a Statecraft Justification for a Pardon?*

The last question does not arise out of the operation of the criminal justice system. Instead, it stems from the need to manage the nation's foreign policy or to bring to a close severe domestic turmoil. There is an ancient practice of granting clemency for reasons of state.[156] Kings, military rulers, and democratically elected chief executives manage the operation of government in both foreign and domestic spheres. In so doing, they might find that the nation's interests require that a just conviction or sentence be excused because the nation's overall interests outweigh the need to punish a lawfully convicted criminal. A President might find clemency appropriate even for a clearly guilty offender or one who received precisely the punishment that

156. *See, e.g.*, 4 BLACKSTONE, *supra* note 2, *398 (noting that clemency can "endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince"); COKE, *supra* note 2, at 233 ("Mercy and truth preserve the king, and by clemency is his throne strengthened."); CHARLES L. GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION xviii n.10 (2007) (noting Julius Caesar granted clemency to some nations that he conquered); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 50 (1998) ("[A]n executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security."); Jay Cost, *In Praise of Gerald Ford*, NAT'L REV. (Sept. 9, 2019, 6:30 AM), https://www.nationalreview.com/2019/09/gerald-ford-pardon-richard-nixon-deserves-praise/ (praising President Gerald Ford for pardoning Richard Nixon to end the domestic turmoil over Watergate).

any reasonable person would deem just for reasons having nothing to do with that offender, his crime, or his trial, entirely because of geopolitics.

The occasions when the President must answer this question fortunately arise only infrequently. They stem from instances when a pardon is necessary to reconcile different quarreling political factions, to quiet severe domestic turmoil, or to exchange prisoners with a foreign nation. When those scenarios arise, the only satisfactory resolution may require the President to grant a pardon, or sometimes a commutation, to one or more of a small number of individuals, or to declare an amnesty covering a far larger number of people.[157]

The Founders recognized the need for the President to use his pardon power to advance the nation's interests.[158] Presidents from George Washington through George H.W. Bush granted clemency to resolve political turmoil.[159] George Washington granted amnesty to participants in the Whiskey Rebellion, and John Adams did the same for participants in Fries Rebellion, both of which were tax-related revolts. Thomas Jefferson pardoned everyone convicted of violating

---

157. *See* Larkin, *Revitalizing Clemency*, *supra* note 5, at 850 n.55.

158. *See* THE FEDERALIST NO. 77, at 447 (Andrew Hamilton) (Clinton Rossiter ed., 1961) ("[I]n seasons of insurrection of rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."); James Iredell, *North Carolina Ratifying Convention*, *reprinted in* 4 THE FOUNDERS' CONSTITUTION 17–18 (Philip B. Kurland & Ralph Lerner eds., 2001) (noting the usefulness of the pardon power during civil war and to protect spies useful to the government).

159. *See, e.g.*, EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 181 (Randall W. Bland et al. eds., 5th rev. ed. 1984); CROUCH, *supra* note 2, at 40–45, 55–56; Proclamation by John Adams, President of the United States, *in* 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 293, 293–94 (James D. Richardson ed., 1897); Love, *Pardon Twilight*, *supra* note 5, at 1173 ("Presidents since Thomas Jefferson have issued post-war pardons to deserters and draft evaders." (footnote omitted)); *id.* at 1173 n.16 (collecting cases); Love, *DOJ Conflict of Interest*, supra note 14, at 104 nn.79–80; Love, *Reinventing Pardons*, *supra* note 69, at 6 & nn.6–8; Ruckman, *21st Century*, *supra* note 5, at 453–56. *See generally* Charles Shanor & Marc Miller, *Pardon Us: Systematic Pardons*, 13 FED. SENT'G REP. 139 (2001).

the Sedition Act.[160] James Madison pardoned smuggler and pirate Jean Lafitte (and his Baratarian Pirates) for assisting Andrew Jackson during the defense of New Orleans in the War of 1812. James Buchanan pardoned Brigham Young, founder of the Church of Jesus Christ of Latter-Day Saints, and others involved in the Utah War of 1857–1858. Recognizing the strategic value of clemency in his relations with the Indian Tribes, Abraham Lincoln commuted the death sentences of 265 Sioux tribesmen involved in an uprising. During the Civil War, Lincoln pardoned soldiers on the Union side to boost morale, and soldiers of the Confederacy to regain their allegiance.[161] Andrew Johnson extended Lincoln's work by pardoning Jefferson Davis, the former President of the Confederacy, along with other officers of the Confederacy. Henry Harrison and Grover Cleveland pardoned polygamists in Utah.[162] Teddy Roosevelt pardoned participants in the Philippine Insurrection of 1899–1902. Calvin Coolidge granted pardons to World War I deserters. Warren Harding commuted the sentences of people convicted of sedition, espionage, or interfering with military recruitment, such as Eugene Debs. Harry Truman granted pardons to service members with pre-World War II convictions who served honorably during that war. John F. Kennedy commuted the sentence imposed on Soviet spy Rudolph Abel so that he could be exchanged for U-2 pilot Francis Gary Powers, who had been shot down while flying over the USSR.[163] Gerald Ford pardoned Richard Nixon for

160. *See* Duker, *supra* note 2, at 516; Easterbrook, *supra* note 108, at 909.

161. Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863); Proclamation No. 14, 13 Stat. 747 (Mar. 26, 1864); Ruckman, *Seasonal Clemency*, *supra* note 5, at 26; P.S. Ruckman, Jr. & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 PRESIDENTIAL STUD. Q. 84, 84 (1999).

162. Proclamation No. 37, 13 Stat. 758 (May 29, 1865); Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867); Proclamation No. 6, 15 Stat. 702 (July 4, 1868); Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868); *see* Duker, *supra* note 2, at 511–15.

163. *See Hollow Nickel/Rudolph Abel*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/history/famous-cases/hollow-nickel-rudolph-abel/ (last visited Jan.

any crime he might have committed in connection with Watergate to allow the nation to put that episode in the rear view mirror, which could not have happened if Nixon had been tried.[164] Ford and Jimmy Carter granted amnesty to Vietnam War draft evaders and military deserters.[165] Ronald Reagan granted clemency to Russian spies so that they could be exchanged for American prisoners.[166] Finally, George H.W. Bush pardoned the parties involved in the Iran-Contra arms-for-hostages controversy to end that imbroglio.[167]

Several of those actions were controversial and hotly criticized at the time, especially Ford's pardon of Nixon. Whatever the merits of those decisions, from time-to-time Presidents will need to act as the head of a nation, rather than the chief federal law enforcement officer. When they do, clemency might be the most appropriate response to a national problem.

22, 2022); *see* Abel v. United States, 362 U.S. 217, 221–25 (1960). The story was depicted in the 2015 film *Bridge of Spies*. *See* BRIDGE OF SPIES (DreamWorks Pictures 2015).

164. *See* CROUCH, *supra* note 2, at 66–85. The immediate public reaction to Ford's decision likely cost him the election in 1976, but history has generally concluded that Ford made the right move. *See* MINOW, LAW'S FORGIVENESS, *supra* note 70, at 119–20 (noting change in public attitude to "a majority approval by 1986"); Carter, *supra* note 66, at 887.

165. Proclamation No. 4,313, 39 Fed. Reg. 33,293, 33,293–95 (Sept. 17, 1974), *reprinted in* 88 Stat. 2504 (1974) (as amended by Proclamation No. 4,345, 40 Fed. Reg. 4,893 (Feb. 3, 1975), *reprinted in* 89 Stat. 1236 (1975)); Proclamation No. 4,483, 42 Fed. Reg. 4,391, 4,391–92 (Jan. 24, 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); *see* Kent Greenawalt, *Vietnam Amnesty—Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1, 2, 7–8 (1976).

166. *See* George E. Curry, *U.S. Swaps 4 Spies For 25 Prisoners*, CHI. TRIB., June 12, 1985 (§ 1), at 3.

167. *See* Proclamation No. 6,518, 57 Fed. Reg. 62,145, 62,145–47 (Dec. 30, 1992).

III. AN ALTERNATIVE APPROACH TO COMMUTATION DECISION-MAKING: A CATEGORY-BY-CATEGORY APPROACH

Turn back to the text of the Pardon Clause. Interestingly, the text does not empower the President to commute an offender's sentence, only to delay or excuse it. Yet that fact is inconsequential. Logically speaking, the greater power to excuse an offense in its entirety includes the lesser power to leave a conviction in place but reduce the punishment imposed on the offender.[168] Chief executives have commuted sentences for probably as long as there have been chief executives,[169] and the Supreme Court has expressly upheld that practice.[170] Moreover, the ordinary retort to any greater-includes-the-lesser argument—viz., that no one should be free to use the greater power in a discriminatory manner—is only obliquely relevant here. Discrimination is impermissible in the exercise of either power. Accordingly, the issue is not whether the President can commute a sentence, but how should he go about deciding whether to do so. The sections below address that issue.

---

168. *See* RONALD L. GOLDFARB & LINDA R. SINGER, AFTER CONVICTION 343 (1973) ("[P]resumably the [commutation] power is simply a lesser form of pardon. The power to commute sentences has been held to be implicit in the general grant of the pardoning power in the states whose constitutions do not mention commutation and in the federal system."). The principal objection to any greater-includes-the-lesser argument is that equal-treatment principles require like cases to be treated alike. In the case of the Pardon Clause, that principle requires only that the President act in a non-arbitrary manner.

169. *See id.* at 343–43 ("Mostly, [commutation] is used to allow prisoners with terminal illnesses to die out of prison, to make prisoners eligible for parole and to avoid capital punishment.").

170. *See* Schick v. Reed, 419 U.S. 256, 266 (1974) ("The plain purpose of the broad power conferred by [Article II, Section 2, Clause 1], was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable."); Biddle v. Perovich, 274 U.S. 480, 486 (1927) (quoted *supra* in text accompanying note 53).

A. *The Choice Between Case-by-Case and Category-Wide Decision-Making*

Commutation requests raise issues that materially differ from the ones involved by a pardon request. Atop the reasons given above is this crucial difference: pardons focus on *one offender* and *his crime*; commutations, on *one offender* and *his sentence*, when compared against *other similarly situated offenders* and *their punishments*. Those differences call for a very different approach than the one I discussed above for pardons.

Consider how former President Barack Obama approached this problem in the "Clemency Initiative 2014." He believed that the Anti-Drug Abuse Act of 1986[171] imposed draconian punishments on offenders guilty of selling crack cocaine. In response, he directed Attorney General Eric Holder to implement a program allowing him to decide whether to commute the sentences imposed on drug traffickers and, if so, by how much. The evidence strongly suggests, however, that Obama simply delegated decision-making to subordinate officials at the Justice Department and in the White House Counsel's Office.[172] Obama might

171. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841 (amended 2010)).

172. *See* Larkin, *Delegating Clemency*, *supra* note 11, at 267 ("Obama acted on more than 27,000 clemency petitions during his presidency. In how many cases did he make what amounts to a resentencing decision himself, rather than delegate those decisions to others down the clemency food chain? [¶] Consider the clemency data for October 2016 through January 20, 2017. Obama granted 1043 commutations, denied 4864 commutation petitions, and granted 221 pardons. That amounts to 6128 clemency decisions, approximately 1532 petitions per month or 51 each day. If you count just the grants, that comes to about 9.3 each day. Does anyone really think that Obama read 9 clemency memoranda, let alone *files*, each day during that four-month period? I doubt it. Of course, maybe a four-month period is too short. If so, let's put the starting date back to January 2016, when a new lawyer became the Pardon Attorney. The number of days to make 6128 clemency decisions now becomes 385, which reduces the daily number to just below 16, or 2.7 if we count only commutation cases. Does anyone really think that Obama read 2 to 3 clemency memoranda (or files) each day during that near thirteen-month period, let alone 16? I doubt that too." (footnote omitted)).

have actually signed commutation warrants (or directed someone else to use his autopen), but that does not mean he independently evaluated clemency petitions. He likely just went along with the recommendations he received from others, perhaps without any deliberation.[173] It is doubtful that the Framers had that process in mind when they vested the President with the clemency power.[174]

---

173. *Id.* at 268 ("The President has the power to revise every sentence imposed in federal district court; the Pardon Clause does not cap the number of commutations that a President may grant. But it would be a mistake to act in that manner. Obama's decision to do so exposed what, as a practical matter, happened in that scenario: He delegated his clemency power to subordinates, perhaps even Assistant U.S. Attorneys. Evidence for that conclusion can be seen in the fact that offenders did not always receive a 'Get Out of Jail Free' card along with their commutation. A goodly number simply had some portion of their sentence shaved off—say, from life imprisonment plus 30 years to 30 years' imprisonment. It is difficult to believe that Obama made those decisions himself. If that is how Obama wanted release decisions to be made, there was another vehicle for him to use. He could have directed the Federal Bureau of Prisons to ask district court judges to reconsider a prisoner's sentence under a federal statute authorizing such 'second looks' in some circumstances, as former Pardon Attorney Margaret Love has argued. At a minimum, that approach would have had the virtue of honesty. It also would have relied on the experience of people who sentence offenders for a living." (footnotes omitted)).

174. *Id.* ("The Framers granted the President the power to grant clemency in Article II because they believed that one person, the nation's chief executive, should be responsible for making that decision. The President's clemency power is found in the same part of Article II as his Commander-in-Chief power and the power to demand opinions from his principal lieutenants, neither of which is subject to review by Congress or any other official. By contrast, the President's powers to make treaties and to appoint ambassadors, consuls, and other federal officers are subject to the 'advice and consent' of the Senate. That is important because it signals that *he* is to make those decisions, not someone else. [¶] The flip side of the fact that the President's clemency power is his *alone* to exercise is that it is *his* alone to exercise. *The President* must make that decision—not the Attorney General, not the Deputy Attorney General (to whom Attorney General Griffin Bell delegated final decision-making responsibility for the Justice Department), not the Pardon Attorney, not a U.S. Attorney, and not an Assistant U.S. Attorney. It is difficult to believe that the Framers would have approved a President's decision to delegate his Commander-in-Chief power to a subordinate civilian official or military officer. If the nation were to prosecute a war, the one person responsible for its outcome was to be the one person whom the entire nation elected to office. If so, the Framers must have decided to treat the President's clemency power in the same manner because it is found in the same section and paragraph of Article II. If the nation were to admit a mistake or bestow mercy, it should be the one person who could speak for the nation. And if

The Framers empowered the President to grant clemency because they believed that the remedy was necessary, that only one person should have that power, and that the chief executive was best suited to exercise it on behalf of the nation.[175] It is unlikely that the Framers intended to allow the President to delegate that responsibility to others. The text of Article II lodges the President's clemency power in the same clause and section of that article as the Commander-in-Chief power.[176] By contrast, the President's powers to make treaties and to appoint federal officers are subject to the "Advice and Consent" of the Senate.[177] It is difficult to believe that the Framers would have approved a President's decision to delegate the Commander-in-Chief power to a subordinate civilian official or military officer. If the nation were to prosecute a war, the one person responsible for its outcome was to be the one person whom the entire nation elected to office. If so, the Framers must have decided to treat the President's clemency power in the same manner, because both are found in the same clause and section of Article II. If the nation were to admit a mistake or bestow mercy, it should be the one person who could speak for the nation. And if that is true, then the President cannot delegate his clemency power to someone below him in the chain-of-command.

Accordingly, only the President may make the decision to grant clemency—not the Attorney General, not the Deputy Attorney General (to whom Attorney General Griffin Bell delegated final decision-making responsibility for the Justice Department), not the Pardon Attorney, not a US Attorney,

---

that is true, then the President cannot delegate his clemency power to someone below him in the chain-of-command. It may be the case, however, that Obama did just that." (footnotes omitted)).

175. THE FEDERALIST No. 74, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

176. U.S. CONST. art II, § 2., cl. 1.

177. U.S. CONST. art II, § 2., cl. 2.

and not an Assistant US Attorney.[178] Moreover, the President should make those decisions in a manner that persuades the public that he or she actually made the call, rather than just formally but reflexively ratifying a decision made by others.

Obama was certainly correct that the President might consider each commutation request on its own and forgo making class-wide judgments about the types of offenders who deserve relief. Commutations, like pardons, are generally awarded to particular offenders for reasons peculiar to each specific case. Historically speaking, that is how Presidents have awarded clemency, and doing so makes sense. There might often be occasions where there is a "gap" between a lawful sentence and a just one, or between a legally just sentence and a morally just one.[179] That likely would be particularly common when mandatory minimum sentences tie a judge's hands—the very type of punishments that President Obama sought to address in his Clemency Initiative 2014. Case-by-case decision-making is one way, imperfect though it is, to soften the sharp, unyielding edges of legislatively fixed sentences.

Nevertheless, Obama would have been wrong to think that he could use *only* that approach.[180] Nothing in the text

---

178. As President Obama appears to have done. Larkin, *Delegating Clemency*, *supra* note 11, at 268.

179. *See* Smart, *supra* note 75, at 353 ("I think that, if a judge conscientiously examined every case before him, and, where the law was too crude and inflexible to bridge the gap between legal and moral justice, exercised mercy, we would probably regard him as a very humane and merciful judge.").

180. Obama never explained why he chose a case-by-case approach, although Attorney General Loretta Lynch said that the President lacks the authority to engage in "mass" clemency. She was clearly wrong (or she lied). *See* P.S. Ruckman, Jr., *Creepy Cloud of Error/Ignorance in the Air*, PARDON POWER (Jan. 5, 2017), http://www.pardonpower.com/search?updated-max=2017-01-13T22:30:00-06:00&max-results=20&start=20&by-date=false [https://perma.cc/6TQ7-QQPX] ("Recently, U.S. Attorney General Loretta Lynch appeared on the *Rachel Maddow Show* and said the granting of a pardon is 'an individual decision that's made on a case-by-case basis.' Consequently, 'There's no legal framework or regulatory framework that allows for a pardon of a group *en masse*.' The

of the Pardon Clause bars a President from making category-wide commutations, the history of clemency places no roadblock in that path, and Presidents have awarded relief to large groups of offenders. George Washington granted amnesty to the members of the Whiskey Rebellion. Abraham Lincoln and Andrew Johnson forgave the soldiers who fought for the Confederacy during the Civil War. Gerald Ford and Jimmy Carter granted amnesty to Americans who successfully evaded the Vietnam War-era draft.[181] The Supreme Court has also approved that practice. The distinction between "pardon" and "amnesty," the Court noted in *Knote v. United States*, "is one rather of philological interest than of legal importance."[182] In *United States v. Klein*, the Court wrote that "[p]ardon includes amnesty."[183] Accordingly, there is no persuasive argument that a President may consider commutation petitions only on a case-by-case basis.

President Trump seems to have made clemency decisions on just such a case-by-case basis. From all that appears, however, he did not act in any type of systematic manner. Rather than rely on recommendations offered by the Pardon Attorney or other Justice Department officials, Trump has chosen to listen to family members, celebrities, or other people he knew or saw on television.[184] He commuted the life-imprisonment sentence of Alice Marie Johnson at the behest of his son-in-law (and presidential advisor) Jared Kushner, his daughter Ivanka, and Kim Kardashian West, a television

---

statement was, of course, a preposterous blunder. Amnesties and group pardons are a great American tradition.").

181. Larkin, *Revitalizing Clemency*, *supra* note 5, at 850 n.55.

182. 95 U.S. 149, 153 (1877).

183. 80 U.S. (13 Wall.) 128, 147 (1872).

184. *See* Josh Blackman, *Collateral Damage: The Arpaio Pardon and Separation of Powers*, LAWFARE (Aug. 30, 2017, 1:00 PM), https://www.lawfareblog.com/collateral-damage-arpaio-pardon-and-separation-powers; Margaret Colgate Love, *War Crimes, Pardons and the Attorney General*, LAWFARE (May 22, 2019, 6:42 PM), https://www.lawfareblog.com/war-crimes-pardons-and-attorney-general.

celebrity.[185] Agreeing with the views of two White House advisors, Stephen Bannon and Stephen Miller, Trump pardoned former Arizona sheriff Joe Arpaio.[186] After Sylvester Stallone interceded on behalf of deceased heavyweight boxing champion Jack Johnson, Trump pardoned Johnson for violating the Mann Act by transporting his girlfriend across state lines.[187] Trump pardoned Scooter Libby, formerly the chief-of-staff for Vice President Dick Cheney, convicted of perjury and obstruction of justice, perhaps because of the intervention of certain Washington, D.C., lawyers whom Trump unsuccessfully had sought to retain in connection with the Mueller Investigation.[188] For most of Trump's presidency, there seemed to be neither rhyme nor reason to his clemency decisions.[189] Granting clemency because someone has an "in" at the White House allows cronyism to become the dispositive factor, not justice, not mercy. That might not be a "corrupt" exercise of the President's clemency power, a

185. *See* Brian Bennett, *How Unlikely Allies Got Prison Reform Done—With an Assist from Kim Kardashian West*, TIME (Dec. 21, 2018, 3:57 PM), http://time.com/5486560/prison-reform-jared-kushner-kim-kardashian-west/.

186. *See* Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html.

187. *See* John Eligon & Michael D. Shear, *Trump Pardons Jack Johnson, Heavyweight Boxing Champion*, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/sports/jack-johnson-pardon-trump.html. The Mann Act, 18 U.S.C. §§ 2421–2424, makes it a federal crime to transport a woman in interstate commerce for prostitution or "any other immoral purpose." Johnson was black; his girlfriend, white.

188. *See* Peter Baker, *Trump Pardons Scooter Libby in a Case that Mirrors His Own*, N.Y. TIMES (Apr. 13, 2018), https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html ("Victoria Toensing, a lawyer and friend of Mr. Libby's, said on Friday that she brought his case to the attention of the White House Counsel's Office over the summer. Ms. Toensing and her husband and law partner, Joseph diGenova, were briefly set to work for Mr. Trump as private lawyers last month until they backed out, citing a client conflict.").

189. Not everyone has such a relatively benign characterization of Trump's pardons. *See* sources cited *supra* notes 18–20.

calumny often thrown around these days, but it is not the way to run the railroad.[190]

B. *Potential Commutation Categories*

If the President were to use a category-wide approach, how would that work? What would the categories be? What categories define different types of sentences? Some categories come readily to mind.

1. Capital Punishment

Capital cases naturally define a separate category. That certainly is true as a matter of biology. As Justice Holmes once wrote, "By common understanding imprisonment for life is a less penalty than death."[191] It also is true as a matter of history. English kings, state governors, and Presidents have always treated capital sentences differently. They have reduced death sentences to life imprisonment, with or without the possibility of parole, for centuries.[192] Recently,

---

190. Love, *Pardon Twilight*, *supra* note 5, at 1171–72 ("It would be bad enough if Presidents had made a conscious choice not to pardon at all or to make only occasional symbolic use of their constitutional power. But what makes current federal pardoning practice intolerable is that as the official route to clemency has all but closed, the back-door route has opened wide. In the two administrations that preceded Obama's, petitioners with personal or political connections to the presidency bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged. The Department of Justice invited these end runs by refusing to take seriously its responsibilities as Presidential advisor in clemency matters, by exposing President Clinton to charges of cronyism, and then President Bush to charges of incompetence. The two Presidents are also at fault: in confirming popular beliefs about pardon's irregularity and unfairness, they disserved both the institution of the presidency and their own legacies."). The concerns discussed above regarding pardons that bring discredit on the clemency process apply fully to commutations.

191. Biddle v. Perovich, 274 U.S. 480, 487 (1927).

192. The issue arose often at common law. Death was the mandatory punishment for felonies, and the common law did not always recognize defenses such as infancy or grounds for a reprieve such as pregnancy or mental incompetency. *See, e.g.*, RANKIN, *supra* note 2, at 121; Larkin, *Pardoning Mistakes*, *supra* note 109, at 664. The President can reduce a death sentence to life without parole even when the only alternative punishment is life with the

several governors, usually as they are walking out the door, have decided to empty death row. They have offered different reasons for doing so.[193] In some cases, the governor commuted death sentences to remedy trial errors.[194] Illinois Governor George Ryan defended a mass commutation on the ground that the Illinois criminal justice system was so riddled with system-wide flaws that he lacked confidence in the state's ability to convict only the guilty.[195] Other governors have acted for reasons of personal ethics. New Mexico Governor Toney Anaya, for instance, commuted every death row sentence on the ground that he was morally opposed to capital punishment.[196] Whatever the rationale, Presidents could put capital cases into a category by themselves.[197]

2. Life Imprisonment

Recently, some commentators have argued that contemporary society should eliminate not only capital punishment, but also sentences of life imprisonment,

---

possibility of parole. *See* Schick v. Reed, 419 U.S. 256, 267 (1974). Several Supreme Court cases have arisen out of the grant or denial of a commutation petition. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 275 (1998); *Perovich*, 274 U.S. at 486.

193. *See, e.g.*, Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post*-Furman *Capital Cases*, 27 U. RICH. L. REV. 289, 299–303, 300 tbl.2 (1993).

194. *See* Rose v. Hodges, 423 U.S. 19, 21–22 (1975); Radelet & Zsembik, *supra* note 193, at 293–96, 297 tbl.1.

195. *See Closing Remarks by Former Illinois Governor George Ryan*, Presentation, 53 DEPAUL L. REV. 1719, 1727, 1733–34 (2004) (from Race to Execution Symposium).

196. *See* Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177, 177 (1993) ("I commuted the death sentences of all those on 'death row' in the New Mexico State Penitentiary. I have consistently opposed capital punishment as being inhumane, immoral, anti-God, and incompatible with an enlightened society.").

197. Whether clearing out death row is a wise judgment is a different issue. Commuting a capital sentence, however, is always a politically controversial act. For examples of the different views, see generally, Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319 (2004); Paul J. Larkin, Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE. L. REV. 1295 (2016).

particularly life without the possibility of parole, known in the lingo as "LWOP."[198] Some commentators could include as "life" sentences any punishment that, by its terms, would force a prisoner to die in custody, as well as any sentence that has the practical effect of confining a prisoner for the remainder of his expected natural life. Sentences of one hundred (or more) year's imprisonment, as well as any sentence that would reach beyond the average life expectancy of a particular offender, would qualify as "life" imprisonment. Constitutional law permits those sentences to be imposed on adults. The Supreme Court has expressly held that a sentence of life imprisonment is not a cruel and unusual punishment in violation of the Eighth Amendment when imposed on adult offenders,[199] and that a legislature can mandate life imprisonment by statute, without regard to the mitigating factors present in a particular case.[200] Several federal offenses, such as first-degree murder, treason, and large-scale drug trafficking, can result in a LWOP sentence.[201] A President inclined to believe that no one is beyond redemption might put LWOP sentences in the same category as capital punishment.

3. Offenses Where No Imprisonment Is Justified

A third category would be cases where the President concludes that no term of imprisonment is appropriate. As discussed above, the criminal law has historically limited its reach to offenses that display moral blameworthiness, which

198. *See generally, e.g.*, MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES (2018); LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

199. U.S. CONST. amend. VIII.

200. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991) (upholding over an Eighth Amendment challenge a mandatory LWOP sentence for the possession of less than one kilo of cocaine); *cf., e.g.*, Schick v. Reed, 419 U.S. 256, 257 (1974) (upholding the President's decision to commute a death sentence to LWOP); Biddle v. Perovich, 274 U.S. 480, 485 (1927) (same).

201. *See, e.g.*, 18 U.S.C. § 1111; 21 U.S.C. §§ 841, 848.

requires proof that a party acted with "evil intent." The Supreme Court has held that the Due Process Clause does not prohibit the government from dispensing with such proof,[202] but it has never ruled that the government may imprison someone for a strict liability crime.[203] The President could join the members of the Criminal Law Scholars Hall of Fame, who condemn strict liability crimes,[204] by deciding that no one should be imprisoned for any such offense. If the President were to go further and conclude that it is unconstitutional to imprison someone for a strict liability offense,[205] he or she would be duty-bound to commute any term of incarceration.[206]

4. Offenses with a Maximum Term of Imprisonment

The final category would involve a different type of line-drawing exercise. The President could decide that the federal penal code imposes unduly severe sentences for too many different types of crimes. The sentences imposed for drug trafficking are quite lengthy, and they have drawn the most fire from critics.[207] Nevertheless, the sentences for fraud can be quite lengthy too. Historically, the maximum sentence for mail fraud was five years' imprisonment.[208] After the failure of several major corporations, such as Enron, due to large-scale fraud, Congress upped the maximum penalty to twenty years.[209] The Sentencing Guidelines recommend a

---

202. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277, 283–84 (1943); Larkin, *Strict Liability*, *supra* note 100, at 1077–78, 1081 n.55 (collecting cases).

203. Larkin, *Strict Liability*, *supra* note 100, at 1102–03 & n.131.

204. Larkin, *Pardoning Mistakes*, *supra* note 109, at 656 & n.17 (collecting authorities).

205. As I have argued. *See id.* at 663–69.

206. *See* PRAKASH, *supra* note 26, at 310.

207. *See generally, e.g.*, ALEXANDER, *supra* note 8; BARKOW, *supra* note 6.

208. *See* Act of June 25, 1948, ch. 645, 62 Stat. 683, 763 (codified at 18 U.S.C §§ 1–6001).

209. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 18 U.S.C. § 1341 and elsewhere at 18, 28 & 29 U.S.C.)).

sentencing range based on the dollar value of the fraud.[210] The President could believe that the upper ranges for those offenses are too high. For example, the President could decide that neither a drug trafficker nor a fraudster should receive a sentence greater than ten years' imprisonment absent some additional aggravating factor, such as the use of violence to commit the former crime and the offender's decision to prey on vulnerable victims in the case of the latter. The President could also draw numerous other lines in connection with those crimes, as well as different offenses. If so, he would be able to implement his decision on a category-by-category basis. That approach would not eliminate subjectivity, of course. Where anyone, including a President, draws the line, while perhaps not entirely subjective, rests on his personal judgment as to what would be a reasonable range of years of imprisonment.

That is the best that any President can do. There will almost never be societal agreement on what precise sentence an offender should receive. Different people assign different weights to the role of the harms committed by a crime and the mental state of the offender, as well as to the various aggravating and mitigating features of both. Nonetheless, there is general agreement within society regarding the ordinal relationship among offenses (murder is more serious than assault; fraud is worse than trespass; and so forth).[211] Societies also have a general understanding as to what punishments are unduly lenient and disproportionately

---

210. *See* U.S. SENT'G COMM'N, *supra* note 129, § 2B1.1, at 82–83.

211. *See* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 11 (2008) ("[S]ocial science research suggest[s] that average people, no matter their training or level of education, hold strong intuitive views of an offender's blameworthiness for wrongdoing. Indeed, the studies suggest that an astounding level of agreement across demographics regarding the relative blameworthiness of different offenders exists, at least with respect to the core of wrongdoing (physical aggression, taking of property, and deception in exchanges). Thus, one could adopt a distributive principle of 'desert' based on the community's shared intuitions of justice rather than based on philosophical notions of desert.").

onerous for a particular type of crime.[212] The President could decide that the Congress and Sentencing Commission set an upper range that exceeds the purposes of retribution, incapacitation, deterrence, education, respecting victims' suffering, and any other relevant purpose of punishment. If so, the President could commute whatever sentence a prisoner has received above a chosen limit.

A category-by-category approach avoids the flaws that confront Presidents like Obama when making commutation judgments: either the President must delegate case-by-case decision-making to others, or he must take time away from his other responsibilities to review each case. Neither option is a good one.

IV. SHOULD THERE BE AN ADDITIONAL CATEGORY FOR "EXTRAORDINARY" CASES?

As a practical matter, this question is unnecessary. There will be a category for "extraordinary" cases whether or not it can be justified by law or policy. The average person would certainly find that category useful, if not necessary. We recognize that rules can be eminently reasonable ways of managing most of life, but also that there always will be cases that fall outside of whatever rules we adopt, and we need to have sufficient flexibility in our judgment-making to allow for some exceptions. Decision trees and other decision-making tools are just that—*tools* that help someone make the right decision, not a substitute for reasoned judgment.[213]

---

212. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (2d ed. 2008); ROBINSON, *supra* note 208, at 11 ("People do not share a sense of the absolute amount of punishment that is deserved for an offense. Some tend to be harsher in their punishment tastes than others. Rather, what people share is a sense of the relative blameworthiness of different cases.").

213. Ted Sorensen, Counsel to President John Kennedy, made that general point nearly six decades ago:

> Procedures do, of course, affect decisions. They especially affect which issues reach the top and which options are presented . . . . But procedures and machinery do not—or at least they should not—dictate decisions,

Particularly where the subject is forgiveness or mercy, we should be willing to recognize that life is too unruly for rules to govern every scenario. The best explanation of that phenomenon is one given by former Stanford Law School Professor Anthony Amsterdam:

> Several years ago when I was teaching at Penn, we had our local version of the grading reform boom that has since swept the law schools of the nation. Students and some faculty rebelled against the rigidities and artificialities of the 100-point numerical grading system then in use. Other faculty members were loath to abandon it, and challenged the reformers to devise a better scheme. Some suggested a seven-point scale; some said three grades would be sufficient; some stood upon the plank that categories ought to be abandoned entirely, leaving each professor to fill the margins of his bluebooks with such withering or admiring adjectives as he might choose.
>
> Finally, some political genius hit upon a solution. One hundred pairs of adjectives were chosen to replace the 100 numbers of the 100-point grading scale, from "abysmally abominable" for zero to "celestially sublime" for 100. The system was called the Peachy Keen Scale because "peachy keen" was the adjectival equivalent for a 78, which everyone agreed ought to remain the median grade, or adjective, at the law school. The system was a fireball until several professors—who had never previously felt unduly confined by the numerical scale because numbers are recognizably artificial—complained that the Peachy Keen Scale contained an insufficient number and quality of adjectives to express their views upon the infinite variety of student writing.
>
> The motto, I suppose, is that any number of categories, however shaped, is too few to encompass life and too many to organize it manageably.[214]

While Presidents are not average people (for good or ill), few are willing to decide that a decision-making tool that works in the vast majority of cases must be followed in every case regardless of how it treats extraordinary ones. No

---

> particularly in our highest political office. We may marvel at the speed and the efficiency with which an electronic computer can solve certain problems, but we would not vote for that computer to be President.

THEODORE C. SORENSON, DECISION-MAKING IN THE WHITE HOUSE 3–4 (2005) (1963).

214. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 376–77 (1974).

President is likely to abandon his ability to grant clemency to someone whom he believes is a deserving candidate just because the approaches set forth above do not result in "Grant Clemency" as the answer. It is impossible to imagine a President saying to him- or herself, "I'd like to pardon John or Jane Doe (or commute his or her sentence) because of some extraordinary feature of his or her life, but I can't do so because the decision-making methodology I've approved does not lead to that result." If that is impossible to imagine, and I believe that it is, we do no one a favor by fighting the eminently natural urge to exercise discretion in extraordinary cases even when a rule tells us not to do so.

Nor do we want a President to feel bound by whatever decision-making tool he uses. We want a President to make reasoned judgments. The schemata discussed above help a President do that without handcuffing him. The President needs to make, and to appear to be making, objectively defensible decisions. He is the nation's chief executive, not a priest, a minister, a rabbi, or an imam. A member of the cloth can forgive even if the congregation would decry his action. A President cannot; he answers to the public, not the Almighty (at least in this life), so he cannot weaken the public's confidence in the fairness of the criminal justice system. Yet, he still should not forgive when doing so would bring the clemency process—and therefore the criminal justice system—into disrepute. If he does, the public loses respect for the system and might choose not to help law enforcement officials do their jobs. Innocent people will become needless victims.

The problem is two-fold: (1) How do you define an "extraordinary" case? (2) How do you keep that exception from swallowing the rule? Neither question has a good answer. If I knew how to define an "extraordinary" case, I would have built the decision into the methodology set forth above. The dictionary is not very useful. It defines "extraordinary" as beyond what is usual, regular, or established; not normal; or surpassing the common degree or

measure, and so forth.[215] That definition, however, is not helpful. A goodly number of cases could satisfy that definition; perhaps one-third to just shy of one-half of clemency applications could meet it. Who knows?

Of course, maybe for that reason "extraordinary" is not the right word to use for this category. Maybe we need to approach the reach of this category from a different direction. Maybe the best way to define the category is to ask whether a clemency petition "dazzles" the reader. That is, the applicant is someone whom every reasonable person would say merits clemency, someone whose desert "just jumps off the pages" of his application.[216] Want an example of how the "extraordinary case" exception should work? Here is one.

On October 10, 2019, President Trump issued a posthumous pardon to Zay Jeffries for his 1948 conviction for engaging in anticompetitive conduct, in violation of the Sherman Antitrust Act.[217] Jeffries, who died in 1965, was a scientist, with a specialty in metallurgy. His work on the Manhattan Project and with development of armor-piercing shells helped the war effort during World War II.[218] A 2013

---

215. *Extraordinary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

216. *See 21* (Columbia Pictures 2008). The film *21* is based on the true story of the students and graduates of MIT and Harvard who used card-counting techniques to win at blackjack in Las Vegas casinos. In the film, an MIT senior admitted to the Harvard Medical School (HMS) is speaking with the HMS Admissions Director about a prestigious scholarship that would pay for the entire cost of his education. The director tells the student that there are numerous others who have applied for that scholarship and that the application essay will be critical. He then tells the student that the recipient will be someone who "dazzles. Someone who just jumps off the page." He asks the student, "What can you tell me, Ben, that's going to dazzle me?" Melissa Tsuncova, *Did I Dazzle You? – 21 (2008)*, YOUTUBE (June 16, 2017), https://www.youtube.com/watch?v=rEYS-Xx-s-U.

217. Donald J. Trump, Executive Grant of Clemency to Zay Jeffries (Oct. 10, 2019).

218. *Trump Pardons Scientist Who Helped Allies Triumph in WWII*, ASSOCIATED PRESS (Oct. 10, 2019), https://apnews.com/article/ad44481404cd40669b3bec49b583da80; John Bowden, *Trump Grants Posthumous Pardon to Manhattan Project Contributor*, THE HILL (Oct. 10, 2019, 4:54 PM), https://thehill.com/homenews/administration/465290-trump-grants-

biographical memoir prepared for the National Academy of Scientists, of which Jeffries was an elected member, described the circumstances of his conviction as follows:

> One of the great satisfactions of Jeffries' life, but also one of his great disappointments, was his leadership of the cemented-carbide tool industry in the United States—a satisfaction because his executive efforts helped to establish the industry; and a disappointment because he and two other GE [viz., General Electric Company] executives were later indicted and found guilty for violating antitrust and tariff acts in connection with certain licensing and merchandising practices. As indicated below, they were convicted for following licensing practices that had been implicitly approved by a Supreme Court decision in 1928 but overturned 20 years later when the Supreme Court reversed itself on those same practices.
>
> In 1925 the General Electric Company sent one of its research engineers, Samuel L. Hoyt, to Germany to investigate metallurgical processes of interest to GE. Having been involved in the drawing of tungsten wires for light filaments, Hoyt had worked with tungsten carbide as a possible die material. While in Germany he learned of a process that had been developed at the German company F. Krupp AG for making cemented tungsten carbide, wherein particles of tungsten carbide could be embedded in a tough cobalt matrix that made a superior tool, not only for wire drawing but for machining as well. On his return to Schenectady, Hoyt worked to duplicate the process in an effort to make die materials that could be used for wire drawing in GE's lamp division. This led to the development of a cemented-carbide material, which the company called Carboloy.
>
> GE recognized the broad potential value of this material for machining, but subsequent patent searches determined that the Germans had already been awarded a patent on an alloy identical to Carboloy and further that Krupp had acquired the rights to market that alloy throughout the world. This situation led to negotiations that allowed GE to market Carboloy in the United States. By 1928 GE had formed a separate company, Carboloy Co., with Zay Jeffries as one of the key executives. He became President of Carboloy in 1932 and was named chairman of the board in 1936. The cemented-carbide industry struggled in the years of the depression and continually fought with Krupp over past business agreements; Krupp even stopped marketing the product in the United States. Through a new agreement in 1936, Krupp surrendered its right to export into the United States in return for royalty payments based on its remaining patents. Thus by the late 1930s the cemented-carbide tool industry was entirely in American

---

posthumous-pardon-to-manhattan-project-contributor.

hands.

In 1940 Carboloy filed a routine suit against a U.S. company that Carboloy considered to be infringing on the patents it had acquired through its agreements with Krupp. Jeffries and others at Carboloy were surprised, if not shocked, that the federal judge presiding in the case handed down a decision that all of the patents that had been granted in the 1920s should not have been granted. This unbelievable ruling almost certainly was motivated by international politics—royalties were owed to Krupp, but the judge concluded that he could not sanction sending money to Hitler's evil government. And the way to stop the flow of money was to strike the patents down, although there was no legitimate legal basis for doing so.

Because the patents were about to expire anyway, and also because the company believed that the unanimous Supreme Court decision from the 1920s was ample protection, Carboloy elected not to challenge the federal judge's ruling. Unfortunately, this action was later interpreted as an admission that Carboloy had been using licensing and merchandising practices that violated the Sherman and Wilson Antitrust Acts. Thus a criminal indictment was brought against Jeffries and others at GE in connection with these antitrust charges.

When the war began, government officials, including the Secretary of War, wrote to the Attorney General essentially begging him not to prosecute because of the need for Jeffries' expertise in the war effort. Thus given the intervention of World War II, the case was not brought to trial until 1947. The defendants were found guilty on all charges more than a year later, in October of 1948. Amazingly, the decision of the court was based on a Supreme Court decision on price-fixing reached earlier in 1948, which completely reversed the decision of the same court 20 years before. The judge in the case was so troubled by the new legal requirement that he saw fit virtually to apologize to Jeffries and the others for having handed down his decision. In a long statement, the judge pointed to the great service that Jeffries had provided to the nation in developing cemented-carbide tools, which played such a key role in winning the war.[219]

---

219. William D. Nix, *Zay Jeffries, 1888–1965: A Biographical Memoir*, NAT'L ACAD. SCI. 9–10 (2013), http://www.nasonline.org/publications/biographical-memoirs/memoir-pdfs/jeffries-zay.pdf; *see also* Off. of Comm'ns, The White House, Statement from the Press Secretary Regarding the Pardon of Zay Jeffries (Oct. 10, 2019).

> One of America's leading scientists, Dr. Jeffries was crucial to the United States war effort in World War II. His efforts enabled the United States to develop artillery shells capable of piercing the armor of German

The Jeffries's pardon is striking for a host of reasons. To start with, the pardon could readily be justified as an effort to correct a gross injustice because, for all that appears, Jeffries's conviction was unconstitutional. A foundational principle of the criminal law is that the government must explain to the public where the line is between legal and illegal conduct before it can claim that someone crossed it.[220] To protect the public against retroactive criminal liability, the Ex Post Facto Clause prohibits Congress from using a new criminal statute to outlaw past conduct,[221] and the Due Process Clause keeps federal courts from achieving the same result by construing an existing statute in an unreasonably broad and unforeseeable manner.[222] Those principles would appear to directly apply to Jeffries's case. The Justice Department charged him in 1941 with a crime that allegedly

---

tanks, and his contributions to the Manhattan Project helped end the war in the Pacific theater.

Although indicted in 1941, Dr. Jeffries proved vital to the war effort prompting Secretary of War Stimson to take the extraordinary step of requesting, with President Roosevelt's approval, that the Attorney General defer any prosecution until after the war. When the Department of Justice returned to the case in 1947, it grounded its legal theory on a Supreme Court precedent that did not exist when Dr. Jeffries was originally indicted. Reportedly, the judge in the case was apologetic in handing down his sentence, which was a $2,500 fine with no jail time. In 1948, the same year as his conviction, President Truman awarded Dr. Jeffries the Presidential Medal for Merit.

Today, Dr. Jeffries' case has attracted support from Senator Lindsey Graham, former Congressman Trey Gowdy, and others. In light of these facts, and in recognition of his contributions to helping to secure an Allied victory in the Second World War, the President has concluded that Dr. Zay Jeffries is worthy of a posthumous pardon.

Id.

220. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2323 (2019) (quoted *supra* note 93).

221. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

222. *See* Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) (quoted *supra* note 94); *see also, e.g.*, Metrish v. Lancaster, 569 U.S. 351, 356 (2013); Rogers v. Tennessee, 532 U.S. 451, 457–62 (2001); Marks v. United States, 430 U.S. 188, 192 (1977); Douglas v. Buder, 412 U.S. 430, 432 (1973); Rabe v. Washington, 405 U.S. 313, 315 (1972).

had occurred years earlier. That earlier date fixes the relevant time for purposes of criminal liability. Neither the Department nor the district court was free to rely on an interpretation of the law that the Supreme Court did not adopt until years after the completion of the alleged crime. That would amount to precisely the type of retroactive judicial lawmaking that the Supreme Court has prohibited.[223]

Aggravating that error was yet another. If the Supreme Court had approved in the 1920s the conduct that the government sought to make a crime in 1941, the district court should have dismissed the indictment for yet another reason. Prosecuting someone for conduct that the government had earlier and expressly said was lawful is not just retroactive criminal lawmaking but instead playing bait-and-switch with the public, which the Supreme Court has also said the Due Process Clause bars.[224] Accordingly, President Trump appears to have used his Pardon Clause authority to correct a clear miscarriage of justice committed by the Justice Department and the district court.

The Jeffries's pardon is also justifiable under the approach discussed above. Jeffries was legally or morally innocent of the Sherman Act violations charged against him; that conduct certainly appears to have been an isolated episode in a law-abiding life; his wartime conduct atoned for whatever harm he (might have) caused to the economy from the Sherman Act charge; and granting him a pardon enhances the integrity of the criminal justice system by telling the public that the President is willing to correct its

223. I suppose that the Justice Department could argue that retroactive lawmaking is applying post-1947 decisions like *Bouie* retroactively to bar the government from applying the then-most recent Supreme Court interpretations of the Sherman Act to the conduct charged against Jeffries. That argument would be clever, but utterly misguided. If it is always reasonable to apply the most recent judicial interpretations of a pre-existing law, then the department loses. The Due Process Clause became law in 1791.

224. *See* cases cited *supra* note 108.

mistakes. The decision-making approaches set forth above would lead to clemency apart from the constitutional infirmities in his conviction.

Finally, the Jeffries's pardon is also justifiable as a case where mercy would be appropriate even if the questions and categories previously suggested would not lead to relief. Secretary of War Stimson intervened to ensure that Jeffries would be available to help in the war effort. Jeffries must have made an important contribution because President Harry Truman awarded him the Presidential Medal for Merit for his work in 1948, the same year that he was convicted. The district court imposed only a fine and reportedly was apologetic at sentencing. There is no other known blemish on his record. Jeffries died more than fifty years ago, so a pardon cannot lift any of the burdens that a conviction imposes on someone's work opportunities or life. But it does clear his name and perhaps makes a point too—muted, though it is, by the passage of time—that the Justice Department should never have charged Jeffries in the first instance and certainly should never have followed through with its prosecution once the war ended. Presidential pardons send a message. From all that appears, the one this pardon sent is that injustices will be corrected or that mercy is always available. Either message brings credit on a President and the office he or she holds.

Cases like Jeffries's might give us a basis for comparison when deciding whether a pardon application is dazzling. That still leaves the second question, however, the one that asks how we can prevent the exception from swallowing the rule. Unfortunately, we can't.

The President has the prerogative to grant clemency to whomever he decides is due forgiveness or mercy, whenever he wants to do so, and as often he likes. There is no legal restraint other than the ones identified in the text of the Pardon Clause, and there is no judicial review of a decision. The only external restraints are, at best, political and historical. The electorate can refuse to re-elect someone who

cannot be trusted to act responsibly. In an extreme case, the House of Representatives could impeach the President, and the Senate could convict and remove a scoundrel from office. Historians can decry the abuses of presidential power. That, however, is all that can be done. That result will seem odd to a public accustomed to watching the federal courts run virtually every aspect of government, and some others will deem that outcome utterly unacceptable. As Chief Justice and former President Taft once wrote, however, the Framers assumed that Presidents would not abuse their clemency power.[225] We now know that their assumption was mistaken. As far as the Constitution goes, however, we have to accept the bad with the good.

All that said, there is one last question: Suppose President Biden or a successor were to adopt the approach set forth in this Article. Would that improve the presidential decision-making process, or would it simply alert the White House Communications Office to how it should draft press statements explaining the President's decisions? The answer likely turns on the character of the people we elect as President. No system—neither the one proposed here nor any other—can force a President to analyze clemency petitions rigorously or eliminate the risk of subjective decisions. We have seen the latter before,[226] and we

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

226. *See* Sarat, *Mercy*, *supra* note 108, at 277 ("Using familiar tropes and comforting rhetorical appeals, the accounts of their exercise of clemency in capital cases that governors provide begin to emerge as a genre. The first of their generic properties has to do with the structural position of clemency as a discretionary power lodged finally in the office and person of the chief executive. Thus, in each of these accounts we encounter the governor as a solitary figure wrestling alone with an enormous responsibility. But executive clemency is not only a personal discretion, it is a virtually unreviewable power by either the people or the courts. [¶] This leads to two other generic qualities in these narratives: an effort to demonstrate the gravity of the decision-making process, and some rhetorical trope that would ground what is in the end a personal choice in larger cultural and political values. These generic conventions are addressed to an audience imagined to be anxious and doubtful about the way the power to spare life is used. How, then one might ask, do these accounts respond to the pervasive cultural anxiety that necessarily attaches to a power that cannot be subject to rule? What

doubtless will see it again. Neither Congress nor the courts can tell the President whether, when, or how to grant clemency. Clemency is his prerogative. The approaches recommended here, I hope, will reduce the risk of mistaken or improper decision-making. If so, that small improvement would benefit clemency petitioners, the President, and the public. Any improvement in that process would be salutary.

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 on how to treat them once they are in his or her hands. Clemency requests can tax the wisdom and compassion of a member of the clergy or a philosopher. Perhaps Abraham Lincoln had the wisdom needed to resolve clemency applications without any guidance like what I have recommended here. But we have not elected a Lincoln in quite some time, so we need to offer the people we do choose a way to act responsibly and humanely. This Article tries to do just that.

---

rhetorical and literary strategies do they employ? Can, and do, these narratives provide consolation and calm that anxiety?").