

PROSECUTOR MERCY

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The tailwinds might be behind criminal justice reform, but American mercy power remains locked in a sputtering clemency model. Centralized leadership should be braver or the centralized institutions should be streamlined, the arguments go—but what if the more basic mercy problem is centralization itself? In this essay, I explore that question. In so doing, I defend the normative premise that post-conviction mercy is justified, and I address the questions of institutional design and political economy that follow. I ultimately encourage jurisdictions to layer decentralized mercy powers on top of their clemency mechanisms, and for the newer authority to be vested in local prosecutors. I present less a single proposal than a collection of principles for mercy decentralization. Governors and presidents simply cannot deliver the punishment remissions appropriate for an American prison population bloated by a half-century love affair with over-criminalization, mandatory minimums, and recidivism enhancements.

Keywords: *mercy, clemency, punishment, criminal law, sentencing, prosecution*

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New Criminal Law Review, Vol. 24, Number 3, pps 326–366. ISSN 1933-4192, electronic ISSN 1933-4206. © 2021 by The Regents of the University of California. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, <https://www.ucpress.edu/journals/reprints-permissions>. DOI: <https://doi.org/10.1525/nclr.2021.24.3.326>.

INTRODUCTION

The decrepitude of American mercy power, often expressed through clemency practice, has long been a challenge for criminal justice reformers. As jurisdictions slowly retreat from the most extreme registers of carceral excess, and alongside a growing emphasis on *front-end* reform to prison admissions and sentences, there ought to be a parallel emphasis on the *back-end* reform of American power to reduce lawfully imposed sentences.¹ In what follows I propose a conceptual change to the dominant model of centralized clemency, arguing that state and federal governments should concentrate sentence reduction powers in the local officials best positioned to account for the costs and benefits of continued detention: local prosecutors. Prosecutor-initiated mercy power would be *in addition to*, rather than a *substitute for*, the traditional clemency authority vested in presidents, governors, and the centralized boards they appoint.²

I start with a note on terminology. When I use the term “mercy,” I refer to an official act that reduces a lawfully imposed sentence. Three aspects of the definition warrant emphasis. First, I evaluate strategies for mercy that are legal and political, rather than inter-personal. Issues surrounding the behavior of legal institutions differ meaningfully from those surrounding the behavior of human beings toward each other.³ Second, I analyze only institutional behavior that takes place after a conviction and sentence is final.⁴ I do not address discretion exercised in favor of a defendant at earlier phases of the criminal process, such as a prosecutor’s decision to under-

1. The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, which permitted the early release of over two thousand prisoners serving time under since-abandoned guidelines for possessing crack cocaine, is an example of back-end reform that is considerably more incremental than what I propose here.

2. Professor Doug Berman gave a 2010 keynote speech in which he proposed, among other things, that prosecutors have a role in sentence reductions. See Douglas Berman, *Afternoon Keynote Address: Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 437 (2010).

3. See MARTHA MINOW, *WHEN SHOULD LAW FORGIVE?* 14 (2019).

4. The family of strategies that jurisdictions might use to reduce lawfully imposed sentences are increasingly referred to as “second look” mechanisms. See, e.g., Margaret Colgate Love & Cecelia Klingele, *First Thoughts About “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859 (2011); Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 84 (2019).

charge.⁵ Third, I focus on sentences that are *legally* imposed. The arguments herein do not apply, therefore, to prisoners whose sentences are infected with constitutional error—a scenario already heavily theorized as part of the habeas corpus literature.

I proceed in four parts. In Part I, I mount the moral case for post-conviction sentence reductions—i.e., mercy—which predicates the institutional structure that I suggest later. Most fundamentally, sentence reductions avoid human suffering otherwise experienced by prisoners and affected third parties. Given the profile of its likely recipients, moreover, such mercy would have little to no adverse effect on deterrence and incapacitation—the leading consequentialist justifications for criminal punishment.

In Part II, I explore questions of institutional design that follow from the premise that sentence reductions are normatively desirable. A new mercy power that is *concentrated in local officials* has a special normative appeal; it would enhance local political participation, differentiate punishment practices to suit locally varied preferences, and allow localities to register potentially catalytic dissent from prevailing carceral norms. Prosecutors, moreover, are the local officials best suited to exercise sentence reduction powers in ways that produce the benefits of localized decision-making. They are the officials most capable of transmitting a community's punishment preferences across criminal justice institutions—given their visibility, elective status, and bureaucratic footprint.

In Parts III and IV, I address legal and normative objections. First (in Part III), I respond to the argument, often confused with a rule that an executive's clemency power is plenary, that a clemency power is the constitutionally exclusive mechanism for reducing lawfully imposed sentences. Then (in Part IV), I explore the degree to which one can reconcile mercy with retributivist punishment frameworks, and how institutional arrangements should address concerns about equality that would arise both within and across localities.

I do not devote space to the long-term viability of progressive prosecution practices, but the powers proposed herein reflect a guarded optimism about the political economy of American prosecution. In many tellings of

5. See, e.g., Roger A. Fairfax Jr., *Prosecutorial Nullification*, 52 BOSTON COLL. L. REV. 1243, 1273 (2011) (discussing a practice in which prosecutors “nullify” law by refusing to charge).

American carceral excess, the prosecutor is the Big Bad,⁶ but cracks in this account of prosecutor behavior are increasingly conspicuous. They include both political victories for reformist district attorneys⁷ and the passage of bipartisan criminal justice legislation.⁸ These developments in turn reflect the rising contempt for mass incarceration across popular discourse,⁹ and dovetail with broader demands that criminal justice practices be

6. See, e.g., Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824 n.53 (2017) (noting “the important role prosecutors have played in escalating the length of sentences and can play in easing them”); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 206 (2017) (“[p]rosecutors have been and remain the engines driving mass incarceration”). But see Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (disputing account positioning the American prosecutor as “Darth Vader”).

7. See, e.g., Jake Bittle, *Brooklyn Is America's Next Shot at Electing a Progressive Prosecutor*, THE NATION (Sept. 11, 2017), <https://www.thenation.com/article/brooklyn-is-americas-next-shot-at-electing-a-progressive-prosecutor/> (Kenneth Thompson in Brooklyn, NY); Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, THE NEW YORKER (Oct. 28, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> (Larry Krasner in Philadelphia, PA); Derek Hawkins, *Progressive Lawyer Wins San Francisco District Attorney Race, Continuing National Reform Trend*, WASH. POST (Nov. 10 2019), <https://www.washingtonpost.com/nation/2019/11/10/progressive-lawyer-wins-san-francisco-district-attorney-race-continuing-national-reform-trend/> (Chesa Boudin in San Francisco, CA); Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the U.S. Justice System*, THE GUARDIAN (Jul. 23 2019), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> (Rachael Rollins in Suffolk County, MA); Collier Myerson, *Prosecutors Keep Their Jobs by Putting People in Jail. Can They Be Leaders in the Fight for Criminal-Justice Reform?*, THE NATION (Nov. 14, 2017), <https://www.thenation.com/article/prosecutors-keep-their-jobs-by-putting-people-in-jail-can-they-be-leaders-in-the-fight-for-criminal-justice-reform/> (Marilyn Mosby in Baltimore, MD); Daniel Nichanian, *In Austin Prosecutor Races, Wins for the Left and a Milestone for Drug Decriminalization*, THE APPEAL (Jul. 15, 2020), <https://theappeal.org/politicalreport/travis-county-primary-garza/> (José Garza in Austin, TX).

8. See First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194.

9. Perhaps the most recognizable modern critique of the phenomenon appears in MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012). See also Arthur Rizer & Lars Trautman, *The Conservative Case For Criminal Justice Reform*, THE GUARDIAN (Aug. 6, 2018), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> (sketching conservative justification for decarcerative practices). For the major response to Professor Alexander, arguing that prosecutors are substantially responsible for mass incarceration, see PFAFF, *supra* note 6.

conceptualized as part of a more modern approach to community health and safety.¹⁰ The reaction to mass incarceration has produced coalitions capable of passing legislation consistent with, and electing prosecutors interested in, local prosecutor mercy.¹¹

What I present is less a single policy proposal than it is a theoretical argument for concentrating greater discharge power in local prosecutors. Although I favor certain institutional designs—including light-touch judicial review to screen for favoritism, unlawful discrimination, and political bias—what is possible across fifty-one American jurisdictions will vary with respect to the constitutional and political constraints operating in each one.

I. THE CONSEQUENTIAL CASE FOR POST-CONVICTION MERCY

Before asking who is *good at mercy*, I ought to establish that *mercy is good*—that reductions in lawfully imposed sentences can be morally desirable. Because I am interested in the moral justification for a particular institutional practice, I have defined “mercy” a touch less abstractly than do philosophers working in their own academic idiom.¹² I also assume certain profiles for mercy’s most likely recipients: prisoners who offended as juveniles, who are serving decades in prison, or who were convicted of a non-violent crime.¹³ These are the prisoners most likely to be incarcerated

10. See, e.g., Patrick Sharkey, *Why Do We Need the Police?* WASH. POST, June 12, 2020, at <https://www.washingtonpost.com/outlook/2020/06/12/defund-police-violent-crime/?arc404=true> (urging recentering of policing power on safety and health of communities).

11. Cf. Rory Fleming, *Prosecutor-Driven “Second Look” Policies Are Encouraging, But Not a Panacea*, Working Paper, *4–*5 at <https://ssrn.com/abstract=3587034> (discussing receptivity of California prosecutors to prosecutor-driven resentencing).

12. See, e.g., Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 85 (1998) (defining mercy as “an action in a relationship of vulnerability and power in which a powerful person intentionally reduces or removes altogether a threat or to the present suffering of another”); Daniel T. Kobil, *Mercy in Clemency Decisions*, in FORGIVENESS, MERCY, AND CLEMENCY 39 (Austin Sarat & Nasser Hussein eds., 2007) (defining mercy as “an act of benevolence or compassion that reduces what is owed”).

13. Prisoners with these profiles are generally the most sympathetic, present the least risk of reoffending, and therefore present mercy scenarios with the lowest political cost. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165 (2015); Jamie D. Brooks, “*What Any Parent Knows*” but the Supreme Court

under stale community blaming norms, and to be the beneficiaries of post-conviction mercy. Thusly defined mercy is a moral virtue because it reduces human suffering without compromising incapacitation and deterrence—the interests forming the basic consequentialist case for criminal punishment.

A. Suffering

Mercy is properly identified as a human and institutional virtue.¹⁴ The core basis for the type of mercy I analyze here is consequentialist and resembles the reason that we value mercy-giving in other contexts. Mercy is good because punishment entails the disutility of suffering, and, all other things being equal, reducing suffering is virtuous.¹⁵ The human suffering in American jails and prisons is particularly acute, as those facilities house 2.3 million prisoners¹⁶—about a fifth of the world’s prison population.¹⁷

Talk about mercy and suffering naturally focuses on the suffering *of the affected prisoner*—the limited freedom, lost opportunity, emotional distress, and physical pain that incarceration entails.¹⁸ Indeed, the mercy practices I defend here would substantially ameliorate the suffering of affected prisoners. The prisoners, moreover, are not the only people affected. To the extent that their suffering ripples outward—touching families, friends, and communities¹⁹—mercy can significantly affect social

Misunderstands: Reassessing Neuroscience’s Role in Diminished Capacity Jurisprudence, 17 *NEW CRIM. L. REV.* 442, 500 (2014); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 *ROGER WILLIAMS U. L. REV.* 645, 650 (2004).

14. See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 *RUTGERS L.J.* 671, 699 (1988).

15. See Margery Fry, *Bentham and English Penal Reform*, in *JEREMY BENTHAM AND THE LAW* 20, 28 (George W. Keeton & Georg Schwarzenberger, eds 1948); Alwynne Smart, *Mercy*, 43 *PHILOSOPHY* 345 (1968).

16. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE, Mar. 24, 2020, at <https://www.prisonpolicy.org/reports/pie2020.html>.

17. See Peter Wagner & Wanda Bertram, “*What percent of the U.S. is incarcerated?*” (*And other ways to measure mass incarceration*), PRISON POLICY INITIATIVE, Jan. 16, 2020, at <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

18. See David Gray, *Punishment as Suffering*, 63 *VAND. L. REV.* 1619, 1620 n.2 (2010).

19. See Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, III *Q. J. ECON.* 319, 347 (1996); see also, generally, DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN*

welfare, even in limited doses.²⁰ It is the reduced suffering experienced by prisoners, and by their families and extended communities, that forms the core case for mercy.²¹

Mercy might have consequential benefits that are less tangible yet worthy of discussion. Consider, for example, a signaling effect. Official mercy models social practices, potentially producing social value not captured by the reduced suffering of prisoners and their adjacent communities.²² And if such behavior alters other official and private blaming practices, then there is social value in inter-personal acts of mercy and forgiveness that lower stress, anger, and sadness.²³ Finally, there are expressive benefits to mercy; mercy expresses a community's strength, humility, and social cohesion.²⁴ Mercy demonstrates that the people who make up a political unit are mindful of their fallibility and that nobody fully forfeits their humanity.²⁵

B. Future Offending

One might argue, however, that the type of mercy I contemplate reduces social welfare by increasing future offending.²⁶ I ought to make two points before addressing the argument. First, the effect on offending depends on the precise mix of prisoners whose sentences are reduced or eliminated,²⁷ although I have made my assumptions on that front explicit. Second, even if the precise mix of mercy beneficiaries were known, the state of empirical proof is still such that estimates of averted

URBAN AMERICA (2007) (comprehensively exploring the effect of incarceration on families and affected communities).

20. See RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 155–60 (2019).

21. The COVID experience highlights a related virtue: mercy as a public health response. Although mercy power ultimately did little to clear prisons during the early phases of the pandemic, the value of potential discharge was undeniable. See Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 7, 72 (2020).

22. See Kobil, *supra* note 12, at 52–53.

23. See *id.* at 50–51 (citing data).

24. See *id.* at 52–53.

25. See *id.*

26. See Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 341 (2007); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1310 (2000).

27. See Misner, *supra* note 26, at 1309–10.

offending are poor at best.²⁸ Those two caveats notwithstanding, the future-offending objections are unpersuasive.

Consider future offending involving the person whose sentence is reduced, during the period when they would otherwise be imprisoned (incapacitation). There is little to be concerned about in mine-run cases—cases in which the act of mercy would lop off the end of an extremely long sentence.²⁹ Frequently, such cases would involve older offenders in prison for youthful criminality.³⁰ As mentioned above, the most attractive candidates for mercy will be those convicted of nonviolent offenses,³¹ and the rest—for social and physiological reasons—will have aged out of the high-risk window for violence.³² For these prisoners, the difference in social utility produced by reduced incapacitation would be small to nonexistent.³³

With respect to the deterrent effect of the punishment on the sentenced offender (specific deterrence), the social welfare loss associated with a sentence reduction also appears trivial. As explained in the preceding paragraph, the baseline, pre-deterrence threat level of the potentially deterred population is already quite small. Moreover, such an effect would require a mercy recipient contemplating subsequent criminality to have a reduced expectation of punishment, but the pertinent punishment expectation would never be reduced because a serious recidivist episode would almost certainly preclude a second sentence reduction. (I am not suggesting that potential offenders carefully calculate costs and benefits before offending, but those who make specific deterrence arguments must make such an

28. See Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 145–47 (2003).

29. See Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 14 (2017); J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1647, 1668 (2020); see also Prescott et al., *supra*, at 1668–82 (collecting state, national, and international study results on recidivism rates).

30. See Prescott et al., *supra* note 29, at 1655–56.

31. See Misner, *supra* note 26, at 1309–10.

32. See BARKOW, *supra* note 20, at 45; John Monahan et al., *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191, 192 (2017); John Pfaff, *The Forever Bars*, WASH. POST, Apr. 10, 2020, <https://www.washingtonpost.com/outlook/2020/04/10/prison-violent-offender-jail-coronavirus/?arc404=true>.

33. See Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 459 (2017).

assumption.³⁴) If anything, the potential for mercy might offer meaningful incentives to *reduce* offending behind prison walls.

The incapacitation and specific deterrence objections rest on assumptions about rehabilitation that have collapsed over the last forty years. The overwhelming conclusion from newer studies and experiments is that well-run treatment programs using more rigorously tested methodology suppress reoffending better than does incarceration.³⁵ The criminogenic effects of incarceration are especially likely to exceed the benefits of incapacitation when prison sentences are extremely long.³⁶ Reflecting on her early-career experience, an ex-Manhattan prosecutor named Sonia Sotomayor remarked that “[w]e think we’re keeping people safe from criminals. We’re just making worse criminals.”³⁷

I am also skeptical of incapacitation and specific deterrence arguments because an act of mercy probably alters a person’s offending function. Mercy recipients feel obligations to conform to social norms in ways that may confound estimates of incapacitation and specific deterrence.³⁸ Having received mercy rather than having secured release under some other rule, they are less likely to reoffend. The best data that supports such a hypothesis involves a controlled comparison between recidivism rates for those receiving clemency, which were lower, and those released through non-clemency mechanisms, which were higher.³⁹

34. See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1212–14 (1985) (making this assumption).

35. See Tonry, *supra* note 33, at 454 (discussing NATIONAL ACADEMY OF SCIENCES, PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION (Joan Petersilia & Richard Rosenfeld eds., 2007)); Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013); Francis T. Cullen et. al., *Reinventing Community Corrections*, 46 CRIME & JUST. 27 (2017). See generally, also, Joshua C. Cochran et al., *Assessing the Effectiveness of Correctional Sanctions*, 30 J. QUANTITATIVE CRIMINOLOGY 317 (2014) (reporting finding of criminogenic effect when taking into account a non-incarcerative sanction); Daniel P. Mears et al., *Recidivism and Time Served in Prison*, 106 J. CRIM. L. & CRIMINOLOGY 83, 118–23 (2016) (reporting findings of study on relationship between offense length and recidivism).

36. See MODEL PENAL CODE: SENTENCING 569–70 (AM. LAW INST., Proposed Final Draft 2017) [hereinafter ALI SENTENCING DRAFT]; Barkow, *supra* note 20, at 46.

37. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 295–96 (2019).

38. See Kobil, *supra* note 12, at 50–51; Meyer, *infra* note 203, at 90–91.

39. See Kobil, *supra* note 12, at 51.

Nor is a sentence reduction likely to have much effect on general deterrence—the deterrent effect of punishment on people *other* than the mercy recipient.⁴⁰ All of the usual answers to general deterrence arguments are amplified in an analysis of sentence reductions: those contemplating criminality (especially youth) do not internalize a cost-benefit function,⁴¹ offending is more sensitive to the likelihood of apprehension than it is to the magnitude of punishment,⁴² and so forth. Study after study shows that extreme punishment does not overcome moral hazards; marginal increments of longer sentences simply do not deter more crime.⁴³

Other facets of a general deterrence argument against sentence reductions are especially dubious. For the same reasons that a mercy power is unlikely to make a substantial dent in the size of the incarcerated population—the fraction of harm-causers receiving it would probably be small—mercy is unlikely to substantially affect punishment expectancy.⁴⁴ Moreover, any reduced punishment expectancy would be more attenuated than a straight sentence reduction. A change in expectancy would instead reflect some speculative chance at mercy toward the end of a sentence, under an as-yet-unknown district attorney regime.



In sum, mercy is consequentially desirable because it reduces suffering. Provided that mercy is dispensed primarily to juvenile offenders, to those with extraordinary prison sentences, and to those convicted of nonviolent crimes, the utility of averted suffering will almost certainly exceed social welfare losses—if any—from future offending.

40. See JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 3 (1990).

41. See Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351, 361 (1991).

42. See Pfaff, *supra* note 32. See also, e.g., National Research Council, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 140 (Jeremy Travis et al. eds., 2014) (determining that “increasing already long sentences has no material deterrent effect”).

43. See BARKOW, *supra* note 20, at 42–43 (collecting studies demonstrating absence of effect); Prescott et al., *supra* note 29, at 1660 & n.74 (same, concluding, “Research suggests that lengthening already long prison sentences has little to know deterrent effect on violent crime”).

44. See Pfaff, *supra* note 32; ALI SENTENCING DRAFT, *supra* note 36, at 568.

II. INSTITUTIONAL FORMS FOR POST-CONVICTION MERCY

If mercy is justified, then many subsequent questions center on how to best distribute the sentence reduction power I contemplate across institutions. In Part II, I explain why the local prosecutor's office should be among those empowered.⁴⁵ I ultimately urge general principles of institutional design rather than particularized legislative proposals. I favor local prosecutor power to effectuate sentence reductions, although I am comfortable with light-touch judicial review to address concerns about favoritism and arbitrariness discussed in Part IV.

A. Localized Mercy

The best argument in favor of local prosecutor mercy centers on the often unique relationship between those officials and their communities—the idea that, usually operating as local electees with a criminal justice portfolio, local prosecutors are best situated to evaluate the trade-off between mercy and competitor interests. To the extent that back-end penal practices are amenable to the same public-health-and-safety reorientation that many imagine for policing,⁴⁶ sentence reduction decisions should be made by accountable local officials who best internalize social costs and social returns. What follows is primarily a discussion of sentence reduction powers for elected district attorneys, and concludes with a separate subsection about appointed federal prosecutors.

1. Decentralized Prosecutor Mercy

The argument in favor of decentralized sentence reduction power begins with the failures of the centralized alternative. Until the mid-1900s, clemency had been a muscular form of sovereign authority, for both state and national governments.⁴⁷ The rise of parole diminished clemency's

45. Clemency power includes more specific powers to pardon, commute, reprieve, and remit fines. See Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J.L. REFORM 817, 819 (2016).

46. See, e.g., Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOSTON REVIEW, Aug. 1, 2017, <http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> (arguing that policing must be reconstituted to ensure that it enhances a more holistic definition of social welfare).

47. See BARKOW, *supra* note 20, at 81; JUSTICE KENNEDY COMM'N, AM. BAR. ASS'N, *Report to the House of Delegates on Clemency, Sentence Reduction, and Restoration of Rights, in*

importance, swapping administrative review for executive grace.⁴⁸ When parole lost the favor of American jurisdictions, however, there was no corresponding return to other forms of sentence reduction. Instead, the frequency of state and national clemency continued to plummet. Commentators regularly lament the “alarming” decline in pardons and commutations, and the “miserly” state of clemency practice.⁴⁹ Modern clemency is, for the most part, an empty husk of mercy power.⁵⁰

Enter local government institutions, which are well positioned to feature in a rethinking of criminal justice practices generally, and to balance trade-offs between mercy and punishment more specifically.⁵¹ The state government usually foots the fiscal cost of prison incarceration,⁵² but mercy’s costs and benefits are otherwise local: benefits to an incarcerated community member and their family; preferences of, and effects on, victims; public and private resources necessary to facilitate rehabilitation and reentry; the costs of recidivism;⁵³ environmental influences on recidivism risk; employment and housing opportunities; the degree to which a community views the criminal justice system as legitimate; and whether a community’s feelings about deserved punishment have changed. The sources by which this information can be acquired are almost always local, too: the prisoner’s family, victims, defense lawyers, county judges, city hall, the police chief, religious leaders, and community organizations.⁵⁴ There might be good

REPORT TO THE ABA HOUSE OF DELEGATES 68–71 (2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf (state and federal).

48. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 814–15 (2015).

49. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698 (2012); see also Barkow, *supra* note 48, at 809 (describing presidential pardon power as one in “sharp decline”).

50. See BARKOW, *supra* note 20, at 138; Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 223 (2003).

51. See *infra* note 203 (collecting additional support).

52. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991).

53. Upon reentry, those who reoffend tend to recidivate in their home communities. See BARKOW, *supra* note 20, at 48.

54. See Margaret Colgate Love, *Justice Department Administration of the President’s Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 105–06 (2015).

reasons to preserve a centralized sentence reduction power, but there are also good reasons to make it non-exclusive.

The case for a more local power to reduce sentences also tracks generalized arguments supporting decentralized governance. The normative discourse on empowered localities was long dominated by two theories: a participatory account, tracing to Gerald Frug, on which decentralized power enhances community engagement;⁵⁵ and an economic account, associated substantially with Charles Tiebout, on which localities create value by differentiating state responses to varied local preferences.⁵⁶ More recently, Heather Gerken has made the influential argument that sub-sovereign entities function as “servants”—officials and institutions upon whom a centralized lawmaker relies for implementation and execution—and that the local resistance of servants can “generate[] a dynamic form of contestation, the democratic churn necessary for an ossified” sovereign to move forward.⁵⁷

There is much to say about each of these more abstract theories of local governance, but I focus specifically on the value of localized criminal justice decision-making. From the perspective of political participation (Frug’s model), mercy powers would increase community engagement, particularly in urban localities most affected by punishment excess. Criminal justice practices are issues about which communities care both deeply and differently,⁵⁸ and the degree of local engagement is logically sensitive to the capacity of the locality to respond to preferences. From the perspective of differentiated responses to varied community preferences (Tiebout’s model), and to the extent one believes in foot voting, decentralized mercy powers would allow lenience-preferring localities to realize the associated utility, and leave punishment-preferring localities undisturbed.

55. See Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 533 (1987); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

56. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

57. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–71 (2009) (theorizing power of the servant); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1556–60 (2012) (same).

58. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 BOSTON COLL. L. REV. 523, 541 (2020).

A version of Gerken's model—and the linkage between localism and agenda-setting it theorizes—represents a particularly strong justification for decentralizing mercy. By decentralizing power to implement centrally articulated policy, peripheral governance units can become sites of contestation and minority influence.⁵⁹ When the agent (the servant) applies and enforces centrally developed policies in ways not intended by the principal (the master), local dissent sets agendas, models alternative approaches, forces engagement from the senior unit of government, and does all of these things from *within* a bureaucracy rather than from outside of it.⁶⁰ If localities are valuable sites of contestation, then the principal-agent problem ceases to be a problem.⁶¹

Local criminal justice institutions are precisely the types of policy servants capable of generating the “democratic churn” necessary to counter the effects of mass incarceration, and the mercy power I contemplate here is the leverage of Gerken's local servant. Giving local actors power to remit punishment necessarily forces harsh sentencing to the forefront of legislative agendas. I do not want to suggest that local power to tinker with criminal punishment is always (or even often) desirable. But when the local authority in question is a sentence reduction power that operates as a redundant check on punishment, the local servant can force ideas into state and national discourse. Because it can effectively nullify punishment chosen by other institutions, or by the same institution at some prior time, that power can be an especially potent catalyst for criminal justice innovation.⁶² A *decentralized* power would amplify mercy's catalytic potential—reestablishing it as a tool “by which many of the most important reforms in the substantive criminal law have been introduced.”⁶³

That local power to reduce sentences might be desirable does not itself establish that *local prosecutors* should wield it. Why site such power with elected local prosecutors rather than with other local officials like, say, judges? The answers have to do with the unique sensitivity of local prosecutors to community preferences, as well as their restricted professional

59. See Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1351 (2013).

60. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1895 (2014).

61. See Gerken, *supra* note 59, at 1351.

62. See Colgate Love, *supra* note 54, at 93.

63. 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295–96 (1939).

portfolio. State prosecutors are almost all elected,⁶⁴ and those elections guarantee links to communities that are stronger than if some centralized authority appointed them.⁶⁵ (I will have more to say about federal prosecutors momentarily.) Moreover, locally elected district attorneys largely operate without direct interference from state attorneys general.⁶⁶ The elections themselves ensure some responsiveness to local priorities,⁶⁷ although voter accountability is a limited mechanism for official discipline.⁶⁸

There are, however, non-elective mechanisms through which communities can transmit the pertinent norms and preferences to prosecutors charged to reconcile mercy with other goals.⁶⁹ Chief prosecutors often reside in the electing locality,⁷⁰ and they necessarily rise to power on the backs of professional and political networks that form and (quite imperfectly) transmit shared local beliefs and practices. Chief prosecutors have relationships with other local politicians, the local police, local judges, local nonprofit and community organizations, and the local defense bar.⁷¹ Larger district attorneys' offices frequently take the lead in supporting and communicating with victims,⁷² and in initiating restorative justice practices

64. See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at II (2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf>.

65. See Ouziel, *supra* note 58, at 551; Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 961 (1997).

66. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545 (2011). There could always be legislative backlash that deposits more interfering power in other state institutions, however.

67. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 727 (2006); see also, e.g., David Boerner, *Prosecution in Washington State*, 41 CRIME & JUST. 167, 168 (2012) (Washington); Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 284 (2012) (Arizona).

68. See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 142–43 (2009); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 600–05 (2014); Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 416 (2017).

69. See Gordon & Huber, *supra* note 68, at 137.

70. See Timothy Fry, *Prosecutorial Training Wheels: Ginsburg's Connick v. Thompson Dissent and the Training Imperative*, 102 J. CRIM. L. & CRIMINOLOGY 1275, 1293–94 (2012).

71. See Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 213 (2012).

72. See *id.* at 242–43.

that connect those victims with defendants.⁷³ There is no other official that is nearly as close to a comparable mix of local criminal justice stakeholders, who both reflect and produce the community's norms and preferences.⁷⁴

Relative to other local officials, the prosecutor's office also has the best *information and expertise* to make the pertinent decisions.⁷⁵ It either maintains or has plausible access to information about a convicted offender's crimes and criminal history, as well as newer updates about support networks, victims, and correctional behavior.⁷⁶ Other local officials are inferior candidates for sentence reduction powers, for some different reasons. Criminal justice is only a small part of a mayor's portfolio, and the mayor's office lacks the information available to a chief prosecutor.⁷⁷ A police chief, who is ordinarily appointed rather than elected,⁷⁸ has a portfolio consisting almost entirely of law enforcement—but those front-end enforcement responsibilities do not position the chief to make prudent, informed decisions about back-end mercy. Most locally elected judges do not specialize in criminal matters and, more importantly, do not lead bureaucracies with information and operational capacity to operate sentence remission systems.

Prosecutor mercy would be just and welfare enhancing in specific cases, but it would also be a means by which localities communicate with other institutions about shared agendas, priorities, and responsibilities.⁷⁹

73. See, e.g., Mary Louise Frampton, *Finding Common Ground in Restorative Justice: Transforming Our Juvenile Justice Systems*, 22 U.C. DAVIS J. JUV. L. & POL'Y 101, 104 (2018) (Fresno County, CA); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 674 (2005) (Milwaukee, WI); Thomas D. Russell, *Between Town and Gown: The Rise and Fall of Restorative Justice on Boulder's University Hill*, 2003 UTAH L. REV. 91, 106 (2003) (Denver, CO).

74. See BARKOW, *supra* note 20, at 154–55.

75. See Colgate Love, *supra* note 54, at 105–06; Fairfax, *supra* note 5, at 1270.

76. Cf. Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 175 (2005) (noting prosecutors' unique access to information in post-conviction litigation over innocence).

77. Cf. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1353 (2008) (making a more general point about the role of mercy in any executive portfolio).

78. See Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 205 (2019).

79. Cf. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1204 (2010) (discussing this function with respect to the president).

Prosecutor participation would meaningfully alter discourse not only around those who are currently incarcerated, but also around priorities for incarcerating in the first place.⁸⁰ The capacity of local prosecutors to express community preferences is therefore crucial to the normative case in favor of the mercy function I endorse.⁸¹ Justifications sounding in political participation (Frug) and differentiated application (Tiebout) are salient only to the extent that local engagement actually affects policy. Institutional servant justifications (Gerken) best describe socially productive localism when the local decision-making effectively registers a community's dissent from more central policy.

2. Statecraft and the Centralized Alternative

The centralization of American mercy power actually reflects a pairing of functions that jurisdictions can decouple. American sentence reduction authority is largely locked up in clemency power, the federal version of which is reserved in the President's favor by Article II of the Constitution.⁸² (State clemency powers have varied specification, with some jurisdictions following a chief executive model, others giving the power to a board, and others splitting the difference.⁸³) With respect to mercy, executive clemency models reflect a *statecraft* function that is quite distinct from, and now secondary to, a *criminal justice* function.⁸⁴ The two, paired by no less a figure than Alexander Hamilton,⁸⁵ are linked so inextricably that the centralized essence of the statecraft function deadens institutional experimentation around the criminal justice function.

The centralization of American mercy power generally tracks the centralizing imperative of its statecraft function, the historical importance of which is obscured by modern levels of political stability. Consider a non-exhaustive set of presidential examples. George Washington pardoned two men capitally sentenced for inciting the Whiskey Rebellion.⁸⁶ John Adams

80. See Berman, *supra* note 2, at 440–41.

81. See Fairfax, *supra* note 5, at 1268.

82. See U.S. CONST. art. II, § 2, cl.1.

83. See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 254–59 (2003).

84. See Colgate Love, *supra* note 79, at 1173–76.

85. See Colgate Love, *supra* note 54, at 91.

86. See MINOW, *supra* note 3, at 136; Carrie Hagan, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN.COM (Aug. 29, 2017),

pardoned German-American farmers involved in the Fries Rebellion.⁸⁷ Abraham Lincoln issued a broad conditional pardon for rebellious confederates,⁸⁸ using mercy as a device for extracting oaths of allegiance.⁸⁹ Andrew Johnson did the same.⁹⁰ Jimmy Carter unconditionally pardoned draft dodgers to try to move the country past the divisiveness of the Vietnam War.⁹¹ And, of course, Gerald Ford pardoned Richard Nixon, justifying the move as necessary to heal the wounds that Watergate opened.⁹² Political and diplomatic functions *should be* vested in chief executives rather than in prosecutors.

The other function performed by the pardon power—mercy-as-criminal-justice⁹³—*should not*. The relative (un)importance of state-level statecraft might explain why state jurisdictions have been more willing to assign centralized mercy powers to institutions other than heads of state.⁹⁴ Housing the statecraft and criminal justice functions under a single executive roof worked in an environment where the two placed comparable demands on mercy power. When the criminal codes were narrow and shallow, a centralized mercy power could plausibly consider the range of factors necessary to perform the criminal justice junction adequately.

Those days, however, are gone. Criminal codes are broad and thick, and prison facilities are bursting at the seams with prisoners who are serving increasingly long sentences. Given the modern demands on mercy's

<https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

87. See PAUL D. NEWMAN, *FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION 183* (2004).

88. See Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U. L. REV. 58, 97 (2018).

89. See JONATHAN TRUMAN DORRIS, *PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861–1898*, at 53–58 (1953).

90. See Markowitz & Nash, *supra* note 88, at 97.

91. See Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 501–02 (2017) (citing Proclamation No. 4483, 42 FED. REG. 4391 (Jan. 24, 1977)).

92. See Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 809 (1996).

93. Cf. Love, *supra* note 79, at 1175 (contrasting statecraft pardoning with pardoning in cases of “unfortunate guilt”).

94. See Heise, *supra* note 83, at 254–59.

criminal justice function, a centralized authority seems to be an especially ill-suited repository for exclusive mercy power.

3. Federal Prosecutors

Because federal prosecutors are presidentially appointed rather than popularly elected, the case for local mercy looks a bit different. To state the obvious, substituting appointments in place of elections reduces local accountability and dampens the case for mercy. I will nonetheless suggest two reasons why sentence reduction powers might be worth giving to U.S. Attorneys.

First, many benefits of localism are still there; that U.S. Attorneys serve pursuant to a national appointment does not mean that the appointees lack local connections and accountability. They are usually appointed in close consultation with senators from the state containing the federal district in which they will serve, and so they tend to come from, and reflect values aligned with, regional and local communities.⁹⁵ They often come from, and should always expect to exist within, the same political, bureaucratic, and professional ecosystems as do their state counterparts. They litigate cases to local juries, which requires them to appreciate the punishment norms of the communities from which those juries are drawn.⁹⁶ Their sensitivity to local punishment norms increases their credibility with local law enforcement officials.⁹⁷ The Department of Justice, moreover, increasingly welcomes such a distribution of authority, eager to devolve power to its local prosecutors.⁹⁸

Second, interpretation of the clemency power specified in the federal constitution better accommodates prosecutor mercy than clemency power specified in the constitutions of many states. I more carefully scrutinize the relationship between prosecutor mercy and constitutional clemency powers in Part II.C, but one part of that discussion is important to the point I am making here. Whereas some states have assigned constitutional clemency

95. See Richman, *supra* note 65, at 960–61, 984.

96. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 798–99 (2003).

97. See *id.*

98. See *id.* at 798; see also Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 227 (2003) (noting the minimal role of “Main Justice” in disciplining the discretion of U.S. Attorneys).

powers in ways that might exclude maximalist prosecutor mercy,⁹⁹ the federal government has not. A fairly straightforward reading of Supreme Court precedent indicates that the federal pardon power does not preempt the ability of other institutions to effectuate sentence reductions.¹⁰⁰ There is certainly much more to say about the mercy power of federal prosecutors, but I am simply too space-limited to say it here.

B. The Prosecutor Role

Those who prefer their governance more departmentalized might lodge the formalistic objection that a district attorney should limit her role to investigating, charging, and prosecuting. In this telling, prosecutors should not have mercy powers because such powers formally represent legislating and sentencing, which are for legislatures and judges, respectively.¹⁰¹ These formalistic critiques are unpersuasive, for reasons that are probably familiar to many: prosecutors *already* perform legislative and sentencing functions. Encouraging prosecutor mercy is, moreover, consistent with the more catholic prosecutor function that the newer versions of pertinent professional codes describe.¹⁰²

1. Legislating and Sentencing

There is nothing particularly novel about vesting prosecutors with increased power to effectuate policy and sentencing preferences. American criminal codes are “broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.”¹⁰³

99. See *infra* Part III.B.

100. See *infra* notes 151–77 and accompanying text. For this reason, federal prosecutors already have a nonzero post-conviction role in sentencing. Under the Federal Rule of Criminal Procedure 35(b), a federal prosecutor can move that a sentence be reduced for having provided “substantial assistance in investigating or prosecuting another person.” Using so-called *Holloway* motions, a federal prosecutor can dismiss charges after sentencing, and a federal court can thereafter void the sentence. See Hopwood, *supra* note 4, at 113–16.

101. See Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 335 (2009).

102. Cf. Fairfax, *supra* note 5, at 1267–68 (arguing that the existing power of prosecutors to exercise unreviewable discretion would justify nullification powers).

103. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

For the prosecutor, that breadth and depth is the source of enormous functional power to make policy and set punishment.¹⁰⁴

Take the prosecutor's functional power to legislate. A prosecutor can effectively decriminalize conduct that a legislature designates for punishment.¹⁰⁵ In just the past few years, examples abound.¹⁰⁶ Cook County (Illinois) District Attorney Kim Foxx, whose jurisdiction includes Chicago, has ordered her office to stop prosecuting people for driving with licenses that were suspended for financial reasons, and to charge certain retail thefts as misdemeanors.¹⁰⁷ Philadelphia (Pennsylvania) District Attorney Larry Krasner has instructed his subordinates not to prosecute marijuana possession, nor certain closely related offenses.¹⁰⁸ King County (Washington) District Attorney Dan Satterberg initiated a number of diversion programs in and around Seattle that are designed to avoid criminally charging drug, sex worker, and juvenile offenses.¹⁰⁹

The American prosecutor's power to make policy through functional decriminalization, however, is nothing compared with its functional power to sentence.¹¹⁰ That power arises through the interaction of at least four related phenomena: broad criminal codes that frequently allow prosecutors to select charges from a menu of offense options;¹¹¹ mandatory minimums

104. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 721 (1996).

105. Just because a prosecutor refuses to charge an offense, however, does not mean that police stop arresting for it.

106. Although I have collected primary source citations for these examples, the policies I highlight were collected and discussed in Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019).

107. See Megan Crepeau, *Cook County to stop prosecuting some traffic offenses because it lacks resources, Foxx's office says*, CHI. TRIB. (June 15, 2017), <https://www.chicagotribune.com/news/breaking/ct-states-attorney-traffic-offense-prosecution-20170615-story.html> (suspended licenses); Steve Schmadeke, *Top Cook County prosecutor raising bar for charging shoplifters with felony*, CHI. TRIB. (Dec. 15, 2016), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html> (retail theft).

108. See Memorandum from Larry Krasner, Dist. Att'y of Phila., to Phila. Dist. Att'ys on New Policies Announced Feb. 15, 2018, (Mar. 13, 2018), https://cdn.muckrock.com/outbound_composer_attachments/Lucasgsl/62919/Philadelphia-DA-Larry-Krasner-s-Memo.pdf.

109. See Davis, *supra* note 105, at 12–15.

110. See PFAFF, *supra* note 5, at 131.

111. See Wright, *Reinventing American Prosecution Systems*, *supra* note 68, at 415.

that eliminate judicial sentencing preferences;¹¹² sentencing enhancements that are entirely within the prosecutor's discretion to invoke;¹¹³ and the whole system's reliance on a prosecutor-driven plea bargaining process.¹¹⁴ Virtually unreviewable discretion to select charges and enhancements means substantial discretion to set sentencing ranges, and prosecutors leverage *that* power to extract plea bargains on preferred terms. This functional sentencing power is largely responsible for the academic consensus that prosecutors exercise god-like authority in the criminal justice system.¹¹⁵

Nor are the legislative and sentencing powers of prosecutors limited to pre-conviction activity. Two very different examples capture the point. First, in many jurisdictions, prosecutors have enormous control over expunction, which now translates into enormous control over the collateral consequences of conviction.¹¹⁶ Second, in many jurisdictions, local prosecutor assent is necessary to move forward with executions.¹¹⁷ Under such conditions, prosecutors can, and do, decide whether the state actually kills the prisoners that it has sent to death row.¹¹⁸

As a result, a formalistic assertion of incompatibility between prosecutor mercy and role is, given the current state of American prosecutor power, unpersuasive. Any objection must be based on function, not form.

2. Professional Codes

Permitting chief prosecutors to effectuate post-conviction mercy is also something that is within the more formal job description. People have long theorized prosecutors as “ministers of justice,” an idealized role in which prosecutors do more than pursue convictions and sentences.¹¹⁹ Modern

112. *See id.*

113. *See* Simons, *supra* note 101, at 335.

114. *See* Leslie C. Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259, 271 (2001).

115. *See* Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 *AM. CRIM. L. REV.* 1579, 1612 (2019).

116. *See* Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 *FORDHAM L. REV.* 2821, 2846 (2018).

117. *See* Lee Kovarsky, *The American Execution Queue*, 71 *STAN. L. REV.* 1163, 1177 (2019).

118. *See id.*

119. The most famous decisional formulation of the idea is from *Berger v. United States*, 295 U.S. 78, 88 (1935).

ethics codes increasingly embrace that role.¹²⁰ The minister-of-justice ideal is developed at least somewhat with respect to pre-conviction conduct, but the ethical standard for prosecutor conduct after that is anyone's guess.¹²¹

As with pre-conviction behavior, the challenge has always been to define what "justice" entails.¹²² In part because DNA evidence increasingly exposes wrongful convictions, recent revisions to the model rules generally center on cases involving new evidence of innocence. A new comment to Model Rule 3.8, for example, emphasizes that "[c]ompetent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation."¹²³

These changes were made with wrongful convictions in mind, but they represent an expansive view of the prosecutor role that includes obligations to do justice long after the judgment becomes final.¹²⁴ The prosecutor mercy I describe here would not be undertaken "as a matter of obligation," but one cannot overstate the significance of bringing "remedial measures" within the ambit of the idealized prosecutor function. The ABA Criminal Justice Standards make the scope of the duty more explicit in Standard 3.1-2(f), which emphasizes that the "prosecutor is not merely a case-processor," that she is "a problem-solver responsible for considering broad goals of the criminal justice system," and that she "should seek to reform and improve the administration of criminal justice."¹²⁵ That mandate requires

120. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8 (AM. BAR ASS'N 2018) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); ABA STANDARDS FOR CRIMINAL JUSTICE FOR THE PROSECUTION FUNCTION 3-1.2. (AM. BAR ASS'N 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); NATIONAL PROSECUTION STANDARDS § 1-1.1 (NAT'L DIST. ATTORNEYS ASS'N 2009) ("The primary responsibility of a prosecutor is to seek justice[.]").

121. But see, e.g., Daniel S. Medwed, *The Prosecutor As Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009) (theorizing the minister-of-justice ideal as applied to post-conviction prosecutor behavior); Zacharias, *supra* note 76 (exploring the obligation to "do justice" after convictions become final).

122. See generally Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1216 (2020) (explaining the meaninglessness of the justice standard).

123. MODEL RULES OF PROF'L CONDUCT, *supra* note 119, r. 3.8 cmt.1.

124. See generally Brandon L. Garrett, *Prosecutors Post-Conviction*, in THE OXFORD HANDBOOK ON PROSECUTORS AND PROSECUTION (Ronald Wright et al. eds., 2021) (discussing various post-conviction functions that the change in prosecutor role is bringing about).

125. ABA STANDARDS FOR CRIMINAL JUSTICE FOR THE PROSECUTION FUNCTION 3-1.2(f) (AM. BAR ASS'N 2015).

that, “when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, [she] should stimulate and support efforts for remedial action.” This language is certainly subject to multiple interpretations, but its breadth seems deliberate, and it has anchored calls to, among other things, have prosecutors initiate sentencing reform.¹²⁶

C. Institutional Models

Theoretically, prosecutor mercy power runs the gamut from an unreviewable prosecutor pardon (maximalist) to something like an agreed-upon factual stipulation (minimalist)—although I do not argue for either end of that spectrum. Minimalist powers are inconsistent with the basic premise of this essay; maximalist powers would produce many of the same problems that mark unreviewable pardon authority vested in chief executives,¹²⁷ and then some. Instead, I ultimately argue that jurisdictions should be as maximalist as they can—but that they should permit light-touch review by a judicial body.¹²⁸ Jurisdictions could, for example, vest prosecutors with powers to make sentence reduction (mercy) motions to courts, and vest courts with authority to grant relief. Such a system would ensure that prosecutors are bounded by legislative criteria and that courts are capable of checking gross favoritism, arbitrariness, and other abuse. The substantive criteria for mercy can be simple and lax—something like an interest-of-justice standard.

There are some experiments with potential features of the prosecutor mercy I propose here. For example, the American Law Institute (ALI) approved an aspirational “second look” provision in 2011.¹²⁹ Section 305.6 is entitled “Modification of Long-Term Prison Sentences; Principles for Legislation.”¹³⁰ Sentencing under § 305.6 “should be viewed

126. See, e.g., R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014).

127. See Peterson, *infra* note 154, at 1230.

128. American prosecutors can’t do much to effectuate mercy because American judges can’t. Many American jurisdictions do not permit judges to modify lawful sentences. See Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 10 (2003). Judicial modification authority that does exist generally extends only several months beyond entry of the original judgment. See ALI SENTENCING DRAFT, *supra* note 36, at 574.

129. See ALI SENTENCING DRAFT, *supra* note 36, at 564–65, 567 cmt. a.

130. *Id.* at 565.

as analogous to a resentencing in light of present circumstances[.]” and it both (1) provides authority to adjust sentences downward, and (2) vests modification authority that “shall not be limited by any mandatory minimum term of imprisonment under state law.”¹³¹

Section 305.6, however, is not the realized form of prosecutor mercy I encourage here. It is designed to facilitate adversarial resolution of prisoner-initiated proceedings, and contains no text expressly addressing prosecutor-supported reductions.¹³² The provision is framed as a means for addressing “correctional populations exceeding capacity”¹³³—i.e., a means for addressing prison overcrowding—and so it references roles for the prisoner-movant and the corrections department, but not the prosecutor. By contrast, what I urge here is less about solving mass incarceration than it is about promoting other moral virtues. Section 305.6, moreover, appears to be a device tailored only for case-by-case consideration, rather than also to be capable of facilitating more collectivized mercy dispensation.¹³⁴ Finally, § 305.6 applies only to prisoners who have served at least fifteen years in prison,¹³⁵ but a prosecutor-driven process need not be saddled with such a limitation.

Some states are beginning to push the envelope.¹³⁶ In late 2018, California passed a sentencing relief statute for the express purpose of allowing sentencing courts to “recall and resentence” a prisoner upon the “recommendation of [correctional officials] or the *district attorney of the*

131. *Id.* at 564–65.

132. The new second-look provisions operative in the District of Columbia similarly fail to meaningfully contemplate the initiative or support of the prosecutor. *See* DC CODE § 24-403.03.

133. ALI SENTENCING DRAFT, *supra* note 36, at 564.

134. *See* Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 491 (2017).

135. *See* ALI SENTENCING DRAFT, *supra* note 36, at 564.

136. In instances where states have identified limited mechanisms to reduce lawfully imposed sentences long after the initial imposition of the sentence, they usually vest that authority in a combination of the corrections department and parole board. *See, e.g.*, DEL. CODE ANN. tit. II, § 4217 (corrections department and parole board); N.H. REV. STAT. ANN. § 651:18 (2019) (corrections department). There are, however, other jurisdictions that are beginning to give prosecutors an increased role in sentence reductions. *See, e.g.*, IND. CODE ANN. § 35-38-1-17 (granting prisoners limited rights to seek reductions for lawfully imposed sentences, and including streamlined process where prosecutor does not object); N.J. RULES OF COURT 3:21-10(b)(3) (permitting prisoners to seek modifications of lawfully imposed sentence if motion is joined by prosecutor).

county in which the defendant was sentenced.”¹³⁷ Such recommendations need not involve confession of error.¹³⁸ Among the reasons for authorizing the recall-and-resentence process was to “eliminate disparity of sentences and to promote uniformity of sentencing.”¹³⁹ The provisions especially target those offenders who were serving life sentences for juvenile criminality.¹⁴⁰ The first person freed under the California provision walked out of prison in August 2019.¹⁴¹

Like § 305.6, however, the California scheme deviates substantially from what I advocate here. First, most of California’s recall-and-resentence process is only prospective,¹⁴² probably reflecting separation-of-powers concerns I discuss above. Second, the California scheme vests not just local prosecutors with power to seek resentencing, but also state and county correctional officials.¹⁴³ Indeed, the focus of the California provisions seems to be on correctional prerogative.¹⁴⁴ There might be good reasons to endorse such variants of sentence reduction power, but the justifications I offer below are limited to prosecutors. Finally, and as is the case with § 305.6, California’s recall-and-resentence process appears unsuited for more collectivized mercy dispensation.

In some jurisdictions and for varied reasons, maximalist variants of prosecutor mercy may be non-starters. Even if a jurisdiction does not adopt a scheme under which prosecutors can make sentence reduction motions,¹⁴⁵ however, there are other ways to create opportunities for merciful prosecutors. Specifically, for those few jurisdictions that retain

137. CAL. PENAL CODE § 1170(d)(1) (emphasis added).

138. *See id.* (defining an interest-of-justice standard).

139. *Id.*

140. *See id.* at § 1170(d)(2)(A)(i).

141. *See* Sarah Lustbader, *The First Beneficiary of a Sentence Review Unit Walks Free*, THE APPEAL (Aug. 8, 2019), <https://theappeal.org/the-first-beneficiary-of-a-sentence-review-unit-walks-free/>.

142. *See* CAL. PENAL CODE § 1170(d)(1) & § 1170(h). The provisions for juveniles serving life without parole are retroactive. *See id.* at § 1170(d)(2)(J).

143. *See id.* at § 1170(d)(1).

144. *See, e.g., id.* at § 1170(e) (providing extensive guidance for recall-and-resentencing provisions based on the recommendations of correctional officers).

145. The ALI entertains the idea of a “wholly new decisionmaker,” ALI SENTENCING DRAFT, *supra* note 36, at 574, although the communitarian rationale for prosecutor mercy is stronger when judges entertaining the motions are also local.

discretionary parole,¹⁴⁶ extra deference can be given to a favorable prosecutor recommendation—and prosecutors can be better resourced and empowered to make such recommendations when appropriate. Jurisdictions can similarly augment mercy-enhancing roles that prosecutors play in the clemency process.¹⁴⁷ Specifically, jurisdictions can better resource and empower prosecutors to make favorable clemency recommendations to a clemency authority, effectively creating political cover for that authority to act favorably on any request for commutation.¹⁴⁸ Even such minimalism represents a *significant* improvement over existing practice—no state currently gives local prosecutors significant power to effectuate mercy.¹⁴⁹

III. THE NEGATIVE PARDON POWER

The most significant legal obstacles to the sentence reduction powers I propose here are, ironically enough, mercy powers. As mentioned above, every state and federal jurisdiction (except Connecticut) vests clemency power in some combination of a chief executive and a board.¹⁵⁰ If a jurisdiction dispenses mercy through institutions other than the

146. See Paul J. Larkin Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 315 (2013).

147. Cf. Bruce A. Green & Ellen Yaroshfsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 486–87 (2009) (discussing deference to prosecutors in existing clemency mechanisms). Those critical of a prosecutor role in clemency determinations tend to address arrangements in which that role is a “prosecutor sign off” for the exercise of presidential pardon power. See, e.g., Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 440 (2017) (noting the effects of local U.S. Attorney involvement).

148. Some local prosecutor offices are now considering whether to create “sentence review units” for this purpose. See James Forman Jr. & Sarah Lustbader, *Every D.A. in America Should Open a Sentence Review Unit*, NY TIMES (Aug. 1, 2019), <https://nyti.ms/2Mzn134>; Eli Hager, *The DAs Who Want to Set the Guilty Free*, THE MARSHALL PROJECT (March 20, 2018), <https://www.themarshallproject.org/2018/03/20/the-das-who-want-to-set-the-guilty-free>.

149. See Colgate Love, *supra* note 54, at 106.

150. See Heise, *supra* note 83, at 254–59; see also Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 108 n.191 (2019) (collecting constitutionally specified pardon powers across a number of states).

constitutionally designated clemency authority, then a question about the exclusivity of the designee's power naturally arises.

The constitutional limits of prosecutor mercy will depend on at least two features of a jurisdiction's clemency power. First, the limits depend on its *exclusivity*, meaning whether institutions other than the textual designee are permitted to extend clemency. Second, in jurisdictions where the power is exclusive, the limits depend on *breadth*, meaning the degree to which exclusive clemency authority precludes other forms of mercy. Ultimately, very few jurisdictions have a clemency power that is exclusive and broad, so there is plenty of room for the institutional arrangements that I suggest herein.

A. Non-Exclusive Constitutional Clemency Power

Jurisdictions with a non-exclusive clemency power can facilitate maximal local mercy because the power to reduce sentences may be vested in institutions besides the constitutional clemency designee. There is one very important jurisdiction with what appears to be a non-exclusive clemency power: the United States.¹⁵¹

That the President has clemency power is clear from Article II of the U.S. Constitution, as is the fact that the power does not extend to impeachment.¹⁵² There is plenty of information about the Framing and lots of well-aged case law establishing, moreover, that Congress cannot meaningfully impair the president's pardon power.¹⁵³ What is less clear, however, is whether the President's clemency power is exclusive—in the sense that it is the only way to reduce lawfully imposed federal sentences.¹⁵⁴ And if the

151. See generally William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WILLIAM & MARY L. REV. 475, 521–24 (1977) (sketching and criticizing non-exclusivity).

152. See U.S. CONST. art. II § 2.

153. See, e.g., *United States v. Klein*, 80 U.S. 128, 147–48 (1871) (“Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.”); *Ex parte Garland*, 71 U.S. 333, 380 (1866) (“This power of the President is not subject to legislative control.”).

154. Compare, e.g., Duker, *supra* note 151, at 521–24 (concluding that controlling legal authority makes presidential mercy powers nonexclusive) with, e.g., Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1268–79 (2003) (characterizing issue as having “never been definitively resolved by the courts” and arguing in favor of exclusivity).

presidential power to reduce and commute federal sentences is non-exclusive, then a separation-of-powers objection to Congress lodging mercy powers elsewhere largely evaporates.

Start with the state of the clemency power around the time of the American founding.¹⁵⁵ The British power became an important piece of the royal prerogative, although the Crown was not without early competitor institutions, including clergy, nobility, and courts.¹⁵⁶ Henry VIII was finally able to wrest the power from these competitors in 1535,¹⁵⁷ when Parliament acceded by recognizing the “sole power” to remit a broad spectrum of criminal punishment.¹⁵⁸ Parliament, however, regained the authority to issue legislative pardons in 1721.¹⁵⁹

The configuration of clemency power prior to American constitutional ratification was surprisingly varied, and legislative pardon power was commonplace.¹⁶⁰ By the time of ratification, only five states vested an exclusive pardon power in a governor; the rest assigned the power either fully or partially to a legislature.¹⁶¹ With respect to the Constitutional Convention itself, records documenting any disputes about the clemency power are sparse.¹⁶²

The text of the clemency power specified in the federal Constitution does not resolve the exclusivity question, and the prevalence of legislative

155. The Supreme Court has been particularly originalist in its construction of the federal pardon power. See Markowitz & Nash, *supra* note 88, at 72–75 (summarizing reliance of Court authority on English practice).

156. See Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55 (1963).

157. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 586 (1991).

158. See An Acte for Recontynuyng of ctayne libties and franchises heretofore taken frome the Crowne 1535–36, 27 Hen. 7, c. 24, § I.

159. See Act of Settlement, 1721, 7 Geo. I, c. 29.

160. See 7 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 534 (1909) (Connecticut), *id.* at 3215 (Rhode Island); see also Kobil, *supra* note 157, at 589 (discussing distribution of pardon power across colonies).

161. See Kobil, *supra* note 157, at 589. The states to vest the pardon power entirely in a governor were: Delaware (see DEL. CONST. of 1776, art. VII); Maryland (see MD. CONST. of 1776, art. XXXIII), New York (N.Y. CONST. of 1777, art. XVIII), North Carolina (see N. C. CONST. of 1776, art. XIX), and South Carolina (see S.C. CONST. of 1790, art. II, § 7).

162. See *Schick v. Reed*, 419 U.S. 256, 260 (1974).

clemency powers in the states (discussed above) suggests non-exclusivity. What about practice? At the turn of the eighteenth century, British clemency power permitted Parliament to vest various officials with powers to remit fines and penalties that arose from violations of that country's customs and revenue laws.¹⁶³ That practice hopped the Atlantic, as the United States almost immediately vested the treasury secretary with similar authority.¹⁶⁴ American jurisdictions also adopted the British concept of legislative "amnesty"—mass clemency based on an offense or offender category.¹⁶⁵

Finally, the Supreme Court has weighed in on the side of non-exclusivity. In *The Laura*,¹⁶⁶ the Court entertained a pardon-exclusivity challenge to the remittance practice of American treasury secretaries dealing with customs and revenue violations.¹⁶⁷ The Court refused to endorse exclusivity, because doing so would have been "adjudging that the practice in reference to remissions by the secretary of the treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the constitution."¹⁶⁸ In *Brown v. Walker*,¹⁶⁹ the Court upheld a legislative scheme that granted what amounted to a pardon to witnesses willing to cooperate in an investigation into the Interstate Commerce Commission.¹⁷⁰ Equating legislative amnesty with the clemency power—the Court pointedly referred to the distinction as one "of philological interest [rather] than of legal importance"¹⁷¹—*Brown* explained that "[the pardon] power has never been held to take from [C]ongress the power to pass acts of general amnesty."¹⁷²

The assumption of non-exclusivity lurks in places that people might not always expect. Nobody appears to have observed, for example, that the

163. See 54 GEO. 3. c. 171 (1813); 51 GEO. 3. c. 96 (1811); and 27 GEO. 3. c. 32 (1787).

164. See Act of March 3, 1797, 1 St. 506 (assigning treasury secretary with power with sunset provisions); see also Act of February 11, 1800, 2 Stat. 7 (extending prior act in perpetuity).

165. See generally Duker, *supra* note 151, at 509–20 (exploring the relationship between English amnesty and the practice under the federal constitution).

166. 114 U.S. 411 (1885).

167. See *id.* at 412–13.

168. *Id.* at 414.

169. 161 U.S. 591 (1896).

170. See *id.* at 593–94.

171. *Id.* at 602 (citing *Knote v. United States*, 95 U.S. 149, 153 (1877)).

172. *Id.* at 601.

recently adopted FIRST STEP Act¹⁷³ assumes non-exclusivity. For prisoners lawfully sentenced for crack possession prior to 2010 legislation, FIRST STEP outlines a process for obtaining a sentence reduction.¹⁷⁴ The process of sentence reduction for these prisoners begins with a motion filed in the sentencing court, and the motion can be filed by the prisoner, the Director of the Bureau of Prisons, or the U.S. Attorney's Office.¹⁷⁵ The federal court can even issue a sentence reduction *sua sponte*.¹⁷⁶

All of this institutional behavior points in the same direction. To the extent otherwise indeterminate constitutional text is liquidated by the behavior of the three federal branches,¹⁷⁷ that behavior suggests a non-exclusive federal clemency power.

B. Exclusivity in the States

To what degree do *states* treat clemency power as the exclusive mercy power, and what is the effect of any such exclusivity? In states without an express exclusivity rule, like Wisconsin,¹⁷⁸ there is no major constitutional question about the ability to vest mercy powers in institutions other than the constitutional designee.¹⁷⁹ The breadth of traditional clemency power simply has no effect on authority to assign similar functions to other institutions. There are a number of states, however, with older authority that equates the reduction of a lawful sentence with commutation, and that treat the power to commute as exclusive.¹⁸⁰ (In many of those

173. See Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended at 18 U.S.C. § 5043 (2018)).

174. See *id.* at § 404(b).

175. See *id.*

176. See *id.* Even before the FIRST STEP Act, the Bureau of Prisons could move for a sentence reduction in the convicting court. See Hopwood, *supra* note 4, at 100-01 (discussing pre-Act statute).

177. The terminology of "liquidation" is usually associated with James Madison. See THE FEDERALIST No. 37.

178. See *State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 531 N.W.2d 32, 36 (Wis. 1995).

179. See, e.g., *State v. Stenklyft*, 697 N.W.2d 769, 785 (Wis. 2005).

180. See, e.g., *People v. Herrera*, 516 P.2d 626, 629 (Colo. 1973) (Colorado); *Whittington v. Stevens*, 73 So. 2d 137, 140 (Miss. 1954) (Mississippi); *Gilderbloom v. State*, 272 S.W.2d 106, 110 (Tex. 1954) (Texas); *State v. Lewis*, 37 S.E.2d 691, 693 (N.C. 1946) (North Carolina); *People v. Fox*, 20 N.W.2d 732, 733 (Mich. 1945) (Michigan); *State v. Dist. Court of*

jurisdictions, exclusivity is anchored to an express constitutional separation-of-powers provision.¹⁸¹)

Some state supreme courts have indeed relied on an exclusivity rule to snuff out legislation that empowers judges to reduce sentences.¹⁸² Consider North Dakota, the constitution of which provides that “[t]he governor may grant reprieves, commutations, and pardons” and that “the governor may delegate this power in a manner provided by law.”¹⁸³ Although the governor may appoint a pardon advisory board, that pardon power is exclusive. The state supreme court has held that “legislation lessening punishment may not be applied to final convictions because this would constitute an invalid exercise by the legislature of the pardoning power.”¹⁸⁴

In most jurisdictions, however, an exclusivity rule is not a death knell for legislatively authorized prosecutor mercy. Lest these jurisdictions use exclusivity rules to invalidate any institutional attempt to reduce sentences, the rules have developed breadth-based limitations and exceptions capable of accommodating decarcerative practices. These rules are a riff on federal decisional law permitting courts to amend sentences on the ground that judicial amendment is not tantamount to commutation.¹⁸⁵ In *U.S. v. Benz*,¹⁸⁶ the Court distinguished between the act of clemency, which is “an exercise of executive power [that] abridges the enforcement of a judgment,” and a court-ordered reduction in the sentence, which “alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.”¹⁸⁷

Fifth Judicial Dist. in & for Madison Cty., 218 P. 558, 559 (Mont. 1923) (Montana); *State v. Grant*, 79 Mo. 113, 124 (1883) (Missouri).

181. *See, e.g.*, COLO. CONST. art. III (“[N]o person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted.”).

182. *See, e.g. Herrera*, 516 P.2d 626, 629 (Colo. 1973) (basing holding on a misunderstanding of *Benz*); *State v. Bainbridge*, 543 N.W.2d 154, 160 (Neb. 1996) (equating judicial power to reduce lawful punishment with commutation).

183. N.D. CONST. art. V, § 7, cl. 7.

184. *State v. Cummings*, 386 N.W.2d 468, 472 n.2 (N.D. 1986); *see also State v. Shafer-Imhoff*, 632 N.W.2d 825, 838 (N.D. 2001) (explaining that the exclusivity of the North Dakota pardon power prevents the legislature from reducing punishments).

185. *See U.S. v. Benz*, 282 U.S. 304, 311 (1931).

186. *See id.*

187. *See id.* at 311. The same logic holds for the federal parole statute. *See, e.g.*, *Nix v. James*, 7 F.2d 590, 593–94 (9th Cir. 1925).

State courts faced with an exclusivity rule often turn to *Benz*-like logic: permitting other institutions to reduce sentences on the grounds that such reductions differ from constitutionally identified clemency power. For example, the Michigan constitution states that the “governor shall have power to grant reprieves, commutations and pardons”¹⁸⁸ and uses a strict separation-of-powers rule under which the pardon power would ordinarily be treated as exclusive.¹⁸⁹ In *Kent County Prosecutor v. Kent County Sheriff*,¹⁹⁰ the state supreme court nevertheless turned back a separation-of-powers challenge to a state statute that permitted, in times of severe prison overcrowding, a county sheriff to take judicially reviewed steps to reduce sentences of certain prisoner categories.¹⁹¹ In the course of deciding *Kent County*, the state supreme court seemed to go out of its way to read clemency exclusivity as narrowly as possible.¹⁹²

There are many other ways—sometimes subtle, sometimes not—that states avoid giving broad preemptive effect to exclusive pardon power. Obviously, states permitting judges to amend sentences (like Wisconsin and California) are able to distinguish the power to modify sentences from clemency power.¹⁹³ Every jurisdiction that retains a parole mechanism necessarily cabins the exclusivity rule.¹⁹⁴ The same goes for jurisdictions with compassionate release provisions.¹⁹⁵ Conceptually, familiar post-conviction relief based on “naked” claims of innocence likewise involves a mercy power—because the allegation is not that the process producing

188. MICH. CONST. art. V, § 14.

189. *See Kent Cty. Prosecutor v. Kent Cty. Sheriff*, 409 N.W.2d 202, 205 (1987).

190. *See id.* at 202.

191. *See id.* at 203.

192. For example, it distinguished commutation from the amnesty necessary to respond to jail overcrowding, holding that governor exclusivity extended to the former but not the latter. *See id.* at 323–24. It also held that the legislature could reduce prison sentences if doing so was incidental to the legislative power to “confront[] situation[s] affecting the common good.” *Id.* at 326.

193. *See, e.g., State v. Stenklyft*, 697 N.W.2d 769, 785 (Wis. 2005) (affirming the constitutionality of multiple categories of judicial power to reduce or amend sentences).

194. *Cf. BARKOW, supra* note 20, at 78–81 (surveying state of parole across American jurisdictions).

195. *Cf. id.* at 81–87 (surveying state of compassionate release across American jurisdictions).

the conviction was unlawful.¹⁹⁶ State judges regularly stay executions,¹⁹⁷ which are functionally identical to reprieves that fall within clemency power. These workarounds all involve judicial sentence reductions, but institutional variations capable of promoting the prosecutor mercy I contemplate here can culminate in judicial sentence reduction orders.

IV. MORAL OBJECTIONS

A. Retributivism

If mercy is remission from deserved punishment, then can prosecutor-driven sentence reductions be retributively just?¹⁹⁸ The tension between justice and mercy continues to bedevil those who believe that punishment is justified when it is retributively deserved.¹⁹⁹ For this reason, Jeffrie G. Murphy famously objected that mercy ought to have little place in the public sphere, and that people should reserve mercy-giving “to themselves for use in their private lives with their families and pets.”²⁰⁰

Even though I am no retributivist, I lavish nontrivial attention on the retributivist objection. Most prisoners remain in criminal detention on a retributivist theory of just deserts, and not because of some utilitarian calculation involving the slope of an offending function. Indeed, retributivism has been the justification for American punishment for a half-

196. See Lee Kovarsky, *Justice Scalia's Innocence Tetralogy*, 101 MINN. L. REV. HEADNOTES 94, 96 (2016).

197. See Death Penalty Information Center, *Stays of Execution in 2020*, <https://deathpenaltyinfo.org/stories/stays-of-execution-in-2020> (last visited June 6, 2021).

198. Abstract discourse about how mercy can be reconciled with justice dates at least as far back as the eleventh century. See *Prologium IX*, in ANSELM OF CANTERBURY: THE MAJOR WORKS (Brian Davies & Gillian Evans eds., 1998). Alwynne Smart is generally credited with having written the first modern, major academic paper rigorously addressing this issue. See Smart, *supra* note 15, at 345.

199. See Kent Greenwalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1981). Retributive theory generally requires that punishment be commensurate with “desert,” with desert deriving from material attributes of the offense and the offender. See RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 14–18, 33–34 (1979).

200. See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 174 (1988).

century,²⁰¹ and many decision makers in the state and federal criminal justice systems abide by its principles, sub- or self-consciously. The tension between mercy and retribution is a signal question in the pertinent theoretical literature,²⁰² and that tension is potentially magnified when the punishing state shortens a lawfully imposed sentence fixed by the ordinary legislative process.

I believe the retributivist objection to be unpersuasive. In the limited situations where mercy and retributive justice conflict irreconcilably, it remains morally acceptable to favor mercy—provided the appropriate institutional agents are resolving the tension.²⁰³ Because I am responding to an anticipated objection rather than making a retributivist case for prosecutor-driven sentence reductions, I discuss several strains of retributivism instead of committing to and defending one.

Sometimes a sentence reduction would simply be an act of justice. Much of what is described as mercy in modern popular, academic, and legal literature is nothing more than the individuation that we prefer from our punishment institutions.²⁰⁴ Communities use crude legal tools to sort the infinitude of human experience into fixed sentencing categories. Mercy can operate as the back-end solution for a system that poorly calibrates punishment to desert at the front. The criminal sentence, for example, might have failed to adequately distinguish between, on the one hand, a cold-blooded killer and, on the other, a battered woman who killed her intimate partner, or someone who facilitated voluntary euthanasia.²⁰⁵ If mercy takes this form—what some call “mercy as equity”²⁰⁶—then there

201. See Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 846 (2002).

202. See *supra* note 198.

203. See, e.g., Linda Ross Meyer, *The Merciful State*, in FORGIVENESS, MERCY, AND CLEMENCY 89 (Austin Sarat & Nasser Hussein eds., 2007) (arguing that there might be social value in devolving clemency powers to local decision-makers); David Tait, *Pardons in Perspective: The Role of Forgiveness in Criminal Justice*, 34 FEDERAL SENTENCING REPORTER 134, 138 (identifying possibility of assigning mercy-giving powers to local communities).

204. See Mary Sigler, *Equity, not Mercy*, in THE NEW PHILOSOPHY OF CRIMINAL LAW *2 (C. Flanders & Z. Hoskins eds., 2016) (online draft), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734357.

205. See Meyer, *supra* note 203, at 67.

206. See Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1328 (2004); Carol S. Steiker, *Tempering or Tampering?*

can be no retributive justice objection because the activity is justice enhancing.

There are some important strains of retributivism under which prosecutor mercy will be justice *neutral*. Some retributivist models are banded, meaning that they prescribe a punishment range, or they are limiting, meaning that they prescribe a punishment maximum. (These strains of retributivism are actually favored by most model code drafters, legislators, and jurists.²⁰⁷) Under a banded framework, and still assuming the existence of some metaphysically determinable desert, the act of mercy remains just provided that the revised punishment sits in the band. Under a limiting framework, the act of mercy remains just whenever the sentence is reduced. For banded and limiting retributivists, certain reductions in punishment are justice-neutral.

If one relaxes the for-the-sake-of-illustration assumption that an offense can correspond to some metaphysically determinable desert, then sentence reductions will frequently be justice-*indeterminate*—even under more traditional retributivist frameworks that require (as opposed to permit) the government to impose all deserved punishment.²⁰⁸ A desert value represents the blameworthiness assigned to a particular offense, by a particular community, at a particular time.²⁰⁹ And if deserved punishment is *contingent*, then it is necessarily *diachronic*, because the contingent values change over time. The diachronicity of desert means that the reduced sentence would be justice-indeterminate in most scenarios where such mercy would be in the offing.

Unless there is some over-arching theory about which contingent desert value is to control, the diachronicity of desert makes the justness of certain sentence reductions indeterminate.²¹⁰ The justice-indeterminate status of such reductions, in turn, suggests that the morality of state action should be determined by reference to other virtues. This proposition is so important to my argument because it reads on the scenarios most likely to materialize

Mercy and the Administration of Criminal Justice, in FORGIVENESS, MERCY, AND CLEMENCY 25–26 (Austin Sarat & Nasser Hussain eds., 2007).

207. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 78 (2005).

208. See Christopher, *supra* note 201, at 865–66 & nn.118–20 (explaining sub-theory and collecting sources).

209. See Christopher, *supra* note 201, at 896.

210. Cf. ALI SENTENCING DRAFT, *supra* note 36, at 570 (discussing sentencing implications of changed blaming norms).

when prosecutors have mercy powers: when the present community views an offender as significantly less blameworthy than did the prior community against whom the offender transgressed, many years before.²¹¹

Still, there is certainly the possibility that a prosecutor-driven sentence reduction unambiguously drops the sentence below a level corresponding to any contingent desert value. Any retributivist who believes deserved punishment to be retributively required would find the punishment unjustly lenient. Crucially, it is this particular combination of scenario and retributivist theory that produces the clearest tension between post-conviction mercy and justice.

Under such conditions—when mercy and justice conflict—what action is morally permitted or required? I do not attempt to reconcile justice with mercy in such situations, except to observe that they are incommensurable values.²¹² There is no reason, moreover, why justice must always dominate mercy, or vice versa. Both are human and institutional virtues, and those can conflict. In such situations, the best one can do is identify institutions capable of reconciling how these two duties exert influence in the real world.²¹³

B. The Equality Objection

My concerns about prosecutor-driven sentence reductions center on the potential tension not with retributive justice, but with equality.²¹⁴ Mercy

211. See *supra* note 13 and accompanying text.

212. See R.A. Duff, *Justice, Mercy, and Forgiveness*, CRIM. JUST. ETHICS 63 (Summer-Fall 1990); Murphy & Hampton, *supra* note 200, at 159; Steiker, *supra* note 205, at 27.

213. Steiker, *supra* note 205, at 27–28.

214. The equality proposition—that similar cases be treated similarly—dates back at least as far as Aristotle. See ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 267–69 (H. Rackham trans., Harvard Univ. Press rev. ed. 2014) (c. 350 B.C.E.); see also Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–43 & nn.17–19 (1982) (collecting sources on equality and justice). The tension with equality runs through the literature on mercy. See, e.g., Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1472 (2016) (“Perhaps the most striking effect of the turn toward equalizing outcomes is the demise of mercy as an important value in sentencing”); Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 171 (2004) (discussing a view that mercy is inconsistent with equality); Ross Harrison, *The Equality of Mercy*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 108 (Hyman Gross & Ross Harrison eds., 1992) (“a state cannot be merciful [because it] must treat like cases like the others”); Sigler, *supra* note 5, at *7.

and equality can ultimately coexist, however imperfectly, provided that mercy is properly constrained.²¹⁵ Specifically, and as I explain below, equality requires that mercy be exercised with respect to a non-arbitrary variable, and that procedures be reasonably adapted to apply the variable consistently across the eligible prisoner population.²¹⁶

I should note that there is at least one important sense in which mercy is equality enhancing. If jurisdictions dispense mercy to reduce the punishment of offenders who were sentenced using stale blaming norms, then such mercy aligns punishments for its recipients with those of offenders who committed the *same* crime at a later date. It can also restore a measure of proportionality between the mercy recipient and those who committed *different* crimes at a later date.

Now to the aspects of sentence reduction that seem to disrupt norms about treating similarly situated cases the same way. For example, a person receiving a sentence reduction would experience less punishment than would similarly situated offenders who completed their sentences under laws reflecting stale blaming norms. Although such an inequality is real, it is also completely unavoidable; institutions should not invoke equality to disqualify mercy simply because offenders convicted of the same crime may have completed longer sentences. Such disqualification would logically preclude any official act—legislative, executive, or judicial—that decides a particular offense-offender combination should be punished less harshly than it was in the past. Under such a disqualification rule, a political community's interest in equality would lock it into whatever punishment it previously assigned to the offense-offender combination.

More complicated is an equality-based objection involving disparate treatment of otherwise similarly situated offenders sentenced in different localities, and of otherwise similarly situated offenders from the same place. The equality implications flowing from locality-to-locality variation in prosecutor practice are not morally disqualifying because prisoners from different counties are not similarly situated for the purposes of an equality-of-mercy inquiry. Americans tend to think of mercy as a clemency power belonging to a chief executive, but there is nothing inherent about the

215. See MINOW, *supra* note 3, at 26.

216. By “eligible prisoner population,” I mean those prisoners convicted in the county over which the district attorney has territorial jurisdiction.

centralized character of mercy power.²¹⁷ An equality analysis looks very different if, as a normative matter, mercy power *should be* decentralized. American equality norms frequently operate on a criminal justice landscape partitioned by county, and we do not always analyze differentiated local practice as presenting equality issues. And if mercy is indeed a job for the locals—the normative argument I make in Part II—then local variation in mercy practice would not, in and of itself, violate an equality constraint.²¹⁸

The analysis *within* a locality is different. Within a decision-making unit, equality should require that sentences be reduced only for non-arbitrary reasons, and that there be procedures in place to apply those reasons consistently.²¹⁹ A prisoner might receive a prosecutor-driven sentence reduction, for example, to care for a sick child (third-party harm), because his presence might contribute to the vulnerability of a facility to contagion (public health), because he has undergone some unexpected suffering in prison (compassion), or because of some authoritative decision that an initial sentence was unjustly harsh and should not be imposed (equity). A prisoner could not, however, justifiably receive a sentence reduction by morally inappropriate reference to an immaterial attribute like race, religion, sex, gender identity, sexual orientation, alienage, or national origin; in such cases (but not only such cases) equality precludes lenience.²²⁰

What is both defensible and institutionally viable is what one might describe as “mercy as policy”—a practice that requires decision makers to use reasonable process to fairly distribute sentence reductions across a population of materially similar prisoners. For example, if a particular offender received a sentence reduction because they were serving a sentence under stale blaming conventions and because they had a history of good prison behavior, then the decision-maker should similarly analyze the prison behavior of all offenders serving comparable sentences for the same crime.

217. See Part II.A.2 *supra*.

218. See generally Bierschbach & Bibas, *supra* note 214, at 1484–91 (arguing that decentralized criminal justice practices do not violate important equality norms when they reflect normatively desirable differences in the way localities apply law).

219. Cf. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 88 (2011) (noting linkage between non-arbitrary treatment and equality).

220. See David Dolinko, *Some Naïve Thoughts About Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349, 359 (2007).

Indeed, were mercy powers to be more vested in a local official closer to the site of transgression—rather than in a state or national official at significant geographic remove from the affected community—mercy could be much more plausibly constrained by the thinner procedural equality I describe here.²²¹

The equality constraint I envision also *disfavors* certain types of mercy—among other things, mercy that results from favoritism and bias.²²² Decisions made by reference to the decisive variables would be arbitrary, and would violate the equality rule.²²³ Equality therefore precludes otherwise laudable mercy extended at the behest of celebrities unless the mercy giver honors procedural equality by treating similarly situated prisoners the same way.²²⁴ (I suspect many might prefer the availability of unequal mercy, but I regard the risks of mercy-as-favoritism or mercy-as-bias to be too great.)

CONCLUSION

Human experience sometimes overwhelms even the most entrenched institutional pathologies. America's blaming norms are changing at the same time that its prison budgets are exploding, and the inherited wisdom about

221. See Meyer, *supra* note 203, at 92.

222. See, e.g., Maggie Haberman et al., *Trump Commutes Sentence of Roger Stone in a Case He Long Denounced*, NY TIMES, Jul. 10, 2020, <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html> (presidential pardon of Roger Stone). In this respect, I resemble Professor Misner's model legislator, who "concludes that mercy is consistent with justice" but "struggles with the comparative fairness issues" and "worries about the potential for abuse." See Misner, *supra* note 26, at 1331.

223. Favoritism and bias also undermine the legitimacy of the entire enterprise. See Douglas A. Berman, *Turning Hope-and-Change Talk into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59, 69 (2010); Paul J. Larkin Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 856 (2016). Part of the reason mercy exists in such a state of disrepair is the popular association with favoritism. See David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 200 (2012).

224. See, e.g., Pam Belluck, *Clemency for Killer Surprises Many Who Followed Case*, NEW YORK TIMES, Jan. 31, 1999, <https://www.nytimes.com/1999/01/31/us/clemency-for-killer-surprises-many-who-followed-case.html> (Pope John Paul II); Sarah Polus, *Kim Kardashian Fought for a Woman to Be Freed from Jail: 'Keeping Up with the Kardashians' Showed How*, WASH. POST (Dec. 10, 2018), https://www.washingtonpost.com/arts-entertainment/2018/12/10/kim-kardashian-fought-woman-be-freed-jail-keeping-up-with-kardashians-showed-how/?noredirect=on&utm_term=.c998c243634f (Kim Kardashian West).

many criminal justice practices feels stale. Among the most palpable changes are those that involve the political economy of the prosecution function. In an environment where reformist district attorneys are winning elections, it is time to think more seriously about new tools that prosecutors might use to meaningfully reform the carceral state.

If the notion of prosecutor-driven sentence reductions seems less than obvious, then it is only because the American legal tradition associates mercy with centralized clemency powers. Those powers, however, no longer deliver the mercy appropriate for an American prison population bloated by a half-century love affair with over-criminalization, mandatory minimums, and recidivism enhancements. By devolving mercy power to local prosecutors, jurisdictions can restore a measure of community control over criminal punishment. Jurisdictions would thereby encourage local political participation and differentiate punishment practices to suit locally varied preferences. Perhaps most importantly, decentralized, prosecutor-driven sentence reductions would increase local influence on state and national agendas by allowing communities to register potentially catalytic dissent from the punishment practices of senior political units.