

CATEGORICAL CLEMENCY: A NECESSARY RESPONSE TO A CARCERAL STATE

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ABSTRACT

This Article presents categorical clemency as an underused yet necessary mechanism to address excessive sentences in New Jersey. By discussing philosophical justifications for clemency and its historical context, we begin to examine the ad hoc nature of clemency practices. We describe some of the major flaws in New Jersey's sentencing structures that have contributed to the crisis of mass incarceration. After discussing these issues, we then explore the solutions by critiquing federal and state clemency initiatives across the country. We propose categorical clemency as a tool to reduce the prison population and improve the quality of justice in New Jersey. We assert that a sustainable clemency practice is consistent with building safer and stronger communities.

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I. INTRODUCTION

Clemency is one of the oldest administrative remedies to address imperfections in the justice system. The defects that lead to individual injustices are widely acknowledged: innocent people are convicted, extreme sentences are imposed, or the seriousness of a given criminal act is overestimated, resulting in a penalty more severe than is deserved. Clemency has always been seen as a suitable remedy for occasional cases of individual injustices.

Systemic imperfections are also widely acknowledged, and include overly punitive sentencing systems resulting in mass incarceration. While numerous scholars have written about the problems of harsh sentencing practices and mass incarceration, the potential link between clemency as a remedy for the larger problem of systemic injustices has yet to be explored.

In this Article, we argue that clemency is an underused resource for improving the quality of justice in the penal system. We begin by defining clemency and describing various rationales for its use. After a philosophical discussion on clemency, we discuss the idea of “categorical clemency.” By this, we mean the use of clemency as a remedy for the injustices that apply not just to individual cases, but to whole categories of cases. We then discuss the need for clemency by outlining the flaws in the federal sentencing regime and within the state of New Jersey. As flaws often overlap, we then study the practical implications of clemency initiatives across the nation—extracting methodologies that further advance clemency as a longstanding, legitimate means to correct injustices that occur regularly in our criminal legal system. We then look at New Jersey, urging the State to further embrace categorical clemency, and explore various categories of people who suffered injustices. Finally, we explore the potential impact on society. By debunking fearmongering rhetoric, we find that public safety is advanced through clemency.

II. CLEMENCY DEFINITION AND COMMON TYPES

In the United States, clemency is a power granted to the executive branch (the President or governors) to provide relief to individuals convicted of a criminal offense. While the term “clemency” may be used broadly to characterize various forms of post-conviction relief, two types of clemency are best suited to advance categorical clemency and reduce injustice in New Jersey: pardons and commutations.

A. *Pardon*

A pardon constitutes the most extensive form of clemency.¹ The word “pardon” is derived from the Latin term *perdonare*, which means to grant freely.² A pardon gives the executive the power to nullify or forgive the consequences of a criminal offense.³ It aims to reintegrate individuals who committed an offense into society by easing or removing barriers resulting from the offense.⁴ This includes restoring an offender’s civil rights, such as voting rights, and the right to bear arms or to serve in the military, based on the state.⁵ However, reintegration does not necessarily

1. Kathleen M. Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 28 (2009).

2. *Id.*

3. *Id.*

4. *See id.* at 30–31.

5. *Id.* at 28; Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 29, n.67 (2005).

equate to an expunged record.⁶ While some executives can grant a pardon of innocence or exoneration, thus removing offenses from criminal records and restoring rights, others are not granted this authority.⁷ An individual in New Jersey who is granted a pardon still needs an expungement to remove their criminal conviction.⁸ However, this usage should be expanded to include additional categories of injustices.

B. Commutation

A commutation is a modification or reduction in a sentence, often granted when an executive believes the original sentence is excessive.⁹ Unlike a pardon, individuals who committed an offense may continue to serve a sentence after they receive a commutation, as the act simply reduces or modifies a sentence.¹⁰ Commutation also does not expunge an individual's criminal record.¹¹ Therefore, this type of clemency often has barriers to reintegration into society.¹² Further, upon release, these individuals may still face continued punishment by being placed under community supervision.

III. HISTORICAL OVERVIEW OF CLEMENCY

Clemency power has been traced as far back as the code of Hammurabi in 1754 B.C.E.¹³ However, a more modern understanding of clemency is derived from the English common law.¹⁴ The king of England traditionally had extensive power to grant clemency at any stage of the legal process.¹⁵ While clemency power was often abused, as kings would sell pardons and use the money for their personal benefit,¹⁶ acts of clemency distinguished monarchies from other forms of government by ensuring mercy; individuals guilty of a criminal offense were essentially

6. Ridolfi & Gordon, *supra* note 1, at 32–33.

7. *See id.* at 34–40.

8. *See New Jersey Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/new-jersey-restoration-of-rights-pardon-expungement-sealing> (Oct. 26, 2024).

9. *See* Ridolfi & Gordon, *supra* note 1, at 28–29.

10. *See id.* at 28.

11. *See id.*

12. *See* LEAH SAKALA ET AL., HOW GOVERNORS CAN USE CATEGORICAL CLEMENCY AS A CORRECTIVE TOOL: LESSONS FROM THE STATES 3–4 (2020).

13. Jerry Carannante, *What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y. L. SCH. L. REV. 325, 328 (2003).

14. *See e.g., id.* at 329.

15. *See id.* at 329–30.

16. *See id.*

at the “mercy of” the king.¹⁷ As England expanded through colonialism, the king delegated clemency powers to colonial governors to enforce English principles in the colonies.¹⁸ Similar to the king’s use of clemency, colonial governors used this authority to rectify legal errors, pardon individuals of good character, and compel cooperation in criminal investigations.¹⁹

By 1776, the year of America’s independence, England had over 200 crimes punishable by death.²⁰ This prompted a practical need for broad clemency power “[t]o offset the harshness and rigidity of mandatory death sentences”²¹ The practicality of clemency power after independence was apparent to the Founding Fathers.²² In Federalist Paper No. 74, Alexander Hamilton wrote that “[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”²³ Further, he notes that “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”²⁴ While the spirit of Federalist Paper No. 74 demonstrates the intent of having accessible and unrestricted clemency, it also emphasizes the responsibility of the single executive to make just and sound clemency determinations.²⁵

With the ratification of the United States Constitution, clemency was later codified in Article II as an executive authority.²⁶ Presidents began using clemency to varying degrees, but most notably to advance public policy.²⁷ For example, President George Washington (and subsequent presidents) granted pardons to people convicted for their involvement in the Whiskey Rebellion.²⁸ Moreover, out of President Abraham Lincoln’s over 300 pardons, 264 of those pardons were granted to Dakota Native

17. Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 L. & PHIL. 109, 112 (1991).

18. Carannante, *supra* note 13, at 330.

19. *See id.* at 327.

20. Ridolfi & Gordon, *supra* note 1, at 29.

21. *Id.* (quoting Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1829 (2002)).

22. *See, e.g.*, Alexander Hamilton et al., *The Federalist No. 74 The Command of the Military and Naval Forces, and the Pardoning Power of the Executive*, in THE FEDERALIST PAPERS 1, 376 (Ian Shapiro ed., Yale Univ. Press 2009).

23. *Id.* at 376.

24. *Id.*

25. *See id.*

26. U.S. CONST. art. II, § 2.

27. Aliza B. Kaplan & Venetia Mayhew, *The Governor’s Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. REV. 1285, 1293 (2018).

28. *Id.*

Americans convicted of murdering European settlers.²⁹ President Andrew Johnson used his executive power to provide amnesty to former Confederate soldiers and officials.³⁰ Further, President Kennedy “pardoned all first-time offenders convicted under the Narcotic Control Act of 1956.”³¹ Clemency was not only used to promote individual wellbeing, but also “unity and tranquility” in society.³²

However, in the early 1970s, the usage of federal clemency powers began to change with President Richard Nixon’s declaration of the War on Drugs.³³ The War on Drugs criminalized drug use and developed harsh punishments to address drug-related crimes, including mandatory minimums.³⁴ By declaring a national emergency and proclaiming drug abuse as “public enemy number one,” Nixon bolstered a “tough on crime” narrative that strayed from traditional notions of criminal justice.³⁵ This new approach intentionally and disproportionately targeted Black and brown communities and created a pipeline for mass incarceration and racial disparities in the United States.³⁶

Consequently, federal clemency began to decrease in volume, prior to President Barack Obama’s presidency.³⁷ Clemencies, which used to exceed 1,000 pardons or commutations, dropped significantly to mid- to low-hundreds.³⁸ Moreover, the timing of clemencies changed.³⁹ This once important constitutional tool that was used throughout a president’s term was now utilized as an “end of the year gift”—presidents did not want to appear “soft” on crime or ruin reelection prospects.⁴⁰ Although federal clemencies continued to address public policy issues such as,

29. Tony Tekaroniake Evans, *Abraham Lincoln’s Uneasy Relationship with Native Americans*, HIST., <https://www.history.com/news/abraham-lincoln-native-americans> (July 12, 2023).

30. Neil Vigdor, *Presidential Pardons Through History*, N.Y. TIMES, <https://www.nytimes.com/2020/02/21/us/politics/presidential-pardons.html> (June 3, 2021).

31. Kaplan & Mayhew, *supra* note 27, at 1294.

32. Carannante, *supra* note 13, at 331.

33. Ignacio Diaz Pascual, *America’s War on Drugs—50 Years Later*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (June 29, 2021), <https://civilrights.org/blog/americas-war-on-drugs-50-years>.

34. *Id.*

35. *See id.*

36. Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs>.

37. Kaplan & Mayhew, *supra* note 27, at 1310.

38. *See id.*; *Clemency Statistics*, OFF. OF THE PARDON ATT’Y, U.S. DEP’T JUST., <https://www.justice.gov/pardon/clemency-statistics> (Jan. 23, 2025).

39. *See* At Liberty Podcast, *Clemency Is One Answer to the War on Drugs*, ACLU, at 05:38 (Apr. 20, 2023), <https://www.aclu.org/podcast/clemency-is-one-answer-to-the-war-on-drugs> [hereinafter At Liberty Podcast].

40. *Id.* at 07:09.

among other things, Vietnam War draft evaders,⁴¹ the Watergate scandal,⁴² and major financial crimes,⁴³ several presidents shied away from using clemency as a constitutional tool to address injustice and mass incarceration.⁴⁴ The shift in federal clemency post-War on Drugs (pre-Obama era) perpetuates the legacy of these punitive policies on Black and brown communities, despite executives having adequate tools to address the issue.

Further, evaluating the historical application of federal clemency demonstrates that its application is not new and should not be perceived as limited or constrained. In fact, its regular use is crucial to a properly functioning society. However, to fully appreciate the historical application of clemency and to learn from past miscarriages of justice, a review of the philosophical justification for clemency is necessary to conceptualize a better framework that works for all members of society.

IV. PHILOSOPHICAL JUSTIFICATION FOR CLEMENCY POWERS

Our modern understanding of clemency is deeply influenced by philosophical justifications rooted in criminal justice, such as retributivist theory, redemptive theory, and utilitarianism.⁴⁵ In this system, “justice” is given primarily as a form of punishment for committing a crime.⁴⁶ These theories illustrate the framework through which federal and state executive power is best conceptualized.

A. *Retributivist Theory*

Retributivist theory supports the notion of clemency as an act of justice.⁴⁷ Retributivism is a criminal justice theory that holds punishment should be proportionate to the offense.⁴⁸ Within the clemency context, it is utilized as a tool by the executive to acknowledge and rectify unjust outcomes and to curb excessive punishment.⁴⁹ This theory of clemency is supported by the U.S. Supreme Court in *Herrera v. Collins*, which characterized clemency as the “fail safe” of the judicial system for

41. Kaplan & Mayhew, *supra* note 27, at 1293.

42. See Vigdor, *supra* note 30.

43. *Id.* (describing President Clinton’s pardon of “fugitive financier” Marc Rich).

44. See At Liberty Podcast, *supra* note 39, at 05:38.

45. See, e.g., Morison, *supra* note 5, at 18–19.

46. See *id.* at 7.

47. Daniel Pascoe & Marie Manikis, *Making Sense of the Victim’s Role in Clemency Decision Making*, 26 INT’L REV. VICTIMOLOGY 3, 16–17 (2020).

48. See *id.*

49. See Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5 (2015).

“prevent[ing] a miscarriage of justice” by granting executives the authority to address injustices on a case-by-case basis.⁵⁰ Acceptance of the retributivist theory presumes that “unanticipated circumstances” arise in any system of law.⁵¹ Further, it acknowledges a gap in legislative and judicial remedies to comprehensively address injustices and inequities in the current system and thereby gives the executive the power to combat these issues.⁵² Supporters of this theory not only assert that clemency is a constitutional prerogative of the executive branch, but also maintain that it should be used with regularity because of its “fail safe” capabilities.⁵³ However, in practice, several governors and boards only use clemency for serious judicial errors.⁵⁴ More specifically, grants of clemency aligning with the retributivist theory have been issued for reasons such as legal or factual innocence, receiving disproportionate punishment compared to co-offenders or similar cases, being of youth or old age, or suffering from psychiatric or terminal illness.⁵⁵ However, this usage should be expanded to include additional categories of injustice.

B. *Redemptive Theory*

The redemptive theory supports the notion of clemency as an expression of mercy.⁵⁶ This may also be referred to as an act of “leniency” or “forgiveness.”⁵⁷ The redemptive theory emphasizes the idea of forgiveness as a precondition to rehabilitation.⁵⁸ Within the context of clemency, it suggests that the primary purpose of clemency is to offer individuals who have committed crimes an opportunity for redemption and reintegration into society, despite the offense.⁵⁹ Acceptance of this theory presumes that the legal system, particularly the judiciary, was correct in assessing the individual’s conduct and associated conviction.⁶⁰ However, due to the behavior of the offender, the executive may give relief.⁶¹ Supporters of this theory believe that while there is no legal right

50. *Herrera v. Collins*, 506 U.S. 390, 411–15 (1993).

51. Ridolfi & Gordon, *supra* note 1, at 27–29.

52. *See id.*

53. *See* Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 233 (2003) (quoting *Herrera v. Collins* 506 U.S. 390, 415 (1993)).

54. *Id.* at 219.

55. Pascoe & Manikis, *supra* note 47, at 8.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 9.

to clemency, clemency can be granted at the “mercy” of the executive.⁶² Examples of this theory include “rehabilitation and reform in prison, . . . compensation paid to, or forgiveness granted by the victim or victim’s family, or clemency granted on the basis of previous national service.”⁶³

C. Utilitarianism

The utilitarianism theory supports the notion of clemency as a practical or political tool.⁶⁴ Utilitarianism is rooted in the idea that justice should result in the greatest benefit to the largest number of people.⁶⁵ However, the absence of clear standards for granting clemency has often led political leaders to misuse this power, sometimes to promote fairness in punishment, but more often to advance objectives such as preserving their regime or bolstering power.⁶⁶ Examples of utilitarianism and clemency include maintaining diplomatic relations with allies and exchanging clemency for cooperation with authorities.⁶⁷ Most notably, utilitarianism may be influenced by shifting public and political views on justice.⁶⁸

As we progress towards a more inclusive model of clemency, a multifaceted solution that is derived from the strongest aspects of traditional philosophical justifications will be essential to develop a solid foundation for categorical clemency.

V. CATEGORICAL CLEMENCY

Categorical clemency allows groups of people with shared characteristics to obtain relief, and urges the executive to address some of the flagrant disparities in the criminal legal system.⁶⁹ From a philosophical perspective, categorical clemency provides an ideal compromise between retributive and redemptive theories.⁷⁰ On one hand,

62. See Johnson, *supra* note 17, at 117–18 (“Even if the punishment to which he is liable is unfair, that does not confer on him a legal right to avoid it. It is precisely because the law defines justice narrowly, limiting power before the law to the institutional power of entitlements and rights, that it can require genuine mercy to achieve genuine justice.”).

63. Pascoe & Manikis, *supra* note 47, at 9.

64. See *id.*

65. See *id.*

66. See *id.* at 8–9.

67. *Id.* at 9.

68. *Id.*

69. Rebecca Uwakwe, *Categorical Clemency: A Beacon of Hope in an Unjust Criminal Legal System*, ACLU-N.J. (Dec. 7, 2023, 10:00 AM), <https://www.aclu-nj.org/en/news/categorical-clemency-beacon-hope-unjust-criminal-legal-system>.

70. See Pascoe & Manikis, *supra* note 47, at 8–9.

categorical clemency advances notions of justice by promoting sentencing that is commensurate to the offense.⁷¹ On the other hand, it provides individuals who have committed a crime with a chance for redemption and reintegration into society.⁷²

The philosophical differences between traditional notions of clemency and categorical clemency are particularly important—especially as we examine the underutilization of clemency in New Jersey—because traditional notions exhibit key flaws. Firstly, adopting concepts of “mercy” enforces a perception of inferiority of the person imprisoned, which can be detrimental to reintegration into society.⁷³ Moreover, the perspective of additional notions of clemency overemphasizes individual forgiveness, or, the “deserving *person*” based on the crime committed rather than *systemic* challenges leading to injustice.⁷⁴ It is not hard to imagine, considering the stigma of the criminal justice system, that a governor may not find those imprisoned deserving of mercy.⁷⁵ However, it is more unlikely that a governor who acknowledges we have a criminal justice system that perpetuates injustices by the nature of its existence would be hesitant to extend relief.⁷⁶ Unfortunately, the “deserving *person*” narrative associated with traditional notions of clemency is both incomplete and dangerous to those imprisoned and society.⁷⁷ It also strips the governor of the agency associated with using clemency as a practical tool.⁷⁸ It is only when we explore clemency beyond the deserving person narrative by including systemic challenges that a governor will be able to fully realize all people eligible for clemency.

VI. CATEGORICAL CLEMENCY AS A COMBATIVE AND RESPONSIVE TOOL TO EXCESSIVE SENTENCING

The modern criminal legal system in New Jersey today is riddled with laws and policies that have perpetuated mass incarceration in the state. Looking back, before the implementation of the New Jersey criminal code, the sentencing philosophy lacked clear legislative aims.

71. See SAKALA ET AL., *supra* note 12, at 8–9.

72. See Uwakwe, *supra* note 69.

73. See Ridolfi & Gordon, *supra* note 1, at 26–27; Gavriel B. Wolfe, *I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts*, 27 B.C. THIRD WORLD L.J. 417, 447–48 (2022).

74. See Pascoe & Manikis, *supra* note 47, at 9; Uwakwe, *supra* note 69; Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1502 (2000).

75. See Kobil, *supra* note 53, at 223–25.

76. See Ridolfi & Gordon, *supra* note 1, at 26–27.

77. See Love, *supra* note 74, at 1502. *But cf.* Johnson, *supra* note 17, at 111–16.

78. See Kaplan & Mayhew, *supra* note 27, at 1307.

Courts used deterrence, rehabilitation, public protection, and retribution to justify punishment—with deterrence and rehabilitation as the prevailing methods.⁷⁹ Courts believed that punishment should fit the crime and the individual who committed the crime.⁸⁰ The court's discretion was exercised without formal guidelines until 1968, when the New Jersey Criminal Law Revision Commission was established.⁸¹ Its final report in 1971 retained a significant judicial role in sentencing and emphasized rehabilitation.⁸² The report advocated for no imprisonment for all convictions unless the court found that prison was “necessary for the protection of the public.”⁸³ However, in 1979, when the New Jersey Criminal Code was established, it replaced the previous discretionary system with a more structured system to create greater uniformity in sentencing.⁸⁴ The Code established sentencing ranges for crimes, aggravating and mitigating factors, and allowed for departure from the ordinary standards in exceptional cases.⁸⁵ While prioritizing fitting punishment to the crime and ensuring uniformity, it also allows for individualized treatment based on the unique characteristics of offenders.⁸⁶ Nonetheless, even with individual assessments, the punishment is still focused on the crime committed.⁸⁷

Today, coupled with additional policies and practices, the result has been a system of harsh, extreme sentencing with little to no room for discretion. While judges continue to have the ability to consider mitigating factors in reaching their conclusion for an appropriate sentence at the time of an individual's sentencing, the use of this consideration is still largely restricted by mandatory minimums, along with an overall trend toward diminishing the role of mitigating factors at sentencing in favor of focusing attention on aggravating circumstances.⁸⁸ Although the state now has a more uniform criminal code, which the New Jersey Supreme Court has said fosters “less arbitrary and more equal

79. *State v. Ivan*, 162 A.2d 851, 852 (N.J. 1960).

80. *See id.*

81. *See State v. Crawley*, 447 A.2d 565, 567, 570 (N.J. 1982).

82. *See, e.g., State v. Dorsey*, 316 A.2d 689, 692 (N.J. 1974) (“We note that this is the approach adopted by the New Jersey Criminal Law Revision Commission.”); THE NEW JERSEY PENAL CODE, VOLUME I: REPORT AND PENAL CODE 61 (1971) [hereinafter N.J. PENAL CODE].

83. N.J. PENAL CODE, *supra* note 82, at 152.

84. *Compare State v. Ivan*, 62 A.2d 851, 852 (N.J. 1960), *with State v. Yarbough*, 498 A.2d 1239, 1240 (N.J. 1985).

85. *See State v. Yarbough*, 498 A.2d 1239, 1240, 1242–43 (N.J. 1985).

86. *See id.* at 1243.

87. *See id.*

88. Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 163 (2016).

sentenc[ing]”⁸⁹ as opposed to “unfettered sentencing discretion,”⁹⁰ this has also pushed forward enhanced sentencing through the imposition of consecutive sentences as well as automatic parole disqualifiers, allowing judges to depart from rigid sentences only in extraordinary circumstances.⁹¹ In New Jersey and beyond, mandatory minimums have driven mass incarceration by “requiring judges to sentence people convicted of certain crimes to a minimum number of years in prison,” paying little mind to the unique circumstances surrounding the case.⁹² In 2023, seventy-two percent of incarcerated people in New Jersey were sentenced under mandatory minimums.⁹³ There have been numerous initiatives to end mandatory minimums in the state, and “the New Jersey Criminal Sentencing and Disposition Commission—an esteemed group of experts with an array of experience [surrounding the] criminal legal system—has consistently and unanimously recommended reducing the use of mandatory minimums.”⁹⁴ Yet, such change has yet to be realized as New Jersey’s prison population continues to grow because of such enhanced sentencing practices.⁹⁵

Connected with mandatory minimums, excessive sentencing rears its ugly head through the consistent use of strict liability and three strikes laws, as well as the felony murder rule. While many criminal offenses require the state to prove that the individual possessed some intent to commit the crime at hand, as with assault,⁹⁶ sexual assault,⁹⁷ and robbery,⁹⁸ strict liability crimes allow the court to reach a verdict of guilty by finding that the individual performed a certain act, regardless of their intent.⁹⁹ One example of a strict liability crime is drug-induced deaths, where the state must only prove that an individual knowingly distributed drugs to a person who subsequently died after using them.¹⁰⁰ Another is unlawful possession of a weapon, where an individual can be found to have violated the law by possessing a weapon, even if they were simply

89. State v. Roth, 471 A.2d 370, 375 (N.J. 1984).

90. *Id.*

91. See *Decarcerating New Jersey: Expanding Freedom and Centering Humanity*, ACLU-N.J., <https://www.aclu-nj.org/en/expanding-freedom-and-centering-humanity> (last visited Feb. 21, 2025).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. State v. Sloane, 544 A.2d 826, 831 (N.J. 1988).

97. State *re* in Interest of C.P., 514 A.2d 850, 854 (N.J. Super. Ct. Ch. Div. 1986).

98. State v. Sewell, 603 A.2d 21, 23 (N.J. 1992).

99. Legal Info. Inst., *Strict Liability*, CORNELL L. SCH., https://www.law.cornell.edu/wex/strict_liability (last visited Feb. 21, 2025).

100. N.J. REV. STAT. § 2C:35-9 (2023).

passing through New Jersey with a lawful license to carry their weapon in another state.¹⁰¹ Strict liability directly opposes well-established legal principles; this includes both the importance of only criminally convicting those who actually harbor a guilty mind and the opportunity for an accused to defend themselves.¹⁰² Instead, strict liability does away with the former, and severely restricts options for the latter.¹⁰³

New Jersey's Three Strikes Law largely follows the federal "Three Strikes, You're Out" legislation passed in 1994,¹⁰⁴ and permits the imposition of a life sentence without parole when an individual is convicted of certain violent crimes if they have also been convicted of such crimes twice before.¹⁰⁵ The use of this law works counterproductive to criminal legal system goals, such as rehabilitation, while also dramatically increasing prison populations in the state. Further, tying the hands of judges regarding their discretion to consider certain factors at sentencing has led to grave consequences for key groups, including juvenile offenders, as New Jersey's Three Strikes Law does, in fact, permit the imposition of a life sentence without parole even when any of the convictions occurred while the individual was a juvenile.¹⁰⁶

The felony murder rule, as further discussed later in this Article, provides that an individual can be liable for murder if a death results during the course of a felony that they participated in, even if there is no culpability regarding the cause of that death.¹⁰⁷ Similar to strict liability offenses, this imposes a jarring result on an individual without any regard for their actual intent. This "no exceptions" approach, along with the other excessive sentencing policies discussed, has led to a desperate need for other justice-yielding tools to combat the significant incarceration practices we have in New Jersey today. Clemency can

101. See *New Jersey: Concealed Carry Reciprocity Map & Gun Laws*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/ccw_reciprocity_map/nj-gun-laws/ (last visited Feb. 21, 2025); Steve Trader, *Philly Woman Who Mistakenly Brought Gun to NJ Gets Christie Pardon*, WHYY (Apr. 3, 2015), <https://whyy.org/articles/philly-woman-who-mistakenly-brought-gun-to-nj-gets-christie-pardon/>.

102. Cf. Maria Wood, *Juvenile Strikes Count in Three Strikes Law*, N.J. STATE BAR FOUND. (Sept. 7, 2022), <https://njsbf.org/2022/09/07/juvenile-strikes-count-in-three-strikes-law/> (discussing New Jersey's Three Strikes Law, which imposes a mandatory sentence of life without parole for anyone convicted of a serious offense three times).

103. Cf. *id.*

104. Compare 1032. Sentencing Enhancement—"Three Strikes" Law, U.S. DEP'T OF JUST. (Mar. 13, 1995), <https://www.justice.gov/archives/jm/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law>, with Wood, *supra* note 102.

105. *Excessive Sentencing Project—New Jersey*, NAT'L ASS'N OF CRIM. DEF. LAWS. (May 14, 2013), <https://www.nacdl.org/mapdata/ExcessiveSentencingProject-NewJersey>.

106. Wood, *supra* note 102.

107. Paul H. Robinson, *Strict Liability's Criminogenic Effect*, 12 CRIM. L. & PHIL. 411, 413 (2017).

assist in responding to the consequences of these archaic, backward systems and work to build a more just state for all.

VII. FEDERAL CLEMENCY PRACTICE

The Federal government has acknowledged the need to reform the criminal legal system. Under the Obama Administration, even after the passage of the Fair Sentencing Act in 2010 (reducing the sentencing disparity between crack cocaine and powder cocaine),¹⁰⁸ the DOJ's Smart on Crime initiative, and the creation of the Taskforce on 21st Century Policing, clemency was still needed to address the existing disparities in sentencing.¹⁰⁹

President Biden has set a remarkable precedent for the use of clemency powers, granting more clemency petitions than any other president in U.S. history.¹¹⁰ In his final days in office, he commuted the sentences of thirty-seven death row individuals to life in prison and granted clemency to 1,499 individuals.¹¹¹ He also announced plans to commute an additional 2,500 sentences for individuals with nonviolent drug offenses.¹¹² Prior to Biden, President Obama held the record for granting the most commutations in the nation's history with a total of 1,715.¹¹³ Obama's clemency initiative granted 1,696 second chances to non-violent, low-level offenders sentenced under draconian laws, specifically those who were "currently serving a federal sentence in prison and, [under current] . . . law, likely would have received a substantially lower sentence if convicted of the same offense(s) today."¹¹⁴

108. Jesse Lee, *President Obama Signs the Fair Sentencing Act*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Aug. 3, 2010, 4:58 PM), <https://obamawhitehouse.archives.gov/blog/2010/08/03/president-obama-signs-fair-sentencing-act>.

109. See *Criminal Justice Reform*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/criminal-justice-reform> (last visited Feb. 21, 2025).

110. Aysha Bagchi, *Joe Biden Commutes 2,500 'Disproportionately Long' Drug Sentences in Final Days of Term*, USA TODAY, <https://www.usatoday.com/story/news/politics/elections/2025/01/17/biden-commutes-drug-sentences/77756658007/> (Jan. 17, 2025, 11:13 AM).

111. *Id.*

112. *Id.*

113. See *id.*; *Obama Administration Clemency Initiative*, OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUST., <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> (Jan. 12, 2021) [hereinafter *Obama Administration Clemency Initiative*].

114. *Obama Administration Clemency Initiative*, *supra* note 113. See generally U.S. SENT'G COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE (Sept. 2017) [hereinafter IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE].

During a press release for the clemency initiative, Deputy Attorney General James Cole stated, “[f]or our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. These older, stringent punishments that are out of line with sentences imposed under today’s laws erode people’s confidence in our criminal justice system.”¹¹⁵ The petitions that were granted under President Obama were a necessary change to the harsh sentencing regimes in the federal criminal legal system. However, they fell short when they only addressed drug trafficking offenses.¹¹⁶ Something changed from the time of the announcement to the granting of petitions that closed the door for thousands of petitioners who had more than just a drug offense.¹¹⁷

According to the United States Sentencing Commission, of the 1,696 petitioners, only 5.1% met the initial six-factor criteria set forth in the initiative.¹¹⁸ Essentially, even within this well-intended initiative with press releases, multiple governmental offices, hundreds of lawyers, and the country watching, there were factors that were not publicly captured in determining clemency. Although this statistic illustrates inherent weaknesses in the process, it also teaches us that criteria are only guidelines. When tasked with reviewing clemency petitions, the totality of the circumstances must be considered to prevent barring people from relief.

This initiative predicted that 10,000 federally incarcerated people would be eligible, yet it left 7,881 petitions pending,¹¹⁹ revealing the structural flaws of the federal clemency process. In addition to the extensive labor of screening petitions, determining eligibility, obtaining records, and putting together clemency petitions, federal petitions currently have three additional levels of review: (1) the Office of the Pardon Attorney, (2) the Deputy Attorney General’s Office, and (3) the

115. IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE, *supra* note 114, at 6.

116. *See id.* at 9.

117. *See id.*

118. *Id.* at 18. The six factors are:

1) They are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today; 2) They are non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs, or cartels; 3) They have served at least 10 years of their prison sentence; 4) They do not have a significant criminal history; 5) They have demonstrated good conduct in prison; and 6) They have no history of violence prior to or during their current term of imprisonment.

Id. at 7.

119. CTR. ON THE ADMIN. OF CRIM. L. AT NYU L. SCH., THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE 5 (2018).

White House Counsel's Office before it can make it to the President.¹²⁰ After President Obama, President Trump bypassed this bureaucratic red tape and diminished the credibility of clemency by granting most pardons and commutations to people he knew.¹²¹ However, by doing this, he demonstrated that a multi-level bureaucratic system is not necessary to activate the power of clemency.

President Biden's first act of clemency resulted in the pardoning of three people and the commutation of seventy-five people who were serving unduly long sentences for drug offenses.¹²² While a commendable act that embraced second chances and mercy, it did not release one single individual from federal prison.¹²³ Instead, it shortened the sentences of people previously released to home confinement or out on supervised release.¹²⁴

Thus far, we have moved the needle in federal clemency during the age of mass incarceration, yet there is a different reality that remains for the thousands of people incarcerated. The federal process is too burdensome to effectively implement a large-scale clemency initiative. Without structural changes to the process and broad avenues of relief, the reality for most remains the same—riddled with relentless injustices.¹²⁵

VIII. STATE CLEMENCY PRACTICES

State clemency power must be derived from a state statute or constitution.¹²⁶ Although several states adopted a model like the federal Constitution, which allows full clemency powers except in cases of impeachment or treason, other states have adopted unique mechanisms.¹²⁷

120. *Id.* at 25.

121. See Caroline Kelly et al., *Here Are the High-Profile Pardons and Commutations Trump Has Granted During His Presidency*, CNN, <https://www.cnn.com/2020/12/05/politics/trump-pardons-commutations-list/index.html> (Dec. 23, 2020, 8:09 PM).

122. Press Release, The White House, Clemency Recipient List (Apr. 26, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/clemency-recipient-list/>.

123. See *id.*

124. See Naila Awan & Katie Rose Quandt, *Executive Inaction: States and the Federal Government Fail to Use Commutation as a Release Mechanism*, PRISON POLY INST. (Apr. 2022), <https://www.prisonpolicy.org/reports/commutations.html>.

125. Udi Ofer, *Mass Clemency*, INQUEST (Nov. 2, 2021), <https://inquest.org/mass-clemency/>.

126. Ridolfi & Gordon, *supra* note 1, at 31–32.

127. *Id.*

There are three common clemency powers: (1) the governor's absolute authority; (2) independent boards with full authority; and (3) shared authority between the governor and other board members.¹²⁸ Clemency powers vested in state executives are as diverse as the corresponding mechanisms for clemency review. In recent years, states began utilizing clemency to address systemic injustices. Below, we analyze five states: California, Oregon, Connecticut, Pennsylvania, and Colorado—each with a different initiative. These states serve as examples of robust practices that improve the effectiveness of their clemency policies.

A. *California*

Across the nation, there are states championing the use of clemency to reduce incarceration and save lives. In 2019, during his first year in office, Governor Gavin Newsom of California issued an order granting reprieves to the 737 people on death row.¹²⁹ This act of clemency did not just come from mercy; it was an attempt to correct an injustice. Governor Newsom acknowledged that the death penalty system is broken and that it does not enhance public safety nor act as a deterrent.¹³⁰ In fact, the death penalty, like many other laws that carry excessive sentences, “is applied more often to people of color and those with mental disabilities.”¹³¹ In addition to utilizing his clemency powers, Governor Newsom ordered the closure of some state prisons and stated that clemency is a part of the criminal justice system.¹³² Governor Newsom's unwavering support for criminal legal reform is encouraging—during his term, he granted commutations to 123 people, but nineteen were denied by the parole board.¹³³

In California, the governor does not have exclusive authority to grant pardons and commutations, unless a person has no more than one felony conviction.¹³⁴ For people convicted of two or more felonies, the governor

128. See NAT'L GOVERNORS' ASS'N CTR. FOR POL'Y RSCH., GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 15 (1988).

129. Scott Shafer & Marisa Lagos, *Gov. Gavin Newsom Suspends Death Penalty in California*, NPR (Mar. 12, 2019, 11:25 PM), <https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california>.

130. *Id.*

131. *Id.*

132. *Id.*

133. Mackenzie Mays, *Newsom Told 123 California Prisoners They Could Get Out Early. Many Remain Behind Bars*, L.A. TIMES (Feb. 8, 2023, 5:00 AM), <https://www.latimes.com/california/story/2023-02-08/gavin-newsom-california-commutations>.

134. CAL. CONST. art. V, § 8(a); see also CAL. PENAL CODE §§ 4800, 4812–13 (West 2024) (“In the case of applications of persons twice convicted of a felony, the Board of Parole

is required by statute to refer applications to the Board of Parole Hearings (“BPH”)¹³⁵ for a non-binding recommendation and for a binding recommendation from the Supreme Court with at least four judges concurring.¹³⁶ The California Supreme Court has a deferential view of the governor’s power and focuses solely on a potential “abuse of power.”¹³⁷ Newsom added an additional level of scrutiny to the clemency process by authorizing the parole board to make final determinations on clemency through parole hearings, which is how nineteen people were denied clemency despite Supreme Court approval.¹³⁸

Although there is much to celebrate in California, additional systemic barriers only deny people a second chance. Directly granting clemency is not a foreign concept in California, as Governor Newsom has granted commutations without involving the parole board.¹³⁹ Research conducted by the Legislative Analyst’s Office indicates that the overly broad discretion given to the California parole board can lead to biased decision-making, specifically impacting those who are subject to negative implicit biases.¹⁴⁰ However, it is argued that an additional layer of scrutiny is what has guided a robust clemency practice in California, starting with Newsom’s predecessor, Governor Brown, who granted 283 commutations during his term.¹⁴¹ While imperfect, California undoubtedly has a strong commutation process that is steadily reducing the prison population.

B. Oregon

Governor Kate Brown had a revolutionary impact in Oregon. During her term, from 2015–2023, she granted 47,144 pardons for minor marijuana convictions, commuted seventeen death row sentences, and

Hearings, after investigation, shall transmit its written recommendation upon such application to the Governor, together with all papers filed in connection with the application.”).

135. CAL. PENAL CODE § 4802 (West 2024).

136. CAL. CONST. art. V, § 8.

137. See *California Restoration Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing/> (Oct. 11, 2024) (“The Court gave no reasons for its actions, but it may reasonably be assumed it considered these clemency actions an ‘abuse of power.’”).

138. See Mays, *supra* note 133.

139. See *id.*

140. GABRIEL PETEK, PROMOTING EQUITY IN THE PAROLE HEARING PROCESS 8–10 (LAO 2023).

141. Mays, *supra* note 133.

remitted fourteen million in fines.¹⁴² Additionally, Governor Brown granted 1,147 commutations—including 144 people who were convicted of violent crimes, such as murder.¹⁴³ Not only did Governor Brown make rehabilitation the driving force behind her decision-making, but she also corrected injustices.¹⁴⁴ She considered the Supreme Court ruling in *Miller v. Alabama* that ruled mandatory life without parole for juvenile homicide offenses violated the Eighth Amendment because there were fundamental differences between the psychology and brain science between juveniles and adult minds,¹⁴⁵ and extended commutations to allow seventy-three people who committed crimes as juveniles to apply for parole.¹⁴⁶ She was the first Oregon governor to visit a state prison and forty percent of her commutations provided relief for Black people.¹⁴⁷

In Oregon, except for cases of treason, the pardon power rests exclusively with the governor.¹⁴⁸ Only three states—Oregon, Maine, and Wisconsin—and the District of Columbia do not have a statutory advisory process.¹⁴⁹ Nevertheless, in 2022, two district attorneys and family members of crime victims sued Governor Brown and other state agencies, arguing that the commutation of the seventy-three individuals who committed crimes as juveniles was an unlawful delegation of the

142. See Whitney Woodworth, *Oregon Gov. Kate Brown Pardons 45K for Marijuana Crimes*, SALEM STATESMAN J., <https://www.statesmanjournal.com/story/news/local/2022/11/21/oregon-gov-brown-pardons-45k-for-marijuana-crimes-convictions-erases-millions-dollars-fines/69668394007/> (Nov. 21, 2022, 4:02 PM); Rachel Treisman, *Oregon Gov. Kate Brown Explains Why She Commuted All of Her State's Death Sentences*, NAT'L PUB. RADIO, <https://www.npr.org/2022/12/15/1143002545/oregon-death-sentence-governor-kate-brown> (Dec. 15, 2022, 10:46 AM); *Oregon Restoration Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/oregon-restoration-of-rights-pardon-expungement-sealing> (Oct. 30, 2024).

143. See Amanda Waldroupe, *The Story of One US Governor's Historic Use of Clemency: "We Are a Nation of Second Chances"*, GUARDIAN, <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency> (Oct. 17, 2022, 2:53 PM).

144. See *Governor Kate Brown Commutes the Sentence of Dozens of People*, URB. LEAGUE PORTLAND (Oct. 28, 2021), <https://ulpdx.org/news/2021/10/governor-kate-brown-commutes-sentence-dozens-people>.

145. *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012).

146. Waldroupe, *supra* note 143.

147. See *id.*

148. OR. CONST. art. V, § 14; OR. REV. STAT. § 144.649 (2024).

149. See *50-State Comparison: Pardon Policy & Practice*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> (July 2024) [hereinafter *50-State Comparison*].

governor's clemency power.¹⁵⁰ The Court of Appeals ruled in favor of Governor Brown, holding that:

[1] [D]istrict attorneys were not empowered to represent the public or all Oregonians;

[2] [F]amilies of crime victims did not have standing in mandamus to challenge Governor's commutations;

[3] [D]istrict attorneys did not have standing in mandamus to prevent Governor from allegedly unlawful commutations;

[4] [D]istrict attorneys and families of crime victims were not entitled to notice of Governor's commutations; and

[5] Governor had the authority to commute the sentences of juvenile offenders to sentences that included the right to early-release hearings, thus giving BOPPS jurisdiction and the duty to hold such hearings.¹⁵¹

Governor Brown's plenary power to grant clemency is what established her legacy. Until the end of her term, Governor Brown effectively fought for second chances.

C. Connecticut

Connecticut is one of several states in which the governor does not participate in making clemency decisions.¹⁵² Instead, the governor appoints an independent board, the Board of Pardons and Paroles, which has the authority granted by the legislature, to determine pardons and commutations.¹⁵³ In 2021, the Board introduced a new commutations policy to address excessive sentences.¹⁵⁴ A pastor and former police officer, Carleton Giles, led the three-member Board and, under his leadership from 2021–2023, granted commutations for 106 people where

150. *Marteeny v. Brown*, 517 P.3d 343, 346–47 (Or. Ct. App. 2022), *appeal denied*, 518 P.3d 129 (Or. 2022).

151. *Id.* at 343.

152. Other states with an independent board are Alabama, Georgia, Idaho, South Carolina, and Utah. *See 50-State Comparison*, *supra* note 149.

153. CONN. GEN. STAT. § 54-124a(f) (2024).

154. Kelan Lyons, *Connecticut's New Commutation Policy Raises the Bar for Second Chances*, BOLTS (Sept. 8, 2023), <https://boltsmag.org/connecticut-commutation-policy/>.

ninety-six of the cases involved a loss of life.¹⁵⁵ Moreover, nearly two-thirds of the people impacted were Black.¹⁵⁶

In every case, the Board considered the following factors: 1) the seriousness and recentness of the conviction; 2) conduct while incarcerated; 3) the impact on victims and the community; 4) rehabilitation; 5) if a commutation will provide a benefit to the applicant; 6) if a commutation will provide a benefit to society; 7) the length of the sentence; 8) whether the sentence is consistent with contemporary sentencing practices; 9) whether the applicant is suffering from a terminal illness or has a severe and chronic disability that would be substantially mitigated by a commutation; 10) whether, and the extent to which, continued service of the applicant's sentence or sentences are in the interests of justice; and 11) any extraordinary circumstances which favor commutation of the applicant's sentence or sentences.¹⁵⁷

However, things took a turn when Governor Ned Lamont succumbed to critics of the commutation policy. Instead of defending the process and authority of the Parole Board, Governor Ned Lamont responded to pressure from victim advocates and political figures by removing Carleton Giles as chair of the board.¹⁵⁸ Governor Lamont then appointed Jennifer Medina Zaccagnini, who put a hold on all commutations and released a new commutation policy in July of 2023 that retracted all progress made up until that point.¹⁵⁹

Instead of considering the factors of the old policy, Connecticut's new policy states that "[an a]pplicant must clearly articulate in his/her application exceptional and compelling circumstances, which would warrant a hearing on commutation of sentence(s)."¹⁶⁰ Since the new policy took effect, the Board denied an application from Corey Turner, who was convicted of murder but maintained his innocence.¹⁶¹ After serving twenty-seven years, he recounted his rehabilitative efforts—earning a GED, serving as a law librarian, taking parenting classes,

155. *Id.*; Mark Pazniokas, *House Confirms Carleton Giles to Board of Pardons and Paroles*, CT MIRROR (Apr. 27, 2023, 4:17 PM), <https://ctmirror.org/2023/04/27/carleton-giles-ct-parole-board-commutations/>; *Commutation Statistics*, CT.GOV, <https://portal.ct.gov/bopp/research-and-development-division/statistics/commutation-statistics> (last visited Feb. 21, 2025).

156. Lyons, *supra* note 154.

157. Kelan Lyons, *Board of Pardons and Parole Accepting Commutation Applications Again*, CT MIRROR (June 3, 2021, 5:00 AM), <https://ctmirror.org/2021/06/03/board-of-pardons-and-parole-accepting-commutation-applications-again/>.

158. *See* Pazniokas, *supra* note 155.

159. *See* Lyons, *supra* note 54.

160. STATE OF CONN. BD. OF PARDONS & PAROLES, POLICY III.02—COMMUTATIONS 2 (2023), <https://portal.ct.gov/-/media/bopp/pardons/policy-iii02-commutations.pdf>.

161. Lyons, *supra* note 154.

etc.—and explained how he flourished in prison despite the odds and did not let violence or despair dictate the rest of his journey.¹⁶² After hearing from Mr. Turner, the Board's new chair stated, "I commend Mr. Turner for his rehabilitative efforts . . . [h]owever, it does not rise to the level of compelling and exceptional that would warrant a commutation of his sentence."¹⁶³

Connecticut serves as an example of how politics can infect fair practices and procedures that promote second chances and further the interests of society.

D. Pennsylvania

Throughout his tenure, Governor Wolf granted 2,540 pardons—the most pardons granted by a governor in Pennsylvania's history.¹⁶⁴ In addition to pardons, Governor Wolf commuted the life sentences of thirteen people convicted of felony murder.¹⁶⁵ These thirteen individuals will be released to parole as Governor Wolf acknowledged that they "have served time for their crimes and deserve now a second chance[.] They now have a chance to begin a life outside of prison that I hope is fulfilling for each of them."¹⁶⁶

Under the Pennsylvania Constitution, to exercise the governor's pardon power, he must have a favorable recommendation from a majority of the Board of Pardons, and it must be unanimous in the cases with a life sentence.¹⁶⁷ The parole board is essentially the gatekeeper and decides which cases the governor will review.¹⁶⁸

Then Lieutenant Governor, and now Senator, John Fetterman¹⁶⁹ chaired the five-person Board of Pardons and has been a strong

162. *Id.*

163. *Id.*

164. James Wesser, *Gov. Wolf Granted Pennsylvania Record 2,540 Pardons with 300+ More Announced*, ABC27 NEWS (Jan. 12, 2023, 4:31 PM), <https://www.abc27.com/pennsylvania/gov-wolf-granted-pennsylvania-record-2540-pardons-with-300-more-announced/>.

165. Kara Seymour, *Gov. Wolf Commutes Life Sentences for 13 Jailed on Murder Charges*, PATCH (Feb. 16, 2021, 10:50 AM), <https://patch.com/pennsylvania/across-pa/gov-wolf-commutes-life-sentences-13-jailed-murder-charges>.

166. *Id.*

167. PA. CONST. art. IV, § 9(a).

168. *See id.* Other states—such as Arizona, Delaware, Louisiana, Massachusetts, New Hampshire, Oklahoma, and Rhode Island—have the same model. *See 50-State Comparison*, *supra* note 149.

169. *See* Marc Levy, *Democrat John Fetterman Wins US Senate Race in Pennsylvania*, ASSOCIATED PRESS (Nov. 9, 2022, 11:22 AM), <https://apnews.com/article/pennsylvania-senate-race-2022-midterm-elections-93709b5b7ab4cef658f45751cd76c090>.

proponent of second chances.¹⁷⁰ He advocated for those who played a minimal role in their convictions of felony-murder, stating, “[i]f you didn’t take a life, the state shouldn’t take your life through unending incarceration . . . [b]ecause of mandatory sentences in some cases, the people who actually killed are released before those who didn’t. We need to decide when enough is enough.”¹⁷¹ Most notably, he hired formerly incarcerated people—specifically those that recently received commutations—as commutation specialists at the Office of Lieutenant Governor to assist him in reforming the commutation process in Pennsylvania.¹⁷² Additionally, Fetterman supports efforts to eliminate the unanimous vote requirement for commutations on life sentences,¹⁷³ streamline the application process for pardons, and waive the application fee for clemency.¹⁷⁴

E. Colorado

In 2023, Governor Jared Polis granted twenty-one pardons and seven commutations, including a commutation for a man convicted of murder at the age of nineteen named David R. Carrillo.¹⁷⁵ Mr. Carrillo, now forty-nine, was part of a group of teens who shot and killed a seventeen-year-old.¹⁷⁶ Although he was not the shooter, he was sentenced to life in prison without the possibility of parole.¹⁷⁷ He served twenty-eight years in prison and, while incarcerated, he obtained a GED, bachelor’s degree, Master of Business Administration degree, and became the first incarcerated adjunct faculty member at Adams State University.¹⁷⁸

170. See *Lt. Gov. John Fetterman: Board of Pardons Recommends Record Number of Commutations for People Sentenced to Life*, PA. PRESSROOM (Sept. 13, 2019), <https://www.pa.gov/ltgovernor/newsroom/lt-gov-john-fetterman-board-of-pardons-recommends-record-number-of-commutations-for-people-sentenced-to-life.html> [hereinafter *Lt. Gov. John Fetterman: Board of Pardons*].

171. *Id.*

172. *Lt. Gov. John Fetterman Hires Two Commuted Former Life-Sentence Inmates to Improve Commutations Process in PA*, PA. PRESSROOM (Nov. 4, 2019), <https://www.pa.gov/ltgovernor/newsroom/lt-gov-john-fetterman-hires-two-commuted-former-life-sentence-inmates-to-improve-commutations-process-in-pa.html> [hereinafter *Lt. Gov. John Fetterman Hires*].

173. *Lt. Gov. John Fetterman: Board of Pardons*, *supra* note 170.

174. *Lt. Gov. John Fetterman Hires*, *supra* note 172.

175. Jesse Paul & Sandra Fish, *Colorado Governor Pardons 21 People and Reduces Sentences of 7 Others, Including Man Convicted of Murder*, COLO. SUN (Dec. 22, 2023, 4:09 PM), <https://coloradosun.com/2023/12/22/jared-polis-pardons-clemency-2023/>.

176. *Id.*

177. *Id.*

178. *Id.*

Governor Polis recognized an unfortunate pattern: individuals who take their case to trial face harsher sentences, even while everyone else involved, including the actual shooter, is out of prison.¹⁷⁹ In a statement, he expressed that “[t]hese disparities, coupled with the work you have done while incarcerated, support granting your application You have taken accountability for your actions and recognize the mistakes you made in the past. You are remorseful and ready to advance to a new phase of life. I believe you will be successful.”¹⁸⁰

In Colorado, the governor has the sole power to pardon and commute sentences, except in cases of treason or impeachment.¹⁸¹ Thus far, Governor Polis commuted the sentences of twenty-five people, pardoned 4,083 people with marijuana convictions for possessing one ounce or less of marijuana, and signed a bill to abolish the death penalty in Colorado.¹⁸²

Governors and executive authorities who embrace their clemency powers to reduce prison populations are in the minority. However, the Restoration of Rights Project recognizes the following eighteen states for having a frequent or regular clemency process: Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Louisiana, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, and Wisconsin.¹⁸³ Thus far, initiatives that explicitly aim to address excessive sentences do just that.¹⁸⁴ It may not be at the rate expected, but the needle is moving—particularly in the state of New Jersey.

IX. NEW JERSEY’S CLEMENCY PRACTICE

In New Jersey, prior to 2024, executive clemency was rare, leaving us with little to examine.¹⁸⁵ New Jersey governors sparingly used their clemency powers, even though the state had enormous potential to become a champion in clemency.¹⁸⁶ Then, on Juneteenth in 2024, history

179. Paul & Fish, *supra* note 175.

180. *Id.*

181. COLO. CONST. art. IV, § 7.

182. Paul & Fish, *supra* note 175.

183. *50-State Comparison*, *supra* note 149.

184. *See, e.g., id.*

185. *See* Press Release, ACLU-NJ, ACLU-NJ Applauds Gov. Murphy’s Historic Executive Order to Facilitate Categorical Clemency (June 19, 2024), <https://www.aclu-nj.org/en/press-releases/aclu-nj-applauds-gov-murphys-historic-executive-order-facilitate-categorical-clemency>.

186. *See* Press Release, ACLU, ACLU Report Finds Significant Strides in Clemency Trends in 2022 (Apr. 11, 2023), <https://www.aclu.org/press-releases/aclu-report-finds-significant-strides-in-clemency-trends-in-2022>.

was made in the state when Governor Phil Murphy issued an executive order creating an advisory board to review petitions for pardons and commutations, specifically expediting the process for people who meet specified criteria for consideration.¹⁸⁷ These categories include people who committed crimes after being victims of domestic violence, sex trafficking, or other forms of sexual abuse, and people with sentences impacted by excessive trial penalties.¹⁸⁸ This marked an exciting and essential step towards justice. Following the issuance of his executive order, Governor Murphy demonstrated the transformative power of clemency by granting 120 pardons and nine commutations—easily setting the stage for a historic shift in New Jersey’s approach towards clemency.¹⁸⁹ This section therefore examines the past limited use of clemency in New Jersey, discusses the need for more clemency in the state, and the immense contribution clemency will have on reforming the criminal legal system.

A. *Use of Clemency*

The New Jersey Constitution gives the governor power to grant pardons and commutations in all cases other than impeachment and treason.¹⁹⁰ In New Jersey, while the governor may receive recommendations from the parole board, the governor is the ultimate decision maker.¹⁹¹ Although this power is not reviewable by any party other than the governor, “there is an administrative process whereby applications for pardons, reprieves, commutations of sentence and remission of fines can be considered administratively by the governor’s office.”¹⁹²

New Jersey is one of fifteen states where the governor has “full and sole authority to grant clemency.”¹⁹³ The remaining states are Alabama, Arkansas, California, Colorado, Kentucky, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wyoming.¹⁹⁴ Prior to Governor Murphy’s clemency

187. *Id.*

188. *Id.*

189. *ACLU-NJ Celebrates Second Round of Releases Under Its Clemency Project*, ACLU-N.J. (Apr. 8, 2025), <https://www.aclu-nj.org/en/press-releases/aclu-nj-celebrates-second-round-releases-under-its-clemency-project>.

190. N.J. CONST. art. V, § 2, ¶ 1.

191. *Id.*

192. N.J. PRAC., CRIM. PRAC. & PROC. § 49:3 (2019 ed.)

193. *See Clemency and Pardons*, ACLU, <https://www.aclu.org/issues/smart-justice/parole-and-release/clemency-and-pardons> (last visited Feb. 21, 2025).

194. *Id.*

initiative, just 105 pardons and commutations were granted in New Jersey in the thirty years between 1994 and 2024.¹⁹⁵

Historically, New Jersey governors have issued commutations at a low rate. Governor Chris Christie only commuted the sentences of three individuals during his final year in office.¹⁹⁶ Governor Jon Corzine commuted eight death penalty sentences right before he abolished the death penalty in New Jersey.¹⁹⁷ There are some governors who completely failed to issue commutations.¹⁹⁸ For example, Governor Christine Todd Whitman did not issue any commutations out of the nineteen people granted clemency.¹⁹⁹ Governor Murphy has granted clemency to some who were convicted of homicide, highlighting the critical need to address excessive sentences within the criminal legal system, including for those convicted of violent offenses. This step reflects a growing commitment to a more compassionate approach to justice in New Jersey and also presents an opportunity to learn from the experiences of other states who have recognized clemency as a tool to transform lives and strengthen communities.

In 2019, Oklahoma Governor Kevin Stitt signed off on commutations of 527 non-violent sentences, the largest single-day commutations in history.²⁰⁰ That same year, California Governor Gavin Newsom commuted the sentences of twenty-one people convicted of murder and attempted murder.²⁰¹ Moreover, Pennsylvania Governor Tom Wolf commuted the life sentences of eight people,²⁰² and Kentucky Governor Matt Bevin commuted the sentences of several people serving time for

195. 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/>.

196. *Id.*

197. *See id.*; *New Jersey Abolishes Death Penalty*, NPR (Dec. 17, 2007, 11:41 AM), <https://www.npr.org/2007/12/17/17314934/new-jersey-abolishes-death-penalty>.

198. *See Biryukov, supra* note 195.

199. *See id.*

200. Kevin Bliss, *Oklahoma Commutations Largest Mass Release in U.S. History*, PRISON LEGAL NEWS (Mar. 4, 2020), <https://www.prisonlegalnews.org/news/2020/mar/4/oklahoma-commutations-largest-mass-release-us-history/>.

201. *Gov. Newsom Grants Clemency to 21 Convicted Murders, Gang Members & Drive-By Shooters*, CAL. SENATE REPUBLICANS (Sept. 18, 2019), <https://src.senate.ca.gov/content/gov-newsom-grants-clemency-21-convicted-murders-gang-members-drive-shooters>.

202. Samantha Melamed, *Gov. Tom Wolf Releases 8 Lifers, More Than Any Other Pa. Governor in Decades*, PHILA. INQUIRER (May 6, 2019), <https://www.inquirer.com/news/commutation-life-sentences-philadelphia-pennsylvania-tom-wolf-george-trudel-20190506.html>.

violent crime, including homicide.²⁰³ These examples of commutations should encourage future governors of New Jersey to build upon Governor Murphy's blueprint, and inspire other states with limited histories of clemency to take more decisive action. We encourage executive authorities to fully embrace their clemency powers with confidence, setting aside any concerns about potential backlash, and prioritizing justice and second chances.

In the past, most executive authorities have chosen to play it safe without realizing that the people most in need of clemency are those who have been convicted of a violent offense.²⁰⁴ Executive authorities are often blinded to the true injustices because they are fixated on the politics of being labeled as "soft on crime."²⁰⁵ Instead of worrying about being "soft on crime," however, there needs to be a concern toward being soft on injustices. Mass incarceration, a type of systemic injustice, is a crisis that cannot be solved without addressing violent crime. According to a 2015 data analysis for the Marshall Project, "freeing pot smokers and shoplifters won't significantly reduce the incarcerated population—because more than 50 percent of state prisoners are behind bars for violent crimes, including murder, kidnapping, and rape."²⁰⁶ Notably, dealing fairly with violent crimes can be difficult in a hostile political climate.²⁰⁷ But when assessing such cases, a deeper dive must take place, with attention to the transformation from who the person was then, to who they are now. It is a disservice to society to cast someone away solely due to the violent nature of their offense. Furthermore, there is a misconception that commutations mean automatic release for everyone, when in fact, commutations can lead to either a reduction of sentence or earlier parole eligibility, not only immediate release.²⁰⁸ Commutations have the potential to be a corrective tool in the fight against mass

203. WKYT News Staff, *Five Convicted of Murder Among Those Pardoned by Former Governor Bevin*, WKYT (Dec. 11, 2019, 1:03 PM), <https://www.wkyt.com/content/news/Bevin-pardons-man-convicted-in-deadly-Knox-County-robbery-566086571.html>.

204. See generally Awan & Quandt, *supra* note 124.

205. See *id.*

206. Eli Hager, *When "Violent Offenders" Commit Nonviolent Crimes*, MARSHALL PROJECT (Apr. 3, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes>.

207. Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009).

208. Awan & Quandt, *supra* note 124.

incarceration,²⁰⁹ and we support a governor who is not afraid to stand for humanity over “tough on crime” antics.

B. Need for More Clemency in New Jersey

Historically, before Governor Murphy, New Jersey governors granted clemency individually, not categorically. In the past, governors looked at an individual case and would grant clemency based on that person’s individual story. For example, Governor Chris Christie pardoned twenty-five people and, in 2018, commuted the sentence of a woman named Lisa Pyatt, who was convicted of murdering her fiancé.²¹⁰ Lisa Pyatt was a survivor of domestic violence suffering from battered women’s syndrome when she stabbed her fiancé to death.²¹¹ After going to trial and raising the battered woman’s defense, a jury returned a verdict of guilty, which was unfortunately common and resulted in her serving twenty-four years at Edna Mahan Correctional Facility.²¹² Despite having gone to trial, an injustice still occurred, which led Governor Christie to commute her sentence, allowing her to be released six years earlier.²¹³ Lisa Pyatt is one example of hundreds of women who share related stories.²¹⁴ Categorical clemency for survivors of domestic violence creates the possibility for many people to efficiently obtain relief.²¹⁵

While categorical clemency is needed to address sentencing disparities, it does not go without opposition. Even in Lisa’s case, there was backlash from the victim’s family.²¹⁶ This is an unavoidable cost, but hopefully, as many more continue to share their stories of injustices, executive authorities will realize that those who pit victims against those charged with crimes know nothing about the intricacies of the criminal

209. Press Release, ACLU-N.J., ACLU-NJ Announces the Launch of the Clemency Project, (Feb. 22, 2024), <https://www.aclu-nj.org/en/press-releases/aclu-nj-announces-launch-clemency-project>.

210. Associated Press, *Christie Pardons 25, Commutes Sentence of Convicted Murder*, WHYY (Jan. 13, 2018), <https://whyy.org/articles/christie-pardons-25-commutes-sentence-convicted-murder/>.

211. Kathleen Hopkins, *Christie Released Killer, and Point Pleasant Beach Victim’s Family Left in the Dark*, ASBURY PARK PRESS (Feb. 7, 2018, 5:00 AM), <https://www.app.com/story/news/local/courts/2018/02/07/chris-christie-killer-released-lisa-pyatt-kevin-mcgowan/312526002/>.

212. *Id.*; see also Ricardo Kaulessar, *ACLU Clemency Project Aims to Cut Jail Time for Domestic Violence Survivors in NJ Prisons*, NORTHJERSEY.COM, <https://www.northjersey.com/story/news/2024/03/29/aclu-clemency-project-focuses-on-domestic-violence-survivors-in-nj/73056747007> (Mar. 31, 2024, 5:18 PM).

213. Hopkins, *supra* note 211.

214. Kaulessar, *supra* note 212.

215. See Uwakwe, *supra* note 69.

216. Hopkins, *supra* note 211.

legal system. Perpetual punishment will never be the answer to solving crime. People need hope that they can live a meaningful life, and ignoring this pervasive issue fails those who need our help the most.

C. Potential Impact of Clemency in New Jersey

Governors can effectively lead criminal legal reform. Injustices occur every day in the criminal legal system, and if governors are not willing to check the system and balance it out, many will fall victim to stringent laws and policies that do not factor in personal circumstances but instead lead to mass incarceration.²¹⁷ Leveraging clemency as a tool to correct injustices not only grants relief to the recipients but also sends a message to legislatures and members of the criminal legal system that change is needed.

In 2015, Governor Christie pardoned a woman named Sheenan Allen who, during a traffic stop, revealed that she accidentally carried a concealed gun into New Jersey from Pennsylvania, where she had a legal permit to carry a gun.²¹⁸ While her case was pending, she spent almost forty days in jail despite being a mother of two with no criminal record.²¹⁹ The criminal legal system completely failed her, as she was prosecuted and convicted of gun possession under New Jersey's strict Graves Act, which, at the time, required a minimum of three years in prison.²²⁰

As attention to her case grew, the Attorney General clarified the Graves Act to allow her and similarly situated individuals to avoid prison time.²²¹ Although she no longer faced prison, she was still convicted of a felony before Governor Christie pardoned her.²²² There are many cases like Sheenan's that have not garnered the same media attention, and it is, therefore, imperative to crack the system open and take a second look at the silent injustices that occur daily.²²³ Discrepancies in the law should be addressed by all branches of government, including by the governor, who has a moral duty to act through categorical clemency. Clemency can impact our legal system by chipping away at the policies that create more

217. *Decarcerating New Jersey*, *supra* note 91.

218. *Trader*, *supra* note 101.

219. *Id.*

220. *Id.*

221. *See generally* Memorandum from John J. Hoffman, Acting Att'y Gen., N.J. Off. of the Att'y Gen. on Clarification of "Graves Act" 2008 Directive with Respect to Offenses Committed by Out-of-State Visitors from States Where Their Gun-Possession Conduct Would Have Been Lawful to Elie Honig, Director, Div. of Crim. Just. & All County Prosecutors (Sept. 24, 2014), <https://www.nj.gov/lps/dcj/agguide/directives/Graves-Act-clarification-2014.pdf>.

222. *Trader*, *supra* note 101.

223. *Id.*

harm than good. When used effectively, as envisioned through Governor Murphy's Clemency Initiative, clemency serves as a meaningful step toward prioritizing human dignity, fostering community, and building a more just society.

X. CATEGORIES FOR CLEMENCY

In New Jersey, people who have been sentenced for a crime can apply for clemency and, as mentioned, the governor is the ultimate decision-maker regarding who will be granted clemency.²²⁴ This article suggests that the governor can go further and grant *categorical* clemency in certain situations.²²⁵ Categorical clemency is a process that extends consideration for commutations and pardons to groups of people based on shared characteristics, such as survivors of domestic violence, those who have experienced the "trial penalty," co-defendants who've faced sentencing disparities, and individuals sentenced as juveniles.²²⁶ It creates a process for eligible individuals to be considered for clemency.²²⁷ In doing so, categorical clemency can greatly reduce New Jersey's incarcerated population and respond to past injustices of the criminal justice system.²²⁸

A. *Survivors of Domestic Violence*

One group of individuals for categorical clemency attention is survivors of domestic violence who face criminalization and incarceration for offenses relating to their abuse.²²⁹ In New Jersey, at Edna Mahan, the correctional facility for women in Hunterdon County, it was found that seventy-two percent of the women there who were first-time offenders were serving sentences related to violent offenses for attacking their abusers.²³⁰ In fact, most women in prison nationwide are domestic violence survivors, and women of color make up a disproportionate percentage of this population.²³¹ Survivors of domestic violence cross paths with the criminal justice system due to a variety of reasons relating to abuse.²³² They may be arrested for defending themselves by fighting

224. *Decarcerating New Jersey*, *supra* note 91.

225. *See id.*

226. SAKALA ET AL., *supra* note 12, at 2–5.

227. *Decarcerating New Jersey*, *supra* note 91.

228. *Id.*

229. SAKALA ET AL., *supra* note 12, at 4–5.

230. Kaulessar, *supra* note 212.

231. LIZ KOMAR ET AL., SENTENCING REFORM FOR CRIMINALIZED SURVIVORS: LEARNING FROM NEW YORK'S DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT 3 (2023).

232. *Id.* at 1.

back and causing harm to their abuser, or for protecting another.²³³ Often, self-defense and justification laws do not protect these individuals from prosecution and punishment.²³⁴ At sentencing, the extent of the abuse they've endured is not given full and appropriate consideration.²³⁵ Instead, they are characterized as violent and dangerous and given lengthy sentences, even as first-time offenders.²³⁶

B. Trial Penalty

Another ripe area for clemency is the trial penalty phenomenon. This is where individuals exercise their Sixth Amendment right to go to trial, rather than accept a plea bargain, and face disproportionately harsh sentences upon conviction as a result.²³⁷ Typically, the trial penalty results in “two- to sixfold increases in the odds of imprisonment with fifteen to sixty percent longer sentence lengths,”²³⁸ which is further exacerbated by the fact that people who go to trial are less likely to receive mitigated sentences and more likely to face enhancements.²³⁹ This reality is one of the leading explanations behind why less than three percent of criminal cases today ever make it to trial—the trial penalty incentivizes foregoing one's right to a jury trial, a crucial check on the criminal legal system, due to a valid fear that doing so will pre-determine a more severe sentence.²⁴⁰

This differential treatment challenges retributive principles, as plea bargains demonstrate that punishment may not be proportionate to the offense. This makes the trial penalty particularly salient for commutations or pardons, as individuals convicted of a crime will be given the opportunity to receive fair sentencing. Further, utilizing clemency to address systemic injustices caused by the trial penalty not only aligns with constitutional ideals but also reinforces the principle that individuals should have their day in court without coercion to accept guilty pleas.

233. *Id.* at 5.

234. *Id.*

235. *Id.*

236. *See* Kaulessar, *supra* note 212.

237. Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019).

238. *Id.* at 313–14.

239. *Id.* at 314.

240. Christina Swarns, *Why the Trial Penalty Must Go*, INNOCENCE PROJECT (June 1, 2023), <https://innocenceproject.org/why-the-trial-penalty-must-go/>.

C. Co-Defendant Sentencing Disparities

The disparities in the clemency category of co-defendants and sentencing are largely connected to the trial penalty group previously discussed. “Individuals who play similar roles in the same criminal [offense] should [face] similar sentences,” yet those who are convicted after exercising their right to trial, as one example, often receive sentences much greater than their co-defendants who enter a guilty plea for the same offense.²⁴¹ While individuals are allowed leniency at sentencing in return for their acceptance of responsibility and cooperation with the government, a separate co-defendant should not face a harsher sentence for electing to go to trial. Not only does this do a disservice to the goals of just punishment and uniform sentences for similar offenses, but it also directly punishes an individual for exercising their constitutionally guaranteed right under the Sixth Amendment.²⁴²

D. Felony Murder

Felony murder laws apply when someone commits a felony resulting in death, even if the individual did not intend to kill or participate directly in the act.²⁴³ In New Jersey, an individual charged with felony murder can raise an affirmative defense.²⁴⁴ Although difficult to prove, this defense can be used if the defendant can establish that they did not commit the killing, weren’t armed themselves, and had “no reasonable ground[s] to believe” that someone else involved was armed or intended to cause serious harm.²⁴⁵ A felony murder conviction mandates a minimum of thirty years in prison, with some cases resulting in life without parole.²⁴⁶ As of 2023, the state had around 236 individuals incarcerated for felony murder, with a significant portion serving lengthy sentences, and approximately thirty-seven individuals serving life sentences.²⁴⁷ While this might seem like a small fraction of the overall prison population, it presents an opportunity to rectify sentences for those who did not actively engage in the fatal act. The clemency tool of

241. Brian M. Heberlig, *Avoiding Disparities Between Sentences of Co-Defendants Is a Legitimate Sentencing Goal*, 16 WASH. LEGAL FOUND. 1, 1 (Apr. 7, 2006).

242. *See id.* at 2.

243. *The Felony Murder Rule in Criminal Law*, JUSTIA, <https://www.justia.com/criminal/offenses/homicide/felony-murder/> (last visited Feb. 21, 2025).

244. N.J. REV. STAT. § 2C:11-3 (2020).

245. *Id.* §§ 2C:11-3(c)–(d).

246. *Id.* § 2C:11-3(b).

247. *Data New Jersey, FELONY MURDER REPORTING PROJECT*, <https://felonymurderreporting.org/states/nj/> (last visited Feb. 21, 2025).

commutations offers a chance to align punishments with the level of involvement in a crime, fostering fairness and potentially aiding in their reintegration into society through a restorative justice approach.²⁴⁸

Moreover, commutation can help address racial disparities in the application of felony murder laws.²⁴⁹ According to The Felony Murder Reporting Project, a Black person in New Jersey is about twenty-five “times more likely to be incarcerated for felony murder” than their white counterpart.²⁵⁰ And while Black people represent approximately fifteen percent of the population in New Jersey, they represent about seventy-one percent of those incarcerated for felony murder.²⁵¹ Most concerning are felony murder percentages “in Union, Atlantic, Cumberland, Mercer, Burlington, Passaic, and Essex counties,” as “over 75%[] of those convicted of felony murder[s there] are Black” individuals.²⁵²

We begin to see the intersection of the trial penalty and felony murder, considering that communities of color and individuals with serious crimes are more likely to go to trial.²⁵³ Furthermore, prosecutors often use felony murder as a strategy “to obtain plea deals for lengthy sentences.”²⁵⁴ By utilizing commutations, authorities can rectify these inequities and promote a more just system.

E. Juvenile Offenders

New Jersey has taken positive steps regarding its approach to juvenile offenders in the criminal legal system, acknowledging that research on adolescent brain development has revealed that children are different from adults in ways that are especially significant when it comes to applying appropriate criminal sentences.²⁵⁵ In *State v. Comer*, for example, the court held that New Jersey’s murder statute, requiring a mandatory minimum sentence, raised constitutional concerns when applied to people under eighteen because it did not provide young people

248. See *Governor Murphy Launches Historic Clemency Initiative*, N.J.GOV (June 19, 2024), <https://www.nj.gov/governor/news/news/562024/20240619a.shtml> (explaining that the clemency initiative’s purpose is to rectify unfairness in convictions and rehabilitate).

249. See *id.*

250. *Data New Jersey*, *supra* note 247.

251. *Id.*

252. *Id.*

253. *Data New Jersey*, *supra* note 247.

254. Indy Scholtens, *Advocates Seek Justice in the Growing Movement to End the Felony Murder Rule in America*, COLUM. JOURNALISM SCH. (Mar. 19, 2024), <https://columbianewsservice.com/2024/03/19/advocates-seek-justice-in-the-growing-movement-to-end-the-felony-murder-rule-in-america>; see also NAZGOL GHANDNOOSH ET AL., *FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING* 6–7 (2024).

255. GHANDNOOSH ET AL., *supra* note 254 at 1.

with an opportunity to demonstrate that they had matured or had been rehabilitated.²⁵⁶

While the *Comer* decision provides a resentencing after twenty years for juvenile offenders serving the equivalent of life sentences in New Jersey, the state continues to use one's juvenile offenses to impose life sentences.²⁵⁷ New Jersey's Three Strikes Law, known as the Persistent Offender Accountability Act, allows an offense that was committed while the individual was under the age of eighteen to be counted as a strike.²⁵⁸ Thus, if an individual is convicted of three serious offenses, but one of those was as an adolescent, a mandatory sentence of life without parole will still be enforced.²⁵⁹

This rigid, unrelenting approach refuses to acknowledge critical aspects of juvenile offenders.²⁶⁰ For example, in 2012, The Sentencing Project released findings from a survey of people sentenced to life in prison as juveniles in the United States and found that seventy-nine percent witnessed violence in their homes regularly and forty-seven percent were physically abused.²⁶¹ This category also experiences high degrees of racial disparities, as sixty-two percent of those serving a juvenile life sentence without parole in the United States are Black.²⁶² The lives of these individuals are being cut short by acts committed before they've even turned eighteen, during a period of their life where

256. *State v. Comer II*, ACLU-N.J., <https://www.aclu-nj.org/en/cases/state-v-comer-ii> (last visited Feb. 21, 2025). "In 2003, James Comer received a sentence of 75 years in prison, with more than 68 years without parole, for his role in four robberies and a felony murder that he committed as a 17-year-old." *Id.* The sentence was challenged, and the New Jersey Supreme Court ordered a new sentencing hearing for Mr. Comer where his counsel presented compelling evidence that he had matured over the years. *Id.* This was supported by a psychiatrist finding that Mr. Comer had been rehabilitated and could achieve no further benefit from prison, amongst other evidence. *Id.* The court ended up resentencing Mr. Comer to a term of thirty years without parole, pointing out that, under current law, that was the lowest sentence it could impose. *Id.* The ACLU of New Jersey filed an appeal arguing that the mandatory nature of the sentence, which restricted judges from imposing lesser sentences, regardless of the evidence of immaturity presented, constituted cruel and unusual punishment when applied to people under eighteen. *Id.* The court agreed that the statute raised constitutional concerns because it did not provide young people an opportunity to demonstrate that they had matured or had been rehabilitated. *Id.* Instead, the Court read the statute to allow people under eighteen who had received long sentences to petition courts for look back hearings after twenty years and, if the defendant could demonstrate rehabilitation, they could receive a period of parole ineligibility of no less than twenty years. *Id.*

257. Wood, *supra* note 102.

258. *Id.*

259. *Id.*

260. JOSHUA ROVNER, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 2 (2023)

261. *Id.*

262. *Id.*

they still have substantial capacity for rehabilitation as they mature into adults. But instead, their juvenile offenses are defining their fate, and they're handed a sentence that determines the trajectory of the rest of their lives. Clemency attention to this group therefore aligns with modern research and, most notably, necessary justice.

F. Non-Violent Offenses

Individuals who commit a non-violent offense are subject to patchwork relief in New Jersey. Governor Murphy's execution of the recreational marijuana bill gave individuals convicted of low-level non-violent marijuana offenses the opportunity to get their records expunged.²⁶³ Attorney General Gurbir Grewal issued a directive restricting prosecutors from using "mandatory minimum prison terms for non-violent drug offenses."²⁶⁴ However, people with non-violent offenses still face challenges. The New Jersey Legislature sought to address this issue by proposing a bill to remove mandatory minimums for non-violent offenses.²⁶⁵ Governor Murphy, however, vetoed the bill, citing concerns about ensuring accountability for official misconduct.²⁶⁶ Non-violent offenses are ideal for commutations as societal ideals about mandatory minimums are shifting, thus acknowledging that individuals with non-violent offenses may have received harsher sentences than warranted.²⁶⁷

XI. THE ROLE OF CLEMENCY IN SOCIETY AND COMMUNITIES

Though we have presented multiple reasons why clemency upholds its importance for both individuals and categories of cases, it is also necessary to address the influence of clemency on a social scale and within communities. The contributions it could make to individuals and their community are vital elements to the "success" of a clemency decision, as weight is put on the individual released not to commit crime again.²⁶⁸ So, here we explore what clemency means for the community, political legitimacy, and public perception. The use of clemency must promote not only safety and security for others but also an increased

263. Jonathan D. Salant, *Murphy Won't Have to Pardon N.J. Weed Crimes Despite Biden Order. Here's Why.*, NJ.COM, <https://www.nj.com/marijuana/2022/10/murphy-wont-have-to-pardon-nj-weed-crimes-despite-biden-order-heres-why.html> (Oct. 11, 2022, 3:07 PM).

264. *Expanding Freedom and Centering Humanity*, ACLU-N.J., <https://www.aclu-nj.org/en/expanding-freedom-and-centering-humanity> (last visited Feb. 12, 2024).

265. *Id.*

266. *Id.*

267. Barkow, *supra* note 207, at 154.

268. *Id.* at 157.

trust in criminal justice processes, decisions, and agents. By easing fears of 'bad apples,' political recoil, and recidivism and instead replacing them with restorative justice and reintegration, we emphasize the positive effects categorical clemency can have on an individual returning home, victims, and their community.

A. Fear-mongering and Public Perception

Looking further into the role that politics and fear play in the use of clemency, it is important to address the often-divisive expectation for a political leader to either be "soft" or "tough" on crime based on a community's perceived values on reentry and recidivism.²⁶⁹ Regardless, there is a suggestion to go beyond this dichotomy in public discourse, policy, and politics.²⁷⁰ It is easy to get lost within the negative discourse surrounding recidivism as it relates to clemency, where the intimidation of "the one bad apple" whom people fear will be released back into society is often an impediment to progress.²⁷¹ The creation of this mindset has largely been due to the focus political figures and media outlets place on the few people who recommit crime, not those who have abstained from it.²⁷² For example, the case of Willie Horton may frequently come to mind for individuals who fear the release of incarcerated individuals.²⁷³

The facts of the case are well known: in 1974, a Black man named Willie Horton, who was convicted of first-degree murder for the stabbing and killing of a young boy, received several furloughs during his prison sentence, which were passes that allowed incarcerated individuals to leave the prison for the duration of a few hours to several weeks depending on the sentence and behavior while in prison.²⁷⁴ During Horton's tenth furlough in the late 1980s, he tried to evade police and fully escape from prison. About a year later, he was a suspect in the rape of one and the murder and torture of two individuals inside their residence.²⁷⁵ He was convicted of these crimes.²⁷⁶ Prior to Willie's case,

269. KELLY LYN MITCHELL ET AL., EXAMINING PRISON RELEASES IN RESPONSE TO COVID: LESSONS LEARNED FOR REDUCING THE EFFECTS OF MASS INCARCERATION 31 (2022).

270. *Id.*

271. Barkow, *supra* note 207, at 155.

272. *Id.* at 153.

273. *Id.*

274. Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

275. *Id.*

276. *Id.*

all fifty states had furlough programs, and they were widely perceived as successful.²⁷⁷

A few years earlier, in the 1960s and 70s, when Reagan was governor of California and the state was leading the charge on rehabilitation through furloughs, an incident occurred when two individuals out on a furlough committed murder.²⁷⁸ Reagan defended it at the time, stating that over 20,000 individuals already have furlough passes and wanted people to recognize that the system cannot be perfect, but that does not mean it isn't working.²⁷⁹ The same principle needs to apply to the case of Willie Horton. This case still rings in people's ears as it became a leading reason for reservations about reform, rehabilitation, and penal progress, especially for policies related to 'early' release.²⁸⁰ It was also used as the leading propaganda for why politicians needed to be 'tough on crime,' and was a central component of the Bush Campaign for presidency.²⁸¹ While politicians and the media used this case to further generalizations about people who commit crimes, particularly people of color, the effects of this case are still felt more than thirty years later.²⁸² Recognizing the slippery slope that formed after the incident, a group of individuals serving life sentences wrote a letter to lawmakers, reminding them that this is an individual case and should not reflect on other individuals who have accepted responsibility for their actions and are using their sentences to be productive.²⁸³ They are aware of what it may mean for other incarcerated individuals if politicians and media outlets take this case and run with it—and that is what happened.²⁸⁴

There is an issue with the ability to highlight "success" stories of reentry and reintegration. It is hard to know what a successful clemency agreement looks like because there has yet to be a system analysis of successful outcomes.²⁸⁵ Because we do not know how to measure success and mostly know what failure looks like, it leads us to perceive clemency

277. *Id.*

278. *Id.*

279. *Id.*

280. Michael M. O'Hear, *New Research Suggests Potential of Prison Furloughs, But Shadow of Willie Horton Still Looms*, MARQ. UNIV. L. SCH. FAC. BLOG (May 1, 2017), <https://law.marquette.edu/facultyblog/2017/05/new-research-suggests-potential-of-prison-furloughs-but-shadow-of-willie-horton-still-looms/>.

281. *See id.*; Andrew Cohen, *Are Voters Ready to Move on from Willie Horton?*, THE MARSHALL PROJECT (Aug. 2, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/08/02/are-voters-ready-to-move-on-from-willie-horton>.

282. *See* Cohen, *supra* note 281.

283. Schwartzapfel & Keller, *supra* note 274.

284. *See id.*

285. Barkow & Osler, *supra* note 49, at 25.

as bad because public discourse and public opinion focus on the bad apple cases, which are not the majority.²⁸⁶ Given that we do not have a systematic way to look at factors that lead to successful clemency outcomes, we are limited in our ability to match and overpower cases of concern with cases of success.²⁸⁷

B. Fear of Political Recoil

When thinking of Willie Horton's case and its effects on the implementation of early release mechanisms like clemency, it should be a glaring red flag of how *not* to react and respond when deciding the outcome of other individuals' release.²⁸⁸ Fortunately, even for governors facing reelection, they did not let the public rhetoric prevent them from utilizing clemency.²⁸⁹ Former Arkansas Governor Mike Huckabee granted clemency to over 1,000 individuals, and Former Maryland Governor Robert Erlich also granted clemency petitions many times—both of whom ran as members of the Republican Party.²⁹⁰ Though Huckabee approved many of these requests in his first term, he still went on to win reelection in the following election cycle.²⁹¹ Democratic Governor of Virginia Tim Kaine also showed swiftness in his administration of clemency, “grant[ing] nine commutations and restor[ing] the rights of 768 individuals” within his first two years in office.²⁹² It appears that they have not suffered politically for these decisions.²⁹³ In connection with the examples previously mentioned in our section “State Clemency Practices,” while it might be surprising that many U.S. politicians actively utilize clemency in their administration, the majority of American voters agree and support the use of clemency.²⁹⁴ Reports suggest that over two-thirds of voters (sixty-eight percent), consisting of majority Democrats, Independents, and Republicans, support the use of clemency.²⁹⁵ In addition, eighty-two percent of voters

286. *See id.*

287. *Id.*

288. *See* Schwartzapfel & Keller, *supra* note 274.

289. *See* Barkow, *supra* note 207, at 153.

290. *Id.*

291. *See id.*; *Mike Huckabee*, BALLOTPEdia, https://ballotpedia.org/Mike_Huckabee (last visited Feb. 21, 2025).

292. Barkow, *supra* note 207, at 153.

293. *See id.*

294. Memorandum from Danny Franklin, Jessica Reis & Bully Pulpit Interactive on Majority of Voters in the United States Support Clemency to Interested Parties 1–2 (Aug. 2020),

https://assets.aclu.org/live/uploads/publications/majority_of_voters_in_the_united_states_support_clemency.pdf.

295. *Id.*

in the survey support the release of people incarcerated under statutes that have since changed, such as policies surrounding cannabis.²⁹⁶

In fact, the use of clemency on behalf of political leaders may benefit public perceptions, especially as it pertains to legitimacy and perceptions of justice in criminal *justice* institutions. Clemency may help perpetuate perceptions of fairness, as seen in the eighty-two percent of voters who support the retroactive application of changed statutes.²⁹⁷ When outdated punishments bleed into modern day practices, people's confidence in the system as a whole may be eroded.²⁹⁸ Also, strengthening perceptions of legitimacy would be following recommendations to standardize and make uniform the use of clemency.²⁹⁹ If clemency is used in a routine manner consistently, then the individual approving clemency may be better insulated from attacks, whether it be from a political foe or the citizens they serve.³⁰⁰

C. Mass Release and Recidivism

In recent years, mass releases have served as examples demonstrating that politics and fear of recidivism should not be barriers to policy implementation.³⁰¹ During the peak of the COVID-19 pandemic, to minimize the spread of COVID-19, states and federal prisons explored ways to release people in mass quantities.³⁰² This was largely based upon the understanding that decarceration is the superior solution, as it

296. See Press Release, ACLU, ACLU Releases Polling Indicating Strong Support for Clemency, (May 19, 2022), <https://www.aclu.org/press-releases/aclu-releases-polling-indicating-strong-support-clemency> (“[E]ighty-Two percent of the respondents believe that as laws change, people convicted under outdated laws should be given a chance to go home via clemency.”).

297. See *id.*

298. See IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE, *supra* note 114, at 6.

299. See generally Barkow & Osler, *supra* note 49.

300. See *id.* at 15 (“As clemency becomes less relevant to criminal law due to presidential inaction, it gives up its function as a fail-safe. . .”).

301. See Brandy F. Henry, *Social Distancing and Incarceration: Policy and Management Strategies to Reduce COVID-19 Transmission and Promote Health Equity Through Decarceration*, 47 HEALTH EDUC. & BEHAV. 536, 536 (2020) (“Decarceration is superior, as it promotes health equity and avoids health consequences associated with solitary confinement, or prolonged social isolation within prison.”).

302. See *id.* at 537 (“[Decarceration] also reduces the population of people who remain incarcerated, which allows for greater social distancing and improved access to limited available resources. Decarceration includes reducing the flow of people into prisons and accelerating the flow of people out of prisons by reducing arrests and increasing early release. . . . Within the United States, where prison systems exist under fragmented jurisdictions, some policy makers have also applied decarceration, including numerous district attorneys, sheriffs, and governors who have directed release and ordered arrests be reduced.”).

promotes health equity and avoids consequences often associated with confinement to a cell and residing in prison.³⁰³ The mass release of people would be more effective than isolation because complete isolation may exacerbate mental illness, actions of self-harm, and suicide.³⁰⁴ Therefore, the federal government made non-routine releases to reduce the prison population.³⁰⁵

An estimated 80,000 incarcerated individuals were released from prison in thirty-four states and federal prisons due to COVID-19-related policies.³⁰⁶ There were seventy-three distinct release groups across the thirty-five jurisdictions based on categories stemming from criteria for release: one's offense type, one's COVID health risk, and remaining sentence time were most frequently used.³⁰⁷

In New Jersey, specifically, in 2020, Governor Murphy signed an executive order to expedite decisions for people in prison for parole and furlough.³⁰⁸ This included individuals over age sixty, people with high-risk medical conditions, people with short sentences remaining, and people who have been denied parole in the past.³⁰⁹ Offenses such as murder and sexual assault were not included.³¹⁰ Later, in September 2020, the New Jersey legislature passed the Public Health Emergency Credit ("PHEC") Bill, where incarcerated individuals could receive up to eight months of public health emergency credits if they had less than a year of their maximum parole eligibility.³¹¹ It continued to exclude individuals sentenced for serious violent crimes and repetitive offenders.³¹² By the end of March 2021, more than 3,500 individuals had been released from New Jersey prisons, and in a little over a year, 5,000 people had been released from prisons in New Jersey.³¹³ Including jails, more than 6,600 people will have been released.³¹⁴ New Jersey reduced

303. *Id.* at 536.

304. *Id.* at 537.

305. *See id.*

306. MITCHELL ET AL., *supra* note 269, at iii.

307. *Id.*

308. *Id.* at 73.

309. *Id.*

310. *Id.* ("Anyone convicted of murder, sexual assault, or other serious crimes was not eligible for the expedited process.").

311. *Id.* at 74 ("Then, in September of 2020, the New Jersey state legislature passed the Public Health Emergency Credit Bill (S-2519).").

312. *Id.* (noting the exclusion of "those convicted of murder or aggravated sexual assault, and repetitive, compulsive sex offenders").

313. *Id.*

314. Press Release, ACLU-N.J., ACLU-NJ Statement on Additional Early Releases Under Public Health Emergency Credit Law, (Mar. 18, 2022), <https://www.aclu-nj.org/en/press-releases/aclu-nj-statement-additional-early-releases-under-public-health->

its prison population by forty-two percent, which was more than any other state.³¹⁵ Over a year after the first 2,500+ individuals were released, the reincarceration rate was only nine percent.³¹⁶ This low recidivism rate is also seen in the release of individuals varying by age group, finding that older individuals are significantly less likely to recidivate.³¹⁷ Younger age, whether the individual committed a violent or non-violent crime, is correlated with a higher recidivism rate.³¹⁸ Individuals who committed a violent offense and were thirty or younger had a rearrest rate higher than seventy-five percent; for those older than fifty, they had a rearrest rate of roughly thirty-six percent.³¹⁹ Similarly, those younger than twenty-six with a violent offense have a reincarceration rate of forty-eight percent, whereas those older than fifty have a reincarceration rate of just sixteen percent.³²⁰ The same trend is seen for reconviction rates generally, with individuals thirty-five or younger being reconvicted at a rate of forty-three percent or higher. For those older than fifty, they are reconvicted at a rate of just above seventeen percent.³²¹ Recognizing this inverse relationship, it is imperative to consider the benefits of mass release, who it may help, and how little risk it may pose to society.

D. Reintegration and Restoration

Another crucial benefit of clemency comes from the integration of restorative justice and the ways those practices and programs help to give offenders, victims, and communities other avenues to heal instead of having to rely on punishment and harsh sentences. Formally, restorative justice works to consider how offenders, victims, and their communities can work together to restore property or emotional healing,

emergency-credit-law (“[M]ore than 6,600 people have been released early from New Jersey prisons and jails. . .”).

315. Tiana Herring & Maanas Sharma, *States of Emergency: The Failure of Prison System Responses to COVID-19*, PRISON POL’Y INITIATIVE (Sept. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency.html.

316. See Karen Yi, *Study: NJ’s Early Prison Releases to Ease Crowding During COVID Didn’t Raise Public Safety Risks*, GOTHAMIST (Jun. 17, 2022), <https://gothamist.com/news/study-njs-early-prison-releases-to-ease-crowding-during-covid-didnt-raise-public-safety-risks>.

317. See KIM STEVEN HUNT ET AL., U.S. SENT’G COMM’N, *RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS* 26 (2019).

318. See *id.* at 16.

319. See *id.* at 57.

320. See *id.* at 49.

321. See *id.* at 57.

as well as restore a sense of security.³²² As an alternative to punishment, restorative justice reminds and teaches individuals that perpetual punishment may not be the answer and may not be the best path toward one's goals.³²³ Therefore, restorative justice and reintegration rooted in healing provide a unique perspective on punishment and early release.³²⁴ This already has been seen in several programs, including one called the Victim Offender Education Group, which is held within a prison.³²⁵ This group teaches emotional skills and preaches accountability to incarcerated individuals to help them recognize the harm they caused; the group brings in victims so that the men are exposed to the "human impact" of their actions, and victims have reported positive, healing experiences from these sessions.³²⁶ While this takes place during an individual's incarceration, these similar dynamics can be facilitated in the outside world through the promotion of healing and mediating programs.³²⁷ Given that both victims and people who commit crime may have experienced trauma, creating restorative reentry processes may help to repair the relationship between them and their community at large.³²⁸

Another possible benefit of restorative justice for victims is the minimization of victim-shaming, which is the shame one feels after being victimized.³²⁹ Through conferences with those who harmed them, individuals who choose to participate in these programs may be able to talk, receive answers to questions, and obtain a sense of closure.³³⁰ It is important to note that this will vary from person to person, as some will not want contact with their perpetrator nor believe it possible to even

322. See John Braithwaite, *Restorative Justice and a Better Future*, 76 DALHOUSIE REV. 9, 15–20 (1996).

323. Compare *id.* at 11–13 (describing the failures of the current criminal justice system with respect to integration), with *id.* at 15–20 (outlining the goals of the restorative justice philosophy).

324. See *id.* at 15–18.

325. See Jill Suttie, *Can Restorative Justice Help Prisoners to Heal?*, GREATER GOOD MAG. (June 9, 2015), https://greatergood.berkeley.edu/article/item/restorative_justice_help_prisoners_heal.

326. *Id.*

327. See Katy Maskolunas, *Five Best Practices for Trauma-Informed Reentry*, SAFETY & JUST. CHALLENGE (Apr. 1, 2024), <https://safetyandjusticechallenge.org/blog/five-best-practices-for-trauma-informed-reentry/>.

328. *Id.*

329. See generally Suzanne M. Retzinger & Thomas J. Scheff, *Shame and Shaming in Restorative Justice*, 8 RED FEATHER J. POSTMODERN CRIMINOLOGY (2000).

330. *Restorative Justice Program*, OFF. OF THE ATTY GEN. FOR D.C., <https://oag.dc.gov/public-safety/restorative-justice-program> (last visited Feb. 21, 2025).

have closure, but it is an important reminder that not every victim seeks harsh punishment.³³¹

On a more informal and wider scale, the community acts as a crucial entity for the efficiency of restoration and reintegration that can work to benefit both itself and the person returning from prison.³³² Echoing points made earlier, when clemency focuses on rehabilitation, the individual is believed to be a more productive and thoughtful member of society. However, this often necessitates social capital, especially for individuals who have lived unstable lives prior to incarceration due to things such as chronic unemployment,³³³ and emphasizes that reintegration is an obligation of the state, as “the right to punish” is directly complimentary with “the right to reintegrate.”³³⁴

Literature on the informal collateral consequences of incarceration has long examined the influence of informal social out-casting and othering and the formal removal of rights as roadblocks to reintegration.³³⁵ Therefore, it is important to know the role that one’s community plays in the success of the individual. This may be a hard pill to swallow for many, as at face value, it would make sense for the success of these individuals to be dependent on themselves. However, research shows otherwise.³³⁶ Often, veterans returning home report feelings of stress, trauma, alienation from family, and a loss of identity.³³⁷ Aid from social support, services, and transition groups may help remind them of who they were before leaving and before the trauma of their experiences.³³⁸ Many incarcerated individuals are also exposed to these negative experiences.³³⁹ Also, given the common cycle from victim to offender, these individuals may also need different forms of help.³⁴⁰ While

331. See *id.* (finding victims of crime report that they would recommend restorative justice to similarly situated victims).

332. Maskolunas, *supra* note 327.

333. Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 394, 402–04 (2010).

334. Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 80, 88 (2020).

335. Kimberly G. White et al., *Ending Legal Bias Against Formerly Incarcerated People*, OTHERING & BELONGING INST. (Sept. 10, 2019), <https://belonging.berkeley.edu/ending-legal-bias-against-formerly-incarcerated-people>.

336. See, e.g., Anne Demers, *When Veterans Return: The Role of Community in Reintegration*, 16 J. LOSS & TRAUMA 160, 171 (2011).

337. *Id.*

338. *Id.*

339. See generally Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVS. 862 (2014).

340. See Danielle Rousseau, *Addressing the Victim to Offender Cycle*, BOS. UNIV. (Aug. 14, 2022), <https://sites.bu.edu/daniellerousseau/2022/08/15/addressing-the-victim-to-offender-cycle/>.

the burden of repair may be on the returning citizen, the community can help catalyze these changes and assist with mending. This aspect is a crucial reminder of why individuals may be hesitant about clemency, but their concerns neglect the benefits it can provide to people and their communities.

Clemency encourages the mending of trauma, damage, and overall harm caused by the individual, and does so in a way that allows problems to be addressed earlier and more effectively than if they were to still be serving their sentence in prison.³⁴¹ Restorative justice allows all parties to view punishment differently and truly amplifies a victim's voice. Sentencing and what victims *want* from sentencing can be much more complex and restorative than simply applying the maximum sentence. Further, when society shifts from viewing sentencing policies based upon the unrealistic fear of political backlash or a possible increase in violent crime, it's possible to create a space for victims and communities to tell a different story—one of healing, restoration, and redemption.

XII. CONCLUSION

Adopting a categorical approach towards clemency creates an opportunity to begin addressing the harms of mass incarceration.³⁴² Clemency is supported by criminal philosophy and is a legally permissible act deeply rooted in our Constitution and nation's history that acknowledges flaws in our criminal legal system.³⁴³ Over the years, as new policies emerged from tough-on-crime rhetoric, injustices ballooned.³⁴⁴ Using categorical clemency sends a message of hope to communities impacted by mass incarceration and signifies a transformation to legislatures and the judiciary. Instead of executive authorities blinding themselves to injustices that occur, clemency is a tool that empowers them to act. As witnessed across the country and now beginning to take shape in New Jersey, clemency is a powerful tool that has the potential to correct systemic injustices. New Jersey's Clemency Initiative is a historic step to a promising start, but much remains to be done. Prior to Governor Murphy's clemency initiative, the historical

341. See generally *Mass Clemency*, JUST. ROUNDTABLE (Nov. 3, 2021), <https://justicroundtable.org/resource/mass-clemency/>.

342. *Id.*

343. *Herrera v. Collins* 506 U.S. 390, 411 (1993); Neil Eggleston, *Upholding the Principle of Fairness in Our Criminal Justice System Through Clemency*, WHITE HOUSE (Mar. 31, 2015, 3:23 PM), <https://obamawhitehouse.archives.gov/blog/2015/03/31/upholding-principle-fairness-our-criminal-justice-system-through-clemency>.

344. Frank R. Baumgartner et al., *Throwing Away the Key: The Unintended Consequences of "Tough-On-Crime" Laws*, 19 PERSPS. ON POL. 1233, 1235 (2021).

underutilization of clemency in New Jersey has left thousands of eligible individuals at the mercy of a system that often fails to address root causes of crime while disproportionately over criminalizing offenses. By continuing to embrace clemency, Governor Murphy has led New Jersey toward a more just and equitable future. To build on this momentum, we offer actionable recommendations for policymakers and governmental leaders to ensure clemency becomes a cornerstone of meaningful criminal legal reform, fostering rehabilitation and community reintegration for those most in need.

XIII. RECOMMENDATIONS

Without a strategic framework, even promising clemency initiatives risk falling short of their potential. After analyzing federal and state practices and building on New Jersey's recent progress, we present the following recommendations to develop a comprehensive and effective clemency system:

1. Adopt a categorical approach towards clemency: Instead of addressing one person at a time, identify groups of people who have suffered injustices in the criminal legal system, to create an impact that can lead to changes in the law. Naming injustices without change in laws and policies will fall flat. Executive authorities should view clemency as a first step towards significant reform.
2. Use the "Totality of Circumstances" approach: After identifying categories for relief, use them as guidelines and not as a bright-line rule. Many people will be disqualified from categories. However, for those that come close, use a totality of circumstances approach. It is impossible to capture the nuances of all unique injustices; there must be either a catch-all category or an over-inclusive approach.
3. Have paid staff members dedicated to reviewing clemency petitions: Most states with a robust clemency practice had staff members dedicated to reviewing clemency applications, whether through a parole board or advisory council. Having continuous staffers who survive administrations prevents significant backlogs and ensures a thriving clemency practice, irrespective of who is in office.

4. Use clemency to grant mass commutations: Mass incarceration needs to be addressed in every attempt to reform the criminal legal system, including clemency. Sentences over twenty years, where rehabilitation is demonstrated, should automatically be reviewed. There are people in prison beyond rehabilitation who have no other means of relief.
5. Eliminate the requirement of unanimity in boards: Having a majority of votes instead of a unanimous vote encourages the usage of clemency and eliminates the usage of implicit bias in decision-making.
6. Consider all crimes equally-including violent offenses: There should not be carveouts for certain types of crimes, such as murder, rape, or robbery. Differentiating between crimes makes a mockery of clemency, redemption, and second chances.
7. Reinterpret the meaning of Victim Rights: Our policies should reflect all victims' perspectives and should be open to exploring new ways to obtain justice, including those that champion forgiveness, restorative justice, and rehabilitation.