

Mercy for the Masses: A Default Rule for Automatically Triggered Commutations

Adam M. Gershowitz*

Clemency is rare in the United States.¹ And when it is granted, it is not spread evenly across all types of criminal cases. Instead, the distribution of clemency is bimodal—often being granted for low-level misdemeanors on one end, and death penalty cases on the other end.

Governors appear most willing to grant pardons to those convicted of misdemeanors. When governors announce pardons around Christmastime, many of them involve misdemeanor convictions. And recently, a few governors and President Biden have announced mass pardons for people convicted of misdemeanor marijuana possession.²

On the other end of the spectrum, governors and pardon boards (not to mention academics) pay close attention to death penalty cases. Since 1976, there have been more than 300 grants of clemency in capital cases.³ And while capital clemency has declined dramatically since its peak in the first half of the twentieth century, commutations of death sentences still occur with regularity. Over the last decade, there has been roughly one commutation for every ten death sentences handed down. And even when governors and pardon boards reject petitions for commutations, they study and pray over the cases very carefully.

Clemency may not be robust, but it is alive at the polar ends of the criminal justice system. By contrast, clemency is almost totally absent for the

* James D. & Pamela J. Penny Research Professor and Hugh & Nolie Haynes Professor of Law, William & Mary Law School. My thanks to Lee Kovarsky, Jennifer Laurin, and the participants in the Mercy Symposium.

1. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1333 (2008) (“Presidential and gubernatorial grants of clemency are rare events.”). Take New Jersey, for instance: from 1994 to 2022, governors granted pardons or commutations only 105 times, or less than four per year on average. Nikita Biryukov, *Murphy the First Governor Since McGreevey to Issue No Clemencies in First Term*, N.J. MONITOR (Jan. 24, 2022, 6:59 AM), <https://newjerseymonitor.com/2022/01/24/murphy-the-first-governor-since-mcgreevey-to-issue-no-clemencies-in-first-term/> [<https://perma.cc/MFN3-JQQB>].

2. A handful of scholars have advocated for more robust clemency for undocumented immigrants charged with misdemeanor offenses. See Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT’G REP. 184, 186 (2000–2001) (suggesting “systematically pardoning immigrants whose deportation would work grave injustice”); Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293, 297 (2013) (urging “expansion of the use of the pardon power at the state level because it is one of the few remaining vehicles for avoiding deportation”).

3. *Clemency*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency> [<https://perma.cc/E22B-7PV7>].

vast population of “ordinary” felony offenders. Those convicted of burglary, robbery, assault, and other mainstream felony crimes are almost never granted pardons or commutations.⁴ The distribution of clemency, therefore, looks like a bimodal graph or an inverted bell curve: lots of activity at the poles,⁵ but very little mercy in the middle.

Of course, there are exceptions. Clemency is sometimes granted in “ordinary” felony cases where the defendant has been particularly remorseful, where there is a credible claim of innocence, or where some other injustice appears to have occurred. And for a brief historical moment, President Obama’s Clemency Initiative led to nearly 1,700 drug offenders having their lengthy prison terms commuted.⁶

But governors’ sporadic commutations of felonies and the Obama Clemency Initiative are drowned out by the sheer number of people incarcerated for “ordinary” offenses. Felony cases make up most of the 1.2 million people in prison.⁷ Yet, the prospect of commutations for those crimes is close to zero.

This Essay considers how governors who are interested in reducing mass imprisonment can provide “mercy for the masses” who are in the middle of the criminal justice punishment spectrum. It draws on the successful mass pardons for misdemeanor marijuana offenses, as well as the aspects of the Obama Clemency Initiative that worked well. The proposals that follow offer four variations on a default rule for automatic, but modest, mass commutations.

The first proposal—which is the boldest and thus the least likely to be adopted—would call for governors interested in reducing mass imprisonment to adopt a standing policy of commuting each and every felony sentence by 10%. For instance, under a governor’s standing order, a robbery defendant sentenced to 72 months would have his sentence immediately and automatically commuted to 65 months. No application or individualized

4. *See infra* Part II.

5. Of course, there are good reasons for governors to show mercy to defendants sentenced to death or those with low-level misdemeanor convictions. Pardoning people with marijuana possession convictions eliminates the anchor weighing them down when they apply for jobs or search for housing. And given that the death penalty is racially and geographically arbitrary, a compelling case can be made that commuting death sentences is morally justifiable even absent a claim of innocence. But focusing clemency on misdemeanors that carry short sentences and the relatively small pool of capital cases does little to reduce the systemic problem of mass imprisonment.

6. *See infra* notes 66–80 and accompanying text.

7. *See* E. ANN CARSON, BUREAU OF JUST. STATS., PRISONERS IN 2021 – STATISTICAL TABLES 2, 10 (Eric Hendrixson ed., 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf> [<https://perma.cc/VX4Q-993Q>] (reporting that at the end of 2021, persons sentenced to more than one year accounted for 97% of the state prison population and 92% of the federal prison population).

consideration would be necessary; the 10% commutation would occur automatically.

The second proposal—which is more politically palatable—would be for governors and pardon boards to award the 10% sentencing commutation only to defendants who have completed half of their sentence with no major disciplinary violations.⁸ In other words, after the robbery defendant has served 36 months of his 72-month sentence with no major infractions, the governor would automatically commute the sentence by 10% down to 65 months. This proposal is similar to the “good time” credit granted in some states and the federal system.⁹

The third proposal would limit the 10% reduction to those serving time for drug possession or other nonviolent crimes. Granting a sentencing commutation to nonviolent individuals who had never victimized another person would be politically less risky.

The fourth proposal would operate after an individual is released from custody. If a person has not been convicted of a new criminal offense within, for example, five years of release, the governor would automatically pardon them, thus wiping out their prior conviction.¹⁰ This approach would not immediately reduce the prison population, but it would help those with criminal records to more easily gain employment, housing, and reintegration into society. That, in turn, would make it less likely that they would recidivate.

At present, clemency decisions for “ordinary” felony cases are individualized decisions. Governors or pardon boards must study each and every case before granting or denying clemency. The obvious problem with individualized decisions is that they are slow and cumbersome. Casefile reviews, paperwork, and consultations with victims, not to mention objections from the prosecutors who handled the cases, all stand in the way of clemency being awarded under an individualized assessment regime.¹¹

8. Federal regulations provide for four levels of disciplinary violations: (1) Greatest; (2) High; (3) Moderate; and (4) Low. *See* 28 C.F.R. § 541.3 (2024) (dividing a list of prohibited acts into these four categories). As explained below, governors could choose to rely on this regulation to define what constitutes a major violation. *See infra* notes 83–85 and accompanying text.

9. *See, e.g.*, TEX. GOV'T CODE ANN. § 498.003 (West 2023) (allowing accrual of “good conduct time”); N.Y. CORRECT. LAW § 804 (McKinney 2011) (allowing prisoners to receive time allowances to reduce the term of their sentences for “good behavior”); 18 U.S.C. § 3624(b) (providing “up to 54 days for each year of the prisoner’s sentence imposed by the court, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations”).

10. If new criminal charges have been filed and are pending, the automatic pardon would be stayed pending the outcome of that case.

11. Professors Rachel Barkow and Mark Osler have demonstrated this quite clearly in the context of the federal pardon process. *See* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM.

Scholars often point to politics as the reason for the dearth of clemency in the United States.¹² And there is a lot of truth to that narrative. But at a more basic level, the slow process of individualized decision-making also plays a major role in the paltry number of clemency grants in the United States.¹³

The proposals in this Essay flip the default rule away from individualized decision-making, which has historically resulted in a small number of commutations. The default rules proposed in this Essay would create a system of automatic mass commutations, which in turn would result in modest sentencing reductions for most convicted individuals. This approach adopts the successful model of mass commutations that some governors have used for misdemeanor marijuana offenders. At the same time, the proposal offers only modest sentencing reductions and, like the Obama Clemency Initiative for drug offenders, does not result in immediate release of prisoners. The proposal is therefore designed to be modest and politically feasible.

Of course, the proposals are not without serious objections, including that (1) granting a modest automatic commutation is sometimes less desirable than granting a full pardon or larger sentencing reduction; (2) it would lock governors into granting clemency even in cases where the individual is undeserving; and (3) the proposals are politically unpalatable. These objections are compelling, but not impossible to surmount.

First, a chief executive's clemency power is expansive, and there is nothing to suggest that a governor could not afford a more generous clemency grant than the automatic 10% approach provides. For instance, following the automatic 10% reduction in sentence length, a governor could later decide to make a second, broader grant of clemency that provides a full pardon to an individual.

Second, all four proposals can operate as default rules. In the absence of any other action by the governor, the commutation would apply to each and every case. But governors could draft their clemency policy to retain the option to override the default rule and remove a particular individual from being granted a commutation.

Third and obviously, any of the four proposals outlined in this Essay would be politically risky. But so are all clemency decisions. By instituting

& MARY L. REV. 387, 430–31 (2017) (describing the “long vertical bureaucracy that winds through four federal buildings and no fewer than seven levels of review”).

12. See, e.g., Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 819 (2015) (“The main reason for fewer clemency grants is the politics surrounding clemency and crime more generally.”); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1193–94 (2010) (discussing the impact of politics on the decline of the presidential pardon).

13. The slow pace of decision-making explains why thousands of clemency applications were left unresolved in the Obama Clemency Initiative. See *infra* notes 76–80 and accompanying text.

an automatic clemency system, governors would be making a controversial decision *ex ante*, and separate from the specific, bad facts of any particular case. Moreover, there is an increasing consensus that mass incarceration is a problem that needs to be addressed.

This Essay proceeds as follows. First, Part I explains how the modern clemency power has often been focused on death penalty cases and low-level misdemeanors. Part II then recounts how most of the people incarcerated in the United States are there for run-of-the-mill “ordinary” felonies and that those crimes have historically not received clemency. Finally, Part III describes four proposals to flip the current state of affairs from individualized decision-making to a default rule of mass commutations.

I. Bimodal Grants of Clemency

A. *Commutations Continue to Be Granted in Death Penalty Cases*

When we think of commutations, the first thing that comes to mind for many people is death penalty cases. After litigating the direct appeals and habeas process for years or even decades, death-row inmates seek commutations as a last-ditch effort to avoid execution.¹⁴ In the first half of the twentieth century, clemency was extremely common in death penalty cases. Governors commuted one out of every four or five death sentences.¹⁵

Since the Supreme Court reinstated capital punishment in 1976¹⁶ the number of commutations has declined considerably. However, commutations still occur with regularity. There have been 313 death-penalty commutations since 1976.¹⁷ Initially the 300+ commutations (in a period with roughly 1,600 executions and 8,400 death sentences¹⁸) looks like a fairly frequent use of clemency—roughly one grant of clemency for every five to six executions, or one grant of clemency for every thirty-three death

14. See Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 2–3 (2014) (describing the conventional process, but arguing that clemency should be considered earlier in capital cases).

15. See Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 262, 266 (1990–1991) (referencing historical reports that one out of every four or five death sentences were commuted).

16. *Gregg v. Georgia*, 428 U.S. 153, 187, 207 (1976) (holding that the death penalty is constitutional under certain circumstances).

17. *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> [https://perma.cc/5VG8-A9DD].

18. See *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [https://perma.cc/272S-27ZU] (reporting 1,583 executions nationwide since 1976); *Death Sentences in the United States Since 1973*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> [https://perma.cc/2BSZ-UBEM] (listing national death sentences by year since 1972).

sentences. But most of the 313 were mass commutations by governors who cleared death rows either for their own personal reasons or because their states had abolished the death penalty.¹⁹ Only about eighty of the commutations since 1976 have been individualized grants of clemency.²⁰

Even though capital clemency is far less robust than it was prior to *Furman v. Georgia*,²¹ commutations of death sentences are still far more common than commutations for other types of crimes. A comparison between recent death sentences and recent commutations tells the story.

In recent years, death sentences have declined dramatically nationwide,²² but commutations have continued. For the ten-year period from 2013 through 2022, there were 405 death sentences in the United States.²³ During that time, there were thirty-nine capital commutations.²⁴ That amounts to roughly one commutation for every ten death sentences. However, a large chunk of those clemency grants came when the governors of Maryland, Colorado, and Oregon emptied their death rows in mass commutations.²⁵ If we were to exclude those mass commutations, there would be fifteen commutations from 2013 to 2022, which would amount to one commutation for every twenty-seven death sentences. These numbers are obviously far below the pre-*Furman* commutation level, but as we will see in Part II, they are drastically greater than commutations awarded in non-capital cases.

Moreover, even when governors deny clemency, it is clear that they often devote considerable attention, prayer, and discussion to the clemency decisions. For example, former Arkansas Governor Asa Hutchinson described his role in considering clemency as “‘the heaviest and most serious responsibility’ of his office.”²⁶ A previous Arkansas governor said that the clemency decision “keeps you up at night.”²⁷ Former Tennessee Governor Phil Bredesen explained that “you’re the only person on earth with a 15-second phone call who can bring this to an end and save this person’s life . . .

19. For a list, see *List of Clemencies Since 1976*, *supra* note 17.

20. *See id.* (listing death-penalty clemencies since 1976 and the reasons for each commutation).

21. 408 U.S. 238 (1972).

22. BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 1, 4–5 (2017).

23. *See Death Sentences in the United States Since 1973*, *supra* note 18 (listing national death sentences by year since 1972).

24. *See List of Clemencies Since 1976*, *supra* note 17 (listing death-penalty clemencies since 1976).

25. *See id.* (attributing twenty-four clemency grants to the Maryland, Colorado, and Oregon mass commutations).

26. John Moritz, *After Execution, Governor Weighs a Clemency Bid*, ARK. DEMOCRAT-GAZETTE (Apr. 23, 2017, 4:30 AM), <https://www.arkansasonline.com/news/2017/apr/23/after-execution-governor-weighs-a-cleme> [<https://perma.cc/AW4W-77FK>].

27. *Id.*

It's a very agonizing, unpleasant situation to be in."²⁸ Another former Tennessee governor, Bill Haslam, said that "he spent time in prayer and spent hours upon hours calling people he respected and getting their opinion."²⁹

Some governors have remarked that they prayed over the decision whether to grant clemency.³⁰ Other governors note their "extensive review of the case."³¹ For instance, former Maryland Governor Robert Ehrlich denied clemency and allowed an execution to move forward after he "read about the case extensively, reviewed motions and pleas from the prosecution and the defense, considered the court rulings and discussed the details with senior staff members."³² In short, even when governors refuse to commute a sentence, many of them agonize over the decision and take their clemency responsibility very seriously.

B. *Pardons for Misdemeanor Offenses*

Misdemeanor offenses, by definition, carry sentences of less than a year, often far less.³³ And the clemency process is slow. As such, there is almost no prospect of governors or pardon boards commuting a misdemeanor sentence that is currently being served. Accordingly, when misdemeanants are granted clemency, the pardon typically occurs after the individual has served the sentence and been released from custody. In reality, those pardons often come years or even decades after the individual has been released from custody. This gives the applicant time to build a record of rehabilitation and remorse, which seemingly makes a pardon application more compelling. The same is true for low-level felony offenses.

Take Virginia, for example. In 2022, Governor Glenn Youngkin issued twenty-seven pardons to individuals who had already completed their sentences.³⁴ Roughly two-thirds of the pardons were for misdemeanor

28. Tyler Whetstone, *A Phone Call Can Save Him: Tennessee Governors Recount Death Row Decisions*, KNOX NEWS (May 16, 2019, 12:21 PM), <https://www.knoxnews.com/story/news/politics/2019/05/15/tennessee-governors-recall-death-penalty-decisions/1189187001/> [<https://perma.cc/W6M3-RSQ6>].

29. *Id.*

30. See, e.g., Kristen Gelineau, *Virginia Governor Weighs Whether to Allow 1,000th U.S. Execution*, AP WORLDSTREAM (Nov. 29, 2005), <https://1.next.westlaw.com/Document/Ifd66cc60610e11dab0abf4ef922e2f5c/View/FullText.html> [<https://perma.cc/VU8M-HV29>].

31. Andrew A. Green, *Ehrlich Says Decision on Execution Was Difficult*, BALTIMORE SUN (July 1, 2019, 7:24 AM), <https://www.baltimoresun.com/2005/12/07/ehrllich-says-decision-on-execution-was-difficult/> [<https://perma.cc/F9KP-9QV8>].

32. *Id.*

33. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 290 (2011) (noting that misdemeanors generally have punishments of not more than one year in jail).

34. OFFICE OF THE GOVERNOR, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY (2023), <https://rga.lis.virginia.gov/Published/2023/SD2/PDF> [<https://perma.cc/3J92-Z7TK>].

cases.³⁵ And most of the felony pardons were for low-level, nonviolent felonies such as welfare fraud, uttering fake currency, and embezzlement.³⁶ Notably, all of the pardons came long after release from custody and thus did not reduce the size of the jail population.

The idea of granting pardons to deserving misdemeanor and low-level-felony offenders has become a mainstream pillar of criminal justice reform. Governors and two U.S. presidents have specifically designed and promoted such programs.

Following the legalization of marijuana in many states, there has been a movement to pardon people convicted of misdemeanor marijuana possession. For instance, in 2019, Governor Jay Inslee of Washington created an initiative to grant clemency to individuals convicted of misdemeanor marijuana possession.³⁷ The initiative provided that anyone with a conviction for misdemeanor marijuana possession from 1998 to 2012 in Washington state could receive a pardon if they have no other criminal convictions.³⁸ Unfortunately, the initiative did not apply automatically and instead required individuals to apply for a pardon.³⁹ Estimates suggested that as many as 3,500 individuals could be eligible, yet after four years only thirty-eight people had received pardons.⁴⁰

A few months later, Governor J.B. Pritzker of Illinois took the same step and pardoned 11,000 individuals for low-level marijuana convictions.⁴¹ As with the Washington initiative, many of those with Illinois convictions would have to petition for the pardon.⁴² Colorado Governor Jared Polis also

35. *Id.*

36. *Id.* The previous Virginia governor was more generous with clemency grants, but the pattern was the same. From early 2020 to early 2021, Governor Ralph Northam issued 129 simple pardons—all of which came after release from custody. OFFICE OF THE GOVERNOR, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY (2021), <https://rga.lis.virginia.gov/Published/2021/SD2/PDF> [<https://perma.cc/5R67-D3SH>]. More than two-thirds were for misdemeanor cases. *Id.* The felony pardons were primarily for nonviolent lower-level offenses such as welfare fraud, embezzlement, and uttering a forged check. *Id.*

37. Jim Brunner & Asia Fields, *Gov. Jay Inslee Offers Pardons for Thousands with Misdemeanor Pot Convictions*, SEATTLE TIMES (Jan. 22, 2019, 10:07 AM), <https://www.seattletimes.com/seattle-news/politics/gov-jay-inslee-offers-pardons-for-thousands-with-misdemeanor-pot-convictions/> [<https://perma.cc/9LPU-C5MB>].

38. *Id.*

39. David Gutman, *No Big Changes from Gov. Inslee Following Biden's Call for Marijuana Pardons*, SEATTLE TIMES (Oct. 7, 2022, 6:28 AM), <https://www.seattletimes.com/seattle-news/politics/no-big-changes-from-gov-inslee-following-bidens-call-for-marijuana-pardons/> [<https://perma.cc/A4RP-RATM>].

40. *Id.*

41. Associated Press in Chi., *Illinois Governor Pardons 11,000 for Low-Level Marijuana Convictions*, GUARDIAN (Dec. 31, 2019, 4:25 PM), <https://www.theguardian.com/us-news/2019/dec/31/illinois-governor-jb-pritzker-pardons-11000-marijuana-convictions> [<https://perma.cc/799Z-S3AN>].

42. *Id.*

pardoned more than 1,300 people convicted of possession of small amounts of marijuana.⁴³ And in both 2022 and 2023, President Biden issued a presidential proclamation providing a full unconditional pardon for those convicted of marijuana possession in federal court or Washington, D.C.⁴⁴

Notably, all of the clemency related to marijuana possession operates to clear criminal records, not to commute sentences and release people from custody. For instance, while President Biden’s marijuana pardon could apply to thousands of people with marijuana convictions, none of them would be released from jail as a result. The reason is that not a single person was being held in federal custody solely on a charge of misdemeanor marijuana possession.⁴⁵

II. Commutations for “Ordinary” Felony Cases Are Rare

Prisons are filled with people convicted of “ordinary” crimes. By ordinary, I mean the crimes almost everyone is familiar with, many of which are violent crimes. For instance, the Bureau of Justice Statistics reported the following numbers of people incarcerated for murder (160,000), sexual assault (160,000), robbery (130,000), burglary (80,000), drug distribution and other non-possession crimes (100,000), and assault (140,000).⁴⁶ Those six crimes alone account for more than half of the prison population.⁴⁷

Commutations for ordinary felony convictions (besides death penalty cases) have historically been rare in the United States.⁴⁸ These commutations are typically reserved for people who received transparently unjust sentences, showed considerable remorse and/or rehabilitation, or served long portions

43. Elise Schmelzer, *Colorado Governor Pardons 1,351 Coloradans Convicted of Marijuana Possession*, DENVER POST (Dec. 30, 2021, 8:36 PM), <https://www.denverpost.com/2021/12/30/colorado-marijuana-possession-pardons-polis/> [<https://perma.cc/GCG2-J55D>].

44. Katie Rogers, *Biden Commutes Drug Sentences for 11 and Expands Marijuana Pardons*, N.Y. TIMES (Dec. 22, 2023), <https://www.nytimes.com/2023/12/22/us/politics/federal-biden-marijuana-pardons.html> [<https://perma.cc/7BSM-W7H8>]; Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, N.Y. TIMES (Oct. 6, 2022), <https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html> [<https://perma.cc/A4AZ-YN9C>].

45. See Jamiles Lartey, *Don’t Expect Mass Prison Releases from Biden’s Marijuana Clemency*, MARSHALL PROJECT (Oct. 15, 2022), <https://www.themarshallproject.org/2022/10/15/don-t-expect-mass-prison-releases-from-biden-s-marijuana-clemency> [<https://perma.cc/C7CC-AU2U>] (noting that there was “no one currently in federal custody for simple possession of marijuana”).

46. See CARSON, *supra* note 7, at 32 tbl. 17 (listing the number of prisoners under the jurisdiction of state correctional authorities by most serious offenses as of year-end 2020).

47. See *id.* at 1 (reporting that the total prison population in 2020 was just over 1.2 million).

48. See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT. RPT. 153, 153 (2009) (“Recent decades have seen a precipitous drop in the number of clemency requests being granted by state executives and the president. The number of pardons has decreased, and commutations are particularly rare . . .”).

of very lengthy sentences.⁴⁹ A modest number of inmates with grave health problems receive medical pardons that effectively commute their sentences.⁵⁰ Yet even though there are more than a million people incarcerated for felonies, there are very few commutations or pardons for those with felony convictions.

The lack of mercy for ordinary crimes is striking. For instance, in Michigan, Governor Rick Snyder received more than 4,000 requests for commutations between 2011 and 2018.⁵¹ He granted only six, though, and all of them were for medical reasons, meaning the applicants were most likely close to death.⁵² The Minnesota Board of Pardons granted three commutations in 2022 and only one commutation in 2021.⁵³

In New York, Governor Kathy Hochul vowed to overhaul the state's clemency system, but a year after that announcement she had yet to issue a single commutation.⁵⁴ Within sixteen months of the announcement, Governor Hochul issued only a handful of commutations.⁵⁵ To put this small number of commutations in perspective, New York and Michigan each have more than 30,000 people in prison.⁵⁶

Even California—which has the nation's second largest number of prisoners⁵⁷ and which tends to be more progressive on criminal justice issues⁵⁸—has only a modest number of commutations. In 2022, Governor

49. See *id.* at 154 (discussing situations where governors may be more likely to grant clemency).

50. See Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 89–90 (2020) (describing the limited use of clemency during the Covid pandemic).

51. Kristen Jordan Shamus, *Who Gets Clemency in Michigan? Here's a Look at Who Got Out*, DETROIT FREE PRESS (Dec. 19, 2018, 4:33 PM), <https://www.freep.com/story/news/local/michigan/2018/12/19/clemency-michigan-prison/2233353002/> [<https://perma.cc/BNC8-99MT>].

52. *Id.*

53. MINNESOTA BOARD OF PARDONS, 2022 LEGISLATIVE REPORT 2 (2022); MINNESOTA BOARD OF PARDONS, 2021 LEGISLATIVE REPORT 2 (2022).

54. Reuven Blau, *For 'Clemency Season,' Prisoner Advocates Want Hochul to Keep Promise All Year*, CITY (Dec. 13, 2022, 5:00 AM), <https://www.thecity.nyc/2022/12/13/23506561/prisoner-advocates-ask-hochul-grant-clemency-all-year> [<https://perma.cc/XZ46-FAWF>].

55. See *Governor Hochul Grants Clemency to Seven Individuals, Governor Kathy Hochul*, NEW YORK STATE (Apr. 7, 2023), <https://www.governor.ny.gov/news/governor-hochul-grants-clemency-seven-individuals> [<https://perma.cc/E4P6-34ES>] (reporting that Governor Hochul granted two commutations in April 2023); Kiara Alfonseca, *Gov. Kathy Hochul Grants Clemency to Domestic Abuse Survivor, Others in Name of 'Justice and Fairness'*, ABC NEWS (Dec. 22, 2022, 10:08 AM), <https://abcnews.go.com/US/gov-kathy-hochul-grants-clemency-domestic-abuse-survivor/story?id=95703300> [<https://perma.cc/5MDT-TVLF>] (reporting that Governor Hochul granted four commutations in December 2022).

56. CARSON, *supra* note 7, at 8 tbl. 2.

57. See *id.* (listing number of prisoners in each state in 2020 and 2021).

58. See Irene Oritseweyinmi Joe, Shelly Richter & Dayja Tillman, *The Reform Blindspot*, 74 SMU L. REV. 555, 558 (2021) (“California, possessing one of the highest rates of incarceration in the world, has attempted to lead the charge in criminal justice reform.”).

Gavin Newsom issued thirty-two commutations.⁵⁹ California has more than 100,000 people in prison.⁶⁰

In states that have prioritized mercy for those convicted of felonies, the focus has been on ex-offenders who have already completed their sentences. For instance, in 2019, Ohio Governor Mike DeWine worked with two law schools to create an expedited pardon project to wipe out convictions for those convicted of all kinds of crimes, including some violent felonies.⁶¹ But the project is limited to ex-offenders who “completed the sentence for the Ohio conviction(s) for which they are seeking a pardon at least 10 years ago” and it excludes those convicted of homicide, sexual assault, and domestic violence.⁶²

To be sure, governors and pardon boards do commute sentences for currently incarcerated people. In Connecticut, “for much of recent history, commutations have been almost impossible to come by, as both politicians and [pardon] board members have resisted releasing people serving long sentences for serious offenses.”⁶³ But in a notable turn of events, the Connecticut Board of Pardons and Paroles granted commutation to “nearly 100 people in Connecticut serving lengthy prison sentences—typically the result of serious offenses, including murder . . . since the start of 2022, as part of a historic wave of clemency.”⁶⁴ Backlash ensued, however, and the revitalization of clemency quickly came to an end. The Governor removed the Board chair, and the Board subsequently paused the granting of commutations.⁶⁵

One major exception to the rule that commutations are rare and limited is the Obama Clemency Initiative. In 2014, the Department of Justice announced an initiative to lower sentences for nonviolent offenders who “likely would have received substantially lower sentences if convicted of

59. OFFICE OF THE GOVERNOR, EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE, AND REPRIEVES 2 (2023), <https://www.gov.ca.gov/wp-content/uploads/2023/01/Executive-Report-on-Clemency-2022.pdf> [<https://perma.cc/TBC2-UJAH>].

60. CARSON, *supra* note 7, at 8 tbl. 2.

61. See *Ohio Governor’s Expedited Pardon Project*, MIKE DEWINE: GOVERNOR OF OHIO, <https://governor.ohio.gov/priorities/expedited-pardon-project> [<https://perma.cc/78JP-GRL9>] (listing disqualifying offenses but allowing applications for some violent felony offenses).

62. *Can I Apply?*, *Ohio Governor’s Expedited Pardon Project*, THE OHIO STATE UNIV. MORITZ COLL. OF L., <https://www.ohioexpeditedpardon.org/can-i-apply/> [<https://perma.cc/8YW5-877R>].

63. Alex Putterman, *CT Is Commuting Lengthy Prison Sentences at a Historic Rate. It Might Not Last Much Longer*, CT INSIDER (Mar. 14, 2023, 4:32 PM), <https://www.ctinsider.com/news/article/ct-commuting-prison-sentences-historic-rates-17797148.php> [<https://perma.cc/RJ9Z-3JWS>].

64. *Id.*

65. Jaden Edison & Mark Pazniokas, *CT Board of Pardons and Paroles Halts Sentence Commutations*, CT MIRROR (Apr. 20, 2023, 6:13 PM), <https://ctmirror.org/2023/04/20/ct-board-of-pardons-and-paroles-halts-sentence-commutations/> [<https://perma.cc/3LQE-W3S9>].

the same offense' under the law then in effect."⁶⁶ The initiative was originally pitched as applying to any nonviolent crime, but "at some point [it became] limited to drug trafficking offenders."⁶⁷ With the assistance of almost 4,000 volunteer lawyers, petitioners submitted more than 24,000 applications for clemency.⁶⁸ By the end, President Obama granted 1,696 commutations as part of the initiative.⁶⁹ Unlike the pardons described in subpart I(B) above, the vast majority of the offenders were not convicted of marijuana offenses. Instead, almost all involved serious drugs like crack, methamphetamine, and cocaine.⁷⁰ Almost all of the offenders had been subject to a mandatory minimum sentence, and most were serving a sentence of 20 years or longer.⁷¹

For about 1,200 offenders, President Obama's commutation set a specific release date.⁷² For nearly 500 offenders, the commutation "specified a new, shorter sentence to be served."⁷³ The commutations amounted to substantial reductions in the sentences. On average, President Obama granted each individual a 39% sentencing reduction, which amounted to an average sentencing reduction of more than eleven years.⁷⁴ Notably, "most offenders were not immediately released."⁷⁵

In the big picture, the Obama Clemency Initiative was a success. Yet, there were serious problems. First, individualized assessments of clemency applications were slow⁷⁶ and required considerable resources.⁷⁷ And, as a result, more than 3,000 petitions submitted by drug offenders remained unresolved (and thus received no clemency relief) when President Obama's term ended.⁷⁸ Second, there were many nonviolent federal offenders incarcerated for child pornography and white-collar offenses who fell within

66. GLENN R. SCHMITT, TIMOTHY DRISKO & CHRISTINA D. STEWART, UNITED STATES SENTENCING COMMISSION, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 1 (2017).

67. *Id.* at 6, 9.

68. *Id.* at 1, 11.

69. *Id.* at 12.

70. *See id.* at 14 (finding that crack cocaine, methamphetamine, and powder cocaine offenses together accounted for 93.8% of offenses commuted).

71. *Id.* at 16.

72. *Id.* at 17.

73. *Id.*

74. *Id.*

75. *Id.*

76. As Professors Rachel Barkow and Mark Osler have detailed, a key problem with the Obama Clemency Initiative was that it was housed in the Department of Justice, which was inefficient and hostile to reform efforts. *See* Barkow & Osler, *supra* note 11, at 428, 431 (describing the "stunningly inefficient Department bureaucracy").

77. *See id.* at 434 (noting lack of resources).

78. *See* SCHMITT, DRISKO & STEWART, *supra* note 66, at 11 (noting that 3,469 petitions by drug offenders remained pending as of January 19, 2017).

the clemency criteria established by the initiative.⁷⁹ But the exclusive focus on drug crimes left those individuals out of luck. In sum, Professors Rachel Barkow and Mark Osler put it well when they explained that “[President] Obama’s process failed to reach all the people who met the Administration’s stated criteria, much less all the people who deserved clemency.”⁸⁰

Even with its flaws, the Obama Clemency Initiative succeeded in providing commutations to nearly 1,700 people. That number dwarfed the typical number of commutations awarded before and after the initiative. All told, commutations for ordinary crimes in the United States remain quite rare.

III. Proposals for Automatic Sentencing Commutations for Ordinary Crimes

As Part II demonstrated, there are over one million people in prison for “ordinary” crimes and very few commutations for those crimes in a typical year. This Part offers four proposals to increase the number of commutations. I begin with the most ambitious.

A. *Proposal 1: The 10% Reduction in (Almost) All Cases*

Governors, pardon boards, and even the President of the United States (hereinafter “the governor” for ease of exposition) could adopt a 10% reduction policy. Recognizing that the nation is plagued by mass imprisonment, the governor could seek to modestly reduce incarceration by unilaterally reducing each inmate’s sentence by 10%. The governor would issue a standing order cutting the sentence of every person incarcerated in prison by 10%. The order would, however, have an escape hatch. If prosecutors came forward with persuasive evidence that an individual is not deserving of a commutation,⁸¹ the governor would have the option to remove them from the commutation list.⁸²

Here is an example of Proposal 1 in practice: Dan Defendant was sentenced to seventy-two months for robbery. Under the 10% reduction policy, the governor would automatically reduce Dan’s sentence by seven months to sixty-five months unless prosecutors convinced the governor to

79. Barkow & Osler, *supra* note 11, at 430.

80. *Id.* at 436.

81. Prosecutors would be constrained by their own limited resources, however. Around the country, district attorney’s offices are suffering from a prosecutor vacancy crisis. Adam M. Gershowitz, *The Prosecutor Vacancy Crisis* 1–2 (William & Mary L. Sch. Rsch. Paper No. 09-480, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4666047 [https://perma.cc/2XXG-Y6Y2]. Prosecutors in many offices are extremely overburdened with excessive caseloads. *Id.* at 2. Accordingly, prosecutors with limited time will find it challenging to marshal compelling opposition to commutations in large numbers of cases.

82. Each governor would apply their own criteria in determining what constitutes persuasive evidence, but a convincing explanation might be that the individual already received a sentence that was light compared to comparable cases.

opt out of the 10% default reduction. To the extent Dan would be eligible for parole or good time credit, it would be based on a sentence of 65 months.

B. Proposal 2: The 10% Reduction for Good Behavior

The second option would call for the governor to award the 10% sentencing commutation but only to defendants who have completed half of their sentence with no great or high-level disciplinary violations.⁸³ The governor would have to define and list what disciplinary violations qualify. Governors would of course be free to adopt their own criteria, but a straightforward approach would be to follow the existing federal regulation that divides prison disciplinary violations into four categories: (1) greatest; (2) high; (3) moderate; and (4) low.⁸⁴ The types of violations that fall into categories three and four include unexcused absences from work, failing to stand during a prisoner count, smoking, being unsanitary, gambling, using abusive language, or feigning illness.⁸⁵ If our same robbery inmate had only level three or four violations at the end of half his sentence, then the sentence would be commuted from seventy-two to sixty-five months. Once again, any parole or good time credit would be based on a sentence of sixty-five months.

The second option is more in line with longstanding concepts of rehabilitation. Like parole and good time credit, this proposal rewards good behavior and thus enhances prison safety and prisoner rehabilitation.

C. Proposal 3: Limiting Commutations to Nonviolent Drug Offenders

Governors may find it too risky politically to modestly reduce the sentences of all offenders or even those who have exhibited good behavior in prison. After all, even a modest 10% sentencing reduction to individuals convicted of murder, rape, robbery, and other violent felonies will not look good in opposition campaign ads.

A third option would therefore be for governors to limit the 10% commutation to nonviolent offenders. Governors could introduce this concept as a pilot plan, and they might start with offenders convicted of drug possession. If, as expected, recidivism rates do not increase in the early-release cohort, that governor (or her successor) could expand the proposal to

83. The idea of rewarding prisoners for good behavior or good deeds is not new. The federal system and some states provide for good time credit. *See supra* note 9 and accompanying text. And governors have occasionally commuted sentences for good deeds. *See, e.g.*, Amanda Waldroupe, *The Story of One US Governor's Historic Use of Clemency: 'We are a Nation of Second Chances'*, *GUARDIAN* (Sept. 28, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency> [<https://perma.cc/E4TQ-3UH2>] (noting that the Governor of Oregon “removed one year from the sentences of 41 prisoners who worked as firefighters during the 2020 wildfire season”).

84. 28 C.F.R. § 541.3 (2024).

85. *Id.*

other nonviolent individuals and perhaps eventually to those convicted of more serious crimes.

Limiting the 10% commutation to nonviolent offenders would obviously decrease the impact of the proposal. However, it would surmount some political objections as well as objections from crime victims.⁸⁶

D. Proposal 4: Automatic Pardons Years After Completing a Sentence

The fourth option calls for governors to set up a standing order to pardon people who have served their sentences and not been convicted of a new criminal offense. The commutation would be automatically triggered when, for example, five years had passed since the individual's release from custody. Governors could, of course, pick a longer or shorter triggering period if they wished. And governors would likely want to impose an exception that tolled the pardon decision if the individual has pending criminal charges against them.

This proposal is similar to the recent Ohio program that allowed ex-offenders to seek pardons for sentences they had completed at least ten years earlier.⁸⁷ The key difference, however, is that this proposal operates automatically, rather than requiring an individualized pardon decision about which applicants have meritorious claims. This proposal would not immediately reduce the prison population, but it would help those with criminal records. Instead of ex-offenders having to go through a complicated procedure to expunge their criminal records,⁸⁸ old convictions could be wiped away automatically. This, in turn, would make it easier for people to continue to reintegrate into society and would therefore reduce recidivism.⁸⁹

* * *

The virtue of all four proposals offered in this Part is that they are all automatic, rather than individualized. Rather than bogging down the system with individualized assessments, sentencing reductions occur in each

86. Professor Paul Cassell objects that an automatic 10% commutation of all sentences (except where prosecutors can convince the governor to make an exception) reduces the power of victims. Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEXAS L. REV. 1381, 1389–90 (2024). Limiting the 10% commutation to nonviolent offenders responds to Professor Cassell's objection.

87. See *supra* notes 61–62 and accompanying text.

88. See Brian M. Murray, *Insider Expungement*, 2023 UTAH L. REV. 337, 348 (2023) (“Expungement procedure is difficult to navigate and favors insiders who have experience with pursuing an expungement. Procedures are costly, timely, and arduous, and insider knowledge is essential to a smooth experience.”).

89. See Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2831 (2018) (“The overwhelmingly negative effect of a criminal record is undeniable.”).

proposal based on an automatic trigger.⁹⁰ At the same time, each of the proposals provides the governor with the ability to opt out of the pardon or commutation. In this respect, the proposals are classic default rules. Their virtue is that they reverse the current default rule. Our current slow, individualized decision-making regime defaults toward *no* commutation or pardon. Each of the four reform proposals defaults toward *granting* clemency.

At the same time, the proposals are all modest. They do not call for a person sentenced to twenty years in prison to be released after serving only a fraction of their sentence. The first two proposals would cut 10% off of each sentence—a meaningful reduction that would cause objections, but not one that is likely to cause a political firestorm. Relatedly, the first two proposals take a page from the Obama Clemency Initiative playbook by providing for sentencing reductions later down the road, rather than immediate release, which would be more likely to be controversial and politically problematic. The third proposal would be limited to nonviolent offenders. And the fourth proposal would be restricted to those who have already been released and who have not recidivated.

Conclusion

There are too many people in prison in the United States, and many are serving sentences that are too long. After prisoners are released, their convictions typically burden them for a lifetime, making it harder to find employment, housing, and other basic needs that are crucial to a stable life. There is much in the American criminal justice system that needs to be fixed.

A growing number of scholars believe modest reform proposals unacceptably maintain the status quo.⁹¹ Those scholars will likely not be satisfied with the four modest clemency proposals offered in this Essay. They will likely suggest that these reform proposals simply amount to nibbling around the edges. At the same time, more conservative observers will object that using the clemency power to grant commutations to almost all prison inmates disrespects the expertise of sentencing judges and amounts to an abuse of the governor's clemency authority.

These reform proposals may therefore satisfy no one, which perhaps suggests that they are the kind of middle-of-the-road compromise approach that we need. The four proposals would each serve to reinvigorate the use of clemency by automatically triggering clemency unless the governor finds a

90. In this way, the four proposals draw on the successful aspects of the misdemeanor marijuana pardons, which announced a categorical rule rather than individualized decision-making. *See supra* notes 37–45 and accompanying text.

91. *See, e.g.,* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1547–48 (2022) (advocating for radical transformation rather than moderate reform).

reason not to show mercy. In short, these proposals create a default rule of mercy, rather than continuing a status quo of individualized decision-making that results in almost no incarcerated people being granted clemency. At the same time, limiting an automatic clemency mechanism to only 10% of a sentence amounts to a modest sentencing reduction that is more politically palatable. These proposals provide a path forward that grants mercy to the masses.