Clemency for Lifers: The Only Road Out
Is the Road Not Taken

Along with the increased use of sentencing guidelines, mandatory minimums, and truth-in-sentencing laws that limit or abolish parole, life without parole (LWOP) sentences have flourished in the United States in the last thirty years. These developments have made the elimination or curtailment of postconviction appeals and procedures that might be the means for reducing these tough penalties. These developments have made the elimination or curtailment of postconviction appeals and procedures that might be the means for reducing these tough penalties. These developments have made the elimination or curtailment of postconviction appeals and procedures that might be the means for reducing these tough penalties. These developments have made the elimination or curtailment of postconviction appeals and procedures that might be the means for reducing these tough penalties. These developments have made the elimination or curtailment of postconviction appeals and procedures that might be the means for reducing these tough penalties. These developments have made the elimination or curtailment of postconviction appeals and procedures that might be the means for reducing these tough penalties.

I. LWOP in the Federal System
The phrase life without parole is redundant in the federal criminal justice system. In the federal courts, life sentences automatically become LWOP terms. With the passage of the Sentencing Reform Act in 1984, Congress abolished parole for anyone convicted in federal courts after November 1, 1987. The number of parole-eligible people in federal prison today is small—it includes, among a few others, so-called old law prisoners who were convicted before the Sentencing Reform Act went into effect, as well as District of Columbia offenders who are eligible for parole under the District’s code. But the vast majority of currently incarcerated federal prisoners—now numbering more than 210,000—will serve 85 percent of their sentences (assuming they earn all of their good time)—that is, time off for good behavior), with no parole available.

Federal lifers are not eligible for either good time or parole, so in the federal system, life really does mean life. Congress also limited postconviction legal challenges from prisoners, making it difficult (and often impossible) for offenders to return to court and get a sentence reduced. Federal lifers can attempt to obtain an early release using the compassionate release mechanism, but the federal Bureau of Prisons grants a minuscule number of these requests each year, almost solely to terminally ill prisoners facing imminent death. Efforts to restore parole to the federal system have failed to gain traction and, even if successful, would not necessarily be applied retroactively to people already in prison. That leaves clemency. For federal lifers—about 5,200 according to recent data—commutations and death are, practically speaking, the only release mechanisms.

Mandatory minimum life sentences are among the most inhumane in the federal system because, although occasionally justified, they are too often arbitrary, disproportionate, and cruel. Their use is relatively limited: Generally, life applies to murders, some gun and drug offenses, and habitual offenders. There are two federal habitual offender (three strikes) laws requiring life in prison. The first is 21 U.S.C. § 841(b)(1)(A). If a federal drug conviction involves a particular quantity of drugs (e.g., fifty grams of crack cocaine or five kilograms of powder cocaine) and the person has at least two prior felony drug convictions (from state or federal courts), the person faces a mandatory minimum of life in prison.

The second federal habitual offender law is 18 U.S.C. § 3559(f)(4). Under that statute, a federal offender convicted of a “serious violent felony” faces a mandatory life sentence if he has two or more prior serious violent felony convictions or a combination of at least one prior serious violent felony conviction and at least one prior “serious drug offense” conviction. A serious violent felony includes a laundry list of state or federal offenses (misdemeanors or felonies) ranging from murder and manslaughter to robbery, carjacking, and gun possession. The definition also includes a catchall for any other offense punishable by at least ten years in prison “that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” Because the definition of “serious drug offense” includes most federal and state drug crimes, the statute is exceptionally broad. It does have an early release provision in 18 U.S.C. § 3582, allowing judges to reduce a life sentence for defendants who are at least 70 years old, have served at least thirty years in prison, and who the director of the Bureau of Prisons has deemed not to be a danger to...
As with all mandatory minimums, mandatory life sentences sap judges of all discretion to tailor the punishment to fit the individual and his crime, producing disproportionate and unjust sentences in many cases. Under the advisory federal sentencing guidelines, in contrast, judges decide when a life sentence fits the crime and the offender and when it does not. Although still imperfect, the flexibility of the sentencing guidelines makes them a far more just and humane system than mandatory minimum statutes when life is at stake.

When excessive or unjustifiable life sentences do result—either through the guidelines or a mandatory minimum—it is essential that an effective, fully functional clemency system be in place to correct the injustice.

II. Federal Clemency: Traffic Jam and Roadblock

Under the pardon power set forth in article II, section 2 of the U.S. Constitution, the president can pardon offenders (restoring their rights) or commute sentences (shortening their prison terms, often to time served). In 1898, the Office of the Pardon Attorney was created within the Department of Justice to receive and review clemency applications from federal prisoners and send recommendations to the attorney general, who then advised the president on whether to grant or deny individual requests. For many years, this system ran smoothly, and presidents granted pardons and commutations on a regular basis, thus accustomed the public to the use of the pardon power. Then, in the 1980s, the steady flow of clemency grants began to slow.

The drop in federal clemency is attributable to several factors. During President Reagan’s first term, the attorney general, who once directly advised the president on clemency matters, delegated his clemency advisory power to the deputy attorney general, whose principal job is to manage the line prosecutors at the Department of Justice. The deputy attorney general lacked the political influence and direct access of the attorney general and was primarily concerned with obtaining convictions. Hence, the clemency application review process gradually became a low-priority issue dominated by a prosecutorial perspective. With the advent of tough-on-crime politics in the 1980s, presidents became unwilling to appear soft on crime by releasing prisoners early.

In 1988, prisoner Willie Horton raped and killed a woman while on a furlough granted by Massachusetts Governor and presidential candidate Michael Dukakis. George H.W. Bush used Horton’s furlough and crime to torpedo Dukakis’s presidential campaign. Even though Horton was furloughed, not commuted, the damage was done. For politicians who wanted a future, the message was clear: Grant clemency at your own risk.

Just as presidents began blocking off the road to clemency, the demand for it grew exponentially with the passage of harsh mandatory minimum drug and gun laws in the 1980s, including the mandatory life sentence for third-time drug offenders convicted under 21 U.S.C. § 841(b)(1)(A). Jimmy Carter is the last president who granted significant numbers of pardons (534 in four years) and commutations (29 in four years). The downward slide commenced with Ronald Reagan (193 pardons and 13 commutations over eight years) and worsened with George H.W. Bush (74 pardons and 3 commutations over four years). President Bill Clinton’s grants of 396 pardons and 61 commutations over eight years may have seemed like a resurrection of the pardon power, but his administration received the highest number of requests—almost 7,500—for any administration since 1945.

President George W. Bush’s clemency record was even worse than his father’s: In eight years, he received more than 11,000 clemency requests and granted only 189 pardons and 11 commutations (less than two percent of all applications). Only one commutation went to a lifer: Reed Prior, a nonviolent drug offender and addict who received a life sentence because he had three prior state convictions (none of which involved prison time) for drug offenses. Prior is the only federal lifer to receive a presidential commutation in the last twenty years. As of August 2010, President Barack Obama had not granted a single commutation or pardon since taking office on January 20, 2009. In only eighteen months in office, he has received more than 2,500 clemency applications, with thousands of applications still pending from the previous administration.

The lack of presidential commutations is shameful because clemency serves many important functions: It rewards extraordinary rehabilitation, corrects mistakes made during the sentencing process, alleviates sentencing disparities between similarly culpable defendants who received vastly different punishments, and gives the benefit of new, nonretroactive sentencing reforms to those currently incarcerated. It also reduces sentences that are too harsh for the crime the defendant committed. Finally, clemency has the potential to advance legal, sentencing, or prison reform agendas.

Used wisely, clemency can make a powerful political and public statement about what kinds of crimes and offenders merit a life spent behind bars. Is a life sentence ever appropriate for a drug offense? If so, when? And who decides—Congress, through mandatory minimum laws, or judges, using their sentencing discretion under advisory guidelines? Are mandatory minimum life sentences just and equitable policy? Should there always be a “safety valve” or other exceptions to mandatory minimum laws when they require life? Even if deserved, should life sentences be considered cost-prohibitive for certain types of offenders? Granting commutations to federal lifers invites the public and policymakers to ask (and debate) these questions. Such a discourse is the first step to...
reevaluating and reforming the use of life sentences in a federal system that lacks parole or other viable early-release mechanisms.

In some states, governors are using commutations to create such a public dialogue. President Obama and his successors can learn valuable lessons from their examples.

III. LWOP and Clemency in the States

The number of people serving LWOP sentences in state prisons is rising, and, just like federal lifers, state offenders serving LWOP must rely on executive clemency to leave prison. In the states, the pardon power is usually given to the state governor, who has the option (but not necessarily the mandate) of seeking the advice of a pardon or parole board. In a few states, only a parole or executive clemency board can grant clemency, and the governor is not involved; these states tend to have the highest and most consistent rates of granting clemency. In some states, the governor can grant clemency only after receiving a favorable recommendation from a parole or clemency board; some states require that the governor be a member of this board. The involvement of parole or clemency boards in the process can add expediency, political cover, and legitimacy to a grant of clemency. On the other hand, depending on the composition of the board and whether its members are elected or politically appointed, a parole or clemency board can be an obstacle to governors who desire to use the pardon power more liberally.

Typically, governors are just as reluctant to grant commutations or pardons as recent presidents have been. In the past twenty years, only a handful of governors have been uncommonly generous in using their pardon power—Governors Mike Huckabee (Arkansas), Ted Strickland (Ohio), Robert Ehrlich (Maryland), Jennifer Granholm (Michigan), and Tim Kaine (Virginia) are among those who have granted dozens or even hundreds of pardons and commutations in their terms—but they are the exception, not the rule.

Former governor Mike Huckabee can explain why. He was quickly blamed when Maurice Clemmons, a former Arkansas prisoner whose sentence Huckabee commuted in 2000, killed four Seattle-area police officers in November 2009. In the wake of the murders, Huckabee publicly defended the Clemmons commutation and even used it to spark a public debate on the virtues of clemency. Clemmons had served eleven years of a 108-year paroleable sentence for a spate of robberies he committed as a teenager. In 2000, Huckabee found this draconian sentence too harsh for a man who had shown significant rehabilitation, served a lengthy stint in prison, and committed the crimes at a young age.

Huckabee did not free Clemmons outright, but referred his case to the Post Prison Transfer Board. The Board performed a thorough review and released Clemmons. In other words, Governor Huckabee used the pardon power in a cautious, rational, politically accountable manner, as any executive should, and the unforeseen and unknowable consequences of granting clemency did not negate the validity of the commutation at the time it was granted. Huckabee’s reasoned, highly publicized, and compassionate response to the Clemmons commutation and its far-removed consequences may enable him to survive any of its negative political ramifications. Furthermore, it may show other governors (and the current President) that granting clemency is not political suicide—even if an offender does reoffend. What makes the difference is how the clemency grants are presented and justified.

Governor Jennifer Granholm of Michigan is another governor who has used commutations to correct terrible injustices, show mercy, and create meaningful public dialogue about LWOP sentences. Michigan, like many states, is facing a budget crisis, partly due to the state’s overburdened prison system and skyrocketing prison population. This burgeoning population has included a small but significant number of aging prisoners serving LWOP for violating the so-called 650 Lifer law, the mandatory minimum that required LWOP for any offender trafficking more than 650 grams of cocaine or heroin. Over the years, Families Against Mandatory Minimums and other organizations have successfully reformed Michigan law to create parole eligibility for many, but not all, of these offenders.

Beginning in 2007, Governor Granholm made commuting the sentences of nonviolent, aging, ill, or deportable prisoners a priority. As of February 10, 2010, Granholm had granted 124 commutations, far more than most other governors in recent years. Granholm’s commutations have gone to more than fifteen 650 Lifers, as well as to more than thirty-five murderers serving life. Many in this latter group were extremely ill. Upon granting commutations, Granholm has openly and thoughtfully presented the public and the media with data and justifications regarding her clemency decisions. Explaining why clemency was granted or denied to particular individuals may ease some public concerns about public safety and make granting clemency less controversial in the future. The commutations have created an encouraging public dialogue about who deserves to serve LWOP, and the detrimental effects those sentences have on the state budget. On the other hand, victim feedback can be highly unfavorable to prisoners and has even led Governor Granholm to deny clemency to applicants that some consider remorseful and reformed.

At least among current governors, Granholm is the most generous in granting commutations to LWOP offenders. Although Governor Ted Strickland of Ohio has also been remarkably generous in granting clemency, none of the four commutations and twenty-nine pardons he issued in November 2009 went to people serving LWOP. For most governors, granting clemency to lifers—and particularly to those serving LWOP—remains too risky, especially if the person was violent or is a habitual offender. Despite
the risks, governors should use the pardon power boldly, frequently, and compassionately. Clemency can correct injustices and give reformed lifers a second chance at life in the community, as well as expand the public discourse on the proper use of LWOP sentences. Perhaps if more governors broach that conversation, more presidents will join in.

Notes
9 The views expressed in this article do not necessarily reflect the views of Families Against Mandatory Minimums and should be attributed solely to the author.
1 Ashley Nellis & Ryan S. King, No Exit: The Expanding Use of Life Sentences in America 5 (2009).
3 See, e.g., 28 C.F.R. § 1.1 (2009) (listing commutations among the different forms of executive clemency the president may grant); FLA. CONST. art. IV, § 8(a) (1968) (permitting the Florida governor to “commute punishment”).
4 See generally Margaret Colgate Love, Relief From the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (2006) (providing profiles of each state’s clemency system and pardoning and commuting practices, and particularly noting the decreasing frequency of clemency grants nationwide); see also OFFICE OF THE PARDON ATTORNEY, U.S. DEP’T OF JUSTICE, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION: 1945 TO PRESENT, available at http://www.justice.gov/pardon/actions_administration.htm (showing decline in the number of presidential clemency grants since the Reagan administration).
7 BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, WEEKLY POPULATION REPORT (May 27, 2010), available at http://www.bop.gov/locations/weekly_report.jsp (last visited May 27, 2010); BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, QUICK FACTS ABOUT THE BUREAU OF PRISONS (2010), available at http://www.bop.gov/news/quick.jsp (hereinafter BOP QUICK FACTS) (showing 6,075 people serving life sentences); see also Nellis & King, supra note 1, at 5 n.3 (showing that 886 federal lifers were convicted before 1987 and thus are eligible for parole).
8 See 18 U.S.C. § 3624(b) (2009) (permitting federal prisoners serving sentences longer than one year to earn up to fifty-four days of good time credit “at the end of each year of the prisoner’s term of imprisonment” for good behavior).
9 Id. (limiting good time credit to “a prisoner who is serving a term of imprisonment of more than one year other than a term of imprisonment for the duration of the prisoner’s life”) (emphasis added).
12 Mary Price, A Case for Compassion, 21 FED. SENT. REP. 170, 171 (Feb. 2009) (describing how the Bureau of Prisons brings “generally no more than twenty” compassionate release petitions each year, and describing the Department of Justice’s death-rattle rule, which states that compassionate release should be reserved for those who are terminally ill and have received a medical diagnosis of death within a year, or for those who have become so ill that they cannot perform basic bodily functions without help from others).
13 See, e.g., H.R. 3072, 109th Cong. (proposing that federal prisoners be eligible for parole after serving one third of their sentences). The bill language explicitly makes this reform retroactive, but it was never passed out of the House Subcommittee on Crime and Terror. See also 1 U.S.C. § 109 (2009) (placing limits on making new legislation retroactive).
14 See BOP QUICK FACTS, supra note 7 (showing 6,075 federal prisoners—3.1 percent of the federal prison population—serving life sentences).
16 18 U.S.C. § 924(c)(1)(C)(ii) (2009) (requiring a life sentence for a second or subsequent conviction under 18 U.S.C. § 924(c)(1)(A) when the firearm is a machine gun or destructive device or the firearm is equipped with a silencer or muffler).
17 See 21 U.S.C. § 841(b)(1)(A) (2009) (requiring life for a second offense of manufacturing, distributing, or possessing with intent to distribute certain quantities of drugs, when death or serious bodily injury results from that drug activity); 21 U.S.C. § 848(b) (requiring life for those acting as principal administrator, organizer, or leader of a continuing criminal enterprise).
19 21 U.S.C. § 841(b)(1)(A) (2009) (requiring mandatory life sentences when the defendant has “two or more prior convictions for a felony drug offense” and is convicted of a federal drug offense involving particular amounts of drugs).
25 See Molly M. Gill, Let’s Abolish Mandatory Minimums: The Punishment Must Fit the Crime, 36 HUMAN RIGHTS Q. 1, 25 (2005) (explaining that mandatory minimums violate basic human rights: “[Mandatory minimums] fail to account for the nature of the crime or the offender’s mental state, criminal history, or role in the offense, essential factors in determining how much punishment is deserved. The inevitable result is cruel, inhumane, degrading, and undeserved overpunishment.”).
27 U.S. CONST. art. II, § 2 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”) (emphasis added); 28 C.F.R. § 1.1 (2009) (listing commutations among the various forms of executive clemency that may be granted by president).
28 See Margaret Colgate Love, Reinvigorating the President’s Pardon Power, 20 FED. SENT. REP. 5, 6 (2007).
29 Id.
31 Id. at 126.
32 Id.
33 Id.
34 Love, supra note 28, at 7.
of clemency from the Governor's Council before granting clemency.

See, e.g., Fla. Const. art. IV, § 8(a); Fla. Stat. Ann. §§ 940.01, 940.05 (2009) (granting governor the pardon power, to be exercised through a clemency board composed of the governor and three cabinet members; governor can only issue clemency with two cabinet members giving favorable recommendations).


Huckabee, supra note 59.


See OFFICE OF THE GOVERNOR, supra note 64, at 2.

Bell, supra note 57.

Michigan Department of Corrections, Parole and Commutation Board, Commutation Grant List (on file with author).


Liedel, Governor Granholm’s legal counsel, wrote an article defending the commutations. Id. in particular, he noted that Governor Granholm had denied 98 percent of all commutation requests, granting the requests of only 124 applicants (twenty-four of whom had died since their release). Id. Liedel emphasized how Governor Granholm created the Michigan Parole and Commutation Board and followed its recommendations, performed a full review of each case, and consulted with prosecutors, judges, and victims who might be affected by the release. Id.


See, e.g., Some Examples of Commutations: Lawrence Drum, DETROIT FREE PRESS, Feb. 7, 2010, at A10 (describing the case of Lawrence Drum, who served seventeen years of a life sentence for a nonviolent drug offense and received a commutation from Governor Granholm, and noting that since his release in April 2008 he has not had any further problems with law enforcement).

See, e.g., Dawson Bell, How Commutation Bid Failed, DETROIT FREE PRESS, Feb. 13, 2010, at A8. Largely because of the disapproval of the victim’s family, Governor Jennifer Granholm denied the commutation request of Roger Ruthruff, a prisoner serving LWOP for a 1986 conviction for felony murder. Id. Ruthruff was 18 years old at the time of the crime, and it was his co-conspirator, Joseph Ambrose, who actually killed the victim during the attempted robbery. Id.