

2021

Judicial Restoration of Rights as an Auxiliary to the Pardon Power

JaneAnne Murray

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

JaneAnne Murray, *Judicial Restoration of Rights as an Auxiliary to the Pardon Power*, 33:5 328 (2021), available at https://scholarship.law.umn.edu/faculty_articles/742.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Judicial Restoration of Rights as an Auxiliary to the Pardon Power



**JANEANNE
MURRAY**

Professor of
Practice, University
of Minnesota Law
School*

I. Introduction

Much of the current conversation on presidential clemency power focuses on its potential to reduce mass incarceration through the commutation of prison sentences.¹ Given the quintupling of the federal prison population over the last three decades or so,² with tens of thousands of individuals currently serving unnecessarily and disproportionately long sentences,³ this emphasis is born of justifiable urgency. Of note, among President Obama's 1,927 acts of executive clemency, 1,715 were commutations.⁴

But as a large body of research demonstrates, a prison sentence is but one—and sometimes not even the worst—of the cascading consequences of a criminal conviction. Individuals with a criminal conviction face an ever-growing panoply of mandated restrictions and exclusions that touch every facet of their lives. These range from the intimate, such as limiting where and with whom the person can live; to the professional, including loss of licensure or debarment; to civic losses like voting rights; and, in the context of noncitizens, to potential banishment through deportation.⁵ Along with these formal restrictions is an array of informal consequences flowing from the stigma of conviction, which can similarly impact housing and employment opportunities, but can also—less visibly and more perniciously—create social isolation and psychological damage for the individual and their family, an effect with intergenerational implications.⁶ Criminal convictions have consequences for the individual's community, too—including over-policing, under-protection, and disenfranchisement.⁷ Moreover, as a recent study by the Brennan Center reveals, the cumulative economic impact of a criminal conviction—estimated at over \$370 billion annually—has widened national economic and racial inequalities.⁸

The number of people impacted by the collateral consequences of criminal convictions far exceeds the number of people currently behind bars. Tens of millions of people in the United States have been convicted of a crime.⁹ The federal system, in the last fifteen years alone, sentenced over 1.1 million defendants.¹⁰ Yet, unlike in state systems, there is no formalized procedure at the federal level for the sealing of criminal records or for the restoration of rights following a period of productive and arrest-free living.¹¹

Thus, “mass conviction,”¹² as Gabriel Chin has described this phenomenon—that one-third of the U.S. adult population has a criminal record—spotlights anew

the “pardon” aspect of the president's clemency power. A pardon, at its heart, restores an individual's citizenship rights and status. Although sometimes granted as an exoneration, a pardon has traditionally and historically been viewed as an act of forgiveness and an affirmation that the individual is rehabilitated and deserves to rejoin society as a fully participating member.¹³

Needless to say, no presidential administration could review, in an individualized manner, all pardon applications from even a fraction of the population with federal convictions.¹⁴ But our federal judicial system has a battalion of judges, supported by thousands of judicial law clerks, probation officers, prosecutors, and federal defenders, to implement a broad and systematic scheme to restore rights to those who can demonstrate their rehabilitation. Judges are uniquely situated to analyze these requests comprehensively. For one thing, in most cases, they will know the petitioner and their case well. They have the expertise and infrastructure to subject any assertions to a rigorous examination, including adversarial testing. Moreover, with recent changes wrought by Congress, the Supreme Court, and the Sentencing Commission, our federal court system has proved its capacity to process systematically and efficiently thousands of applications for a “second look” at previously imposed sentences, including an evaluation of the applicant's post-sentence conduct.¹⁵

It is time that Congress—through legislation like the proposed RE-ENTER Act or its equivalent¹⁶—harnesses the federal judicial system to restore rights to the vast number of people whose federal criminal convictions have consigned them to a second-class status.

Part II of this essay describes the underpinnings of the president's Article II pardon power, highlighting its goal of establishing a path to forgiveness and restoration—in Alexander Hamilton's words, to mitigate the impact of “unfortunate guilt.”¹⁷ Part III summarizes the current research on the far-reaching and devastating noncustodial consequences of criminal convictions, which impact not just the individuals with convictions, but their families and communities and, given the extent of “mass conviction,” the country at large. This research reveals the pressing need for a robust use of executive pardon power, or, better yet, something more far-reaching, to restore rights and status to those with criminal convictions. Part IV outlines how one scalable auxiliary to presidential pardon power is

Federal Sentencing Reporter, Vol. 33, No. 5, pp. 328–334, ISSN 1053-9867, electronic ISSN 1533-8363.
© 2021 Vera Institute of Justice. All rights reserved. Please direct 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/fsr.2021.33.5.328>.

a legislative scheme that harnesses the federal court system to conduct individualized reviews and adjudications of petitions for the restoration of rights. The essay's Conclusion states that in the digital age, where nothing can be truly forgotten, judicial certifications of rehabilitation, coupled with clear prohibitions on considering criminal records, are the most effective way to address the profound collateral consequences of criminal convictions.

II. The Pardon Power as Mitigating “Unfortunate Guilt”

Presidential pardon power—whether in the form at issue in this essay (a pardon that restores the individual to the civil status they enjoyed prior to conviction) or as amnesty, commutation, or reprieve—has its origins in English history as the “prerogative of mercy.”¹⁸ Despite egregious abuses, the pardon power not only survived through the colonial period but was incorporated into the U.S. Constitution with few limitations.¹⁹ Other than in cases of impeachment, non-federal crimes, and crimes not yet committed, the pardon power is “plenary,”²⁰ subject only to the discretion of the president.²¹

Why did our Founders decide to give this level of expansive power to one individual? The issue was hotly contested. One of the main objections was to its “unqualified” power, which necessarily made it applicable in cases of treason.²² These objections were addressed in part by the addition of an impeachment limitation, but also by reference to the humanistic principles underlying the pardon power. To condition the pardon power on the consent of the U.S. Senate would dilute its potential for mercy because “a single [person]” would be more receptive to “those motives which might plead for a mitigation of the rigor of the law.”²³ The plenary nature of the power was justified by the values of “humanity and good policy;” advice and consent procedures were not implemented, to ensure that the president empathized with the convicted person as a “fellow-creature” when considering clemency.²⁴ The pardon power would be “the ‘private . . . act’ of the executive magistrate,”²⁵ specifically designed to be a *human* decision unconstrained by law.

The Supreme Court's consideration of the pardon power echoes this conclusion: “The plain purpose of the broad power conferred by [the Constitution] was to allow plenary authority in the President to *‘forgive’* the convicted person.”²⁶ Granting and acceptance of a pardon are intended not to erase the underlying conduct, but to mitigate the consequences to a person whose guilt is “established by judicial proceedings.”²⁷ A pardon is “an act of grace,” granting relief from the prospective consequences of an offense, but not erasing the offense itself.²⁸ By its nature, the issuance of a pardon “carries an imputation of guilt; acceptance [of a pardon carries] a confession of it.”²⁹

But the American concept of the pardon power goes beyond mere mercy—it incorporates the idea that American justice may be unduly harsh. Even the most just criminal code incorporates “necessary severity” to effectuate its

goals; this, in turn, requires “easy access to exceptions in favor of unfortunate guilt.”³⁰ In the typical case, a pardon is fundamentally based not on a finding of innocence, a denial of the underlying illegal conduct, or even a rote examination of sentencing factors. Instead, it is based on the personal circumstances of the convicted person and their innate humanity despite “unfortunate guilt.”³¹

More specifically, the pardon is a recognition that laws, even when they are just in the aggregate, may lead to unjust outcomes in particular circumstances. While a pardon may be issued based on miscarriages of justice or actual innocence,³² the underlying theory is that a guilty person deserves relief from some or all of the consequences of their offense. Hamilton worried that justice would “wear a countenance too sanguinary and cruel” if certain legally correct but unduly harsh punishments could not be corrected.³³ When a legally correct but unjust conviction or sentence is imposed, whether through overcriminalization, overzealous prosecution, or other factors, a pardon “releases the offender from all disabilities imposed by the offence, and restores to [them] all [their] civil rights.”³⁴ It is a moral “signal that an offender has been rehabilitated” and is ready to rejoin society as a full member, rather than a legal signal that the conviction or sentence was incorrect.³⁵ The justice (or lack thereof) of continuing consequences, in the face of an offender's innate humanity and cultivated rehabilitation, is at the very core of pardon decisions.

III. Today's Need for a Robust Use of Pardon Power

The pardon power was justified in 1787, in part, by reference to the “necessary severity” of the criminal legal system (which at the time could be very brutal).³⁶ Today's era of mass conviction presents not only the “necessary severity” inherent in the enforcement of the criminal law, but a great deal of unnecessary and unforeseen severity as well. This disproportionate punishment—experienced predominantly by people of color³⁷—only enhances the need for, and the frequent exercise of, a broad pardon power or its equivalent.

As Margaret Love summed it up: “The collateral consequences of a criminal conviction linger long after the sentence imposed by the court has been served, depriving ex-offenders of the tools necessary to reestablish themselves as law-abiding and productive members of the free community . . . [with] no realistic hope of satisfying their debt to society, or regaining a place in it.”³⁸ The “unnecessary severity”³⁹ of these collateral consequences—which may be either formally imposed by the legal system or informally driven by stigma—have implications not just for the individual, but for their family, their community, and, ultimately, society as a whole.

At an individual and familial level, collateral consequences are often “the most severe and long-lasting effect of conviction.”⁴⁰ Formal consequences—including restrictions on where and with whom one can live, the loss of licenses to drive or practice a trade, the loss of the right to vote, deportation, and more—have been compared to “civil death.”⁴¹ Informal consequences, including loss of

opportunities for employment and housing, constitute a permanent “badge of infamy,” yielding deleterious effects on physical and mental health.⁴² The impact on family members can also be devastating, with “parental incarceration putt[ing] children at a higher risk for poverty, instability, and various mental health problems.”⁴³

Concentrations of individuals with criminal convictions can have deep community effects too. Predictive policing technology utilizes criminal record data, resulting in certain neighborhoods being over-policed.⁴⁴ Research also shows that over-policed communities are simultaneously under-protected.⁴⁵ These individuals’ loss of the right to vote—compounded by census counting of their imprisoned community members in their counties of incarceration—results in an outsize level of disenfranchisement.⁴⁶

But the tipping point, as our nation embarks on “a whole-of-government equity agenda” to address historic and systemic inequality,⁴⁷ must be the economic effect. In economic terms, the cost of criminal convictions in the form of lost wages rises into the hundreds of billions.⁴⁸ Annual earnings of those who serve prison sentences fall by over one-half.⁴⁹ While those convicted but not imprisoned suffer smaller losses in earnings, the aggregate economic loss is even higher because more people experience involvement in the criminal legal system at a low level.⁵⁰ Even those convicted of misdemeanor offenses see their income decrease by 16%.⁵¹ The economic loss from misdemeanors alone is \$240 billion annually, and when one factors in felonies, the figure rises to \$370 billion.⁵² These numbers represent more than mere lost aggregate economic potential—lost wages translate into an inability to spend, save, or invest that has a generational impact, holding back not only the convicted person but her family as well.⁵³

Layered over all of these problems is the criminal legal system’s disparate impact on racial minorities and those in poverty. Black and Latinx individuals represent more than half of those sent to prison (and, by extension, more than half of those facing the most severe economic and other collateral consequences).⁵⁴ But the problem of disparate outcomes is not explained by disparities in the pipeline to prison; Black and Latinx people see greater gaps in lifetime earnings based on their past imprisonment than socioeconomically similar whites.⁵⁵ Racial minorities are both more likely to be swept into the system in the first place and to suffer more severe consequences once institutionalized.⁵⁶

Over 70 million Americans have a criminal record at some level.⁵⁷ Some estimates place the number higher still—as early as 2014, the FBI master criminal database contained 77.7 million names and counting, with the number rising by 10,000 to 12,000 each day.⁵⁸ Being charged with a misdemeanor is roughly as common as attending a four-year college. These millions of individuals swept up in the system—including the Brennan Center’s estimate of almost 20 million with a felony conviction and 45 million convicted of misdemeanor offenses—suffer ongoing consequences beyond fines, probation, and jail or prison time.⁵⁹

IV. Drafting Judges to “Pardon” in the Era of Mass Conviction

Our federal judiciary is uniquely situated to act as a large-scale auxiliary to the president’s pardon power. It has the capacity, infrastructure, and expertise to implement a program to restore rights to the hundreds of thousands of law-abiding and productive individuals living with the consequences of federal convictions. It is high time that Congress harnessed this capability in a formalized legislative scheme.

Simply from a personnel standpoint, there are 677 district court judges, supported by 541 magistrate judges, and thousands of judicial clerks, probation officers, prosecutors, and defense lawyers.⁶⁰ By contrast, as the Office of the Inspector General reported, President Obama’s administration deployed what it could—the relatively skeletal staff of twenty-two in the Office of the Pardon Attorney, supplemented by volunteer part-time lawyers from other Department of Justice units and ten full-time lawyers detailed in April 2016—to make recommendations on approximately 13,000 petitions, with some taking the files home with them on weekends.⁶¹ It goes without saying that 13,000 is a drop in the ocean of potential pardon applications, which are arguably more complex than commutation petitions. It is not hard to commute a life sentence today when, under today’s laws, such a sentence would be significantly lower. It is quite another to make the determination that someone who has not been under any kind of criminal supervision for years is fully rehabilitated.

Moreover, the kind of systematic, in-depth, individualized analysis required by this process is *precisely what judges do*. Judge John Gleeson’s 2016 decision in *United States v. Doe*,⁶² in which he devised a unique mechanism to certify an individual’s post-sentence rehabilitation, is a case in point.

Doe, a licensed nurse, moved to expunge a thirteen-year-old fraud conviction unrelated to her employment as a nurse that was inhibiting her from obtaining work in her field. Her post-sentence employment experience was emblematic of so many with federal convictions. Because her conviction appeared in databases and on her nursing license, numerous employers refused to hire her or rescinded job offers shortly after they had been made.⁶³ Although her “probation file reveal[ed] a woman who very much wanted to work,” she was forced to make ends meet by running a house-cleaning business and relying on the support of family members.⁶⁴ She lived day to day, unable to invest in her own and her children’s future.⁶⁵

Denying her motion to expunge because her situation did not amount to “extreme circumstances” warranting that relief, the judge noted that, in any event, expungement would not have given her the relief she sought, as the conviction would remain on her nursing license and on private databases.⁶⁶ Indeed, this is why, in the digital age, expungement or record sealing (the so-called “forgetting model” of addressing collateral consequences)⁶⁷ is not the optimal solution to the adverse effects of a criminal conviction, in the absence of robust regulations to prevent any

reliance on such conviction.⁶⁸ (Months later, in another of Judge Gleeson's cases, the Second Circuit ruled that federal judges do not have the power to expunge an individual's criminal conviction.)⁶⁹

Instead, Judge Gleeson granted Doe a "Federal Certificate of Rehabilitation," a remedy he modeled on the well-established New York State system of offering a Certificate of Relief from Disabilities (available on the date of sentencing to someone with only one felony) and a Certificate of Good Conduct (available to people with more than one felony after a period of good conduct). Critically, both operate to "create a legally enforceable presumption of rehabilitation that 'shall not cause automatic forfeiture of any license . . . right or privilege' under state law, such as the right to vote, subject to some exceptions."⁷⁰ Doe's federal certificate did not immediately grant her any legal relief. But because it had been signed by the Chief Probation Officer of the district, it would carry a legal presumption that the state agency tasked with issuing these certificates would grant her one.⁷¹

The certificate of rehabilitation operationalizes the "forgiveness model"⁷² of remedying collateral consequences of convictions. Given the focus of this essay, we could call it the *pardon model*. It is a public affirmation that the criminal legal system that accused, convicted, and punished an individual now believes that they deserve the right to move on and be fully embraced as co-equal citizens: "[T]he same court that held Doe accountable for her criminal acts has now concluded after careful scrutiny . . . that she be welcomed to participate in society in the ways the rest of us do."⁷³

As Judge Gleeson made clear in the decision, this was a labor-intensive ("painstaking")⁷⁴ process:

Most prospective employers do not have the time or resources to gain a comprehensive understanding of who Doe is, and then to figure out what weight, if any, her conviction should play in the hiring process. So I have done that for them. *I have reviewed each page of Doe's trial transcript, presentence report, probation reports, deposition transcript, and other documents she and the government provided to me for a holistic view of her character and competency today.* I find that there is no relationship between Doe's conviction and her fitness to be a nurse.⁷⁵

The formal process to evaluate an application for a presidential pardon is no less time-consuming.⁷⁶ But a judicial restoration-of-rights procedure has multiple advantages over the pardon process. First, and most obviously, as noted above, drafting the entire federal judiciary in this enterprise creates the potential for relief to hundreds of thousands of people over time. Indeed, as in *Doe*, many judges will already be intimately familiar with the petitioner and their prior criminal conduct, and thus have a head start in the decision-making process.⁷⁷ In addition, the fact-finding process in open court is more transparent and subject to adversarial testing, thus encouraging and leading

to greater accuracy. It also makes the entire process more accountable for all concerned, including victims. Moreover, this open judicial process will involve deadlines, providing a level of certainty and security that current pardon applicants (some with applications languishing for years) have never experienced.⁷⁸

Another significant advantage the federal system has over the pardon process is that our federal courts are well equipped to systematize the adjudication of petitions, as they did in recent years with tens of thousands of petitions for sentencing reductions under changes made by Congress, the Supreme Court, and the Sentencing Commission. As Supreme Court Fellow Caryn Devins concluded in her rich empirical study on the implementation of retroactive federal drug guideline changes, stakeholders reported that it was, "for the most part, smooth and orderly," with judges often working with "probation officers and representatives from the U.S. Attorney's Office and federal defender organizations in order to create expedited sentencing processes."⁷⁹ A restoration-of-rights process is similarly well suited to systematization, potentially with committees of probation officers, prosecutors, and defense lawyers making recommendations to the district judges, thus creating a streamlined pathway to relief for the most deserving of individuals, and identifying the petitions that are premature or need to be litigated.⁸⁰

Although there is currently no procedure for the restoration of rights at the federal level (outside the pardon process), a bipartisan bill was introduced in the last congressional session—the Recognizing Education, Employment, New Skills, and Treatment to Enable Reintegration (RE-ENTER) Act—which would allow federal judges to issue a "Certificate of Rehabilitation" to acknowledge an eligible offender who has successfully reintegrated into society.⁸¹ A full analysis of this bill is outside the scope of this essay, but in short, the proposed legislation aims to provide recipients of these certificates with a tool that removes barriers to housing and employment.⁸² Other proposals for relief have been presented by the Uniform Law Commission and by the American Law Institute through its amended Model Penal Code.⁸³ There is no shortage of proposals and guidance.⁸⁴

Importantly, any legislative scheme to restore rights will not supplant the pardon process. Rather, it is, in a sense, an advance team. It can analyze far more cases than the Department of Justice can do, and dispatch undeserving cases quickly. It can grant relief that might suffice for the party in question, without the need for any additional relief conferred by a pardon (such as protection from deportation). Where a judge refuses relief, the litigated position is now joined, and the issues simplified for the pardon decision-makers. It makes the pardon process a backstop (as was intended) rather than the first port of call.⁸⁵

V. Conclusion

In announcing his comprehensive governmental approach to "advancing equity for all, including people of color and

others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality,” President Biden acknowledged the deep and interlocking forces that undermine the “equal opportunity” that is the “bedrock of our democracy.”⁸⁶ As the Brennan Center’s recent report on the devastating long-term economic consequences of criminal convictions, particularly for racial minorities, has spotlighted, one of the drivers of inequity is post-sentence collateral consequences.

Neither clemency nor expungement, however, is the answer. The task of restoring rights to the millions affected is too great for one executive. Moreover, in the digital age, sealing of criminal records is an illusory fix because it is the rare instance where *some* evidence of an individual’s criminal history cannot be found online.⁸⁷ Rather, the most effective way is a formalized system whereby someone with a prior conviction can obtain an affirmative certification of their rehabilitation and fitness to rejoin society. The states have been implementing these schemes for decades. It is time for the federal system to implement one too.⁸⁸ Such certificates must be coupled with clear prohibitions on considering criminal records in all the areas where these convictions relegate people to a second-class status.

Finally, a welcome byproduct of entrusting the role of restoring rights to judges is that they—and other practitioners in the criminal legal system—get to see sentenced individuals in a fresh and positive light, in their newly constituted productive lives. All of us working in the criminal legal system need constant reminders that human beings should not be defined by their worst decisions. Despite their transgressions, defendants in our criminal legal system have agency and can change, absorbing lessons learned and thereby adapting to be better citizens. We too, as a society, can change—similarly absorbing lessons learned from experience and social science, so that we can, as a nation, fulfill our Founders’ vision of an enlightened polity that recognizes “the rigor[s] of [its] law” and avoids a justice system that is “too sanguinary and cruel.”⁸⁹

Notes

* The author thanks Margaret Love for her inspiration and comments, and Thomas Huling for excellent research assistance.

- 1 See, e.g., Nikki Trautman Baszynski, *Biden Can Help End the Federal Incarceration Crisis with the Stroke of a Pen*, The Appeal (Jan. 26, 2021), <https://theappeal.org/the-point/biden-can-help-end-the-federal-incarceration-crisis-with-the-stroke-of-a-pen/>; *Biden: Bring 25,000 People Home Through Clemency*, ACLU, <https://action.aclu.org/petition/biden-bring-25000-people-home-through-clemency> (last visited May 10, 2021).
- 2 See *Growth in Federal Prison System Exceeds States*, Pew, Jan. 22, 2015, <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/01/growth-in-federal-prison-system-exceeds-states>.
- 3 JaneAnne Murray, *Ameliorating the Federal Trial Penalty Through a Systematic Judicial “Second Look” Procedure*, 31 Fed. Sent’g Rep. 279, 279 (2019).
- 4 U.S. Dep’t of Justice, *Clemency Statistics*, <https://www.justice.gov/pardon/clemency-statistics> (last visited May 10, 2021).

- 5 See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Penn. L. Rev. 1789, 1799–03 (2012); National Inventory of Collateral Consequences of Conviction (state-by-state inventory of collateral consequences, currently documenting almost 45,000 individual legal and regulatory restrictions relating to convictions under specific criminal statutes), <https://niccc.nationalreentryresourcecenter.org/> (last visited May 10, 2021).
- 6 See, e.g., Wayne A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1105–09 (2013).
- 7 See, e.g., Jenn Rolnick Borchetta, *Curbing Collateral Punishment in the Big Data Age: How Lawyers and Advocates Can Use Criminal Record Sealing Statutes to Protect Privacy and the Presumption of Innocence*, 98 B.U. L. Rev. 915, 921 (2018) (pointing out that police data analytics, including arrest and conviction data, “becomes partly self-perpetuating: Officers police certain people and places more heavily because they policed those people and places more heavily before”); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. Rev. 1, 12 (2019) (noting that uncabined police discretion “has resulted in both over- and under-enforcement, typically at the expense of racial minorities and other marginalized groups” and that “[o]ften it is the very same residents who report feeling both underprotected and overpoliced”); Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777, 778 (2002) (describing how felony disenfranchisement has impacted presidential and Senate election outcomes).
- 8 See Terry-Ann Craigie, Ames Grawet & Cameron Kimble, Brennan Ctr. for Just., *Conviction, Imprisonment, and Lost Earning: How Involvement with the Criminal Justice System Deepens Inequality* 7 (Sept. 15, 2020), https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf.
- 9 *Id.* at 6 (noting that over 70 million people in the United States have a criminal record and most of those have actual convictions: 7.7 million were imprisoned for a felony conviction; 12.1 million have been convicted of a felony without being imprisoned for it; and about 45 million have been convicted of at least one misdemeanor).
- 10 Calculated by adding the numbers of sentenced cases set forth in each annual Sourcebook of Federal Sentencing Statistics, <https://www.ussc.gov/research/sourcebook/archive>.
- 11 See Margaret Colgate Love & David Schluskel, *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities after Arrest or Conviction*, Collateral Consequences Res. Ctr. (Sept. 2020), <https://ccresourcecenter.org/the-many-roads-to-reintegration/>.
- 12 Chin, *supra* note 5, at 1790.
- 13 See generally Margaret Colgate Love, *Reviving the Benign Prerogative of Pardonning*, 32 Litig. 25 (2006); Part I *infra*.
- 14 See Office of the Inspector General, *Review of the Department’s Clemency Initiative 41* (Aug. 2018) (“the Department [of Justice] had made recommendations to the White House on 13,892 petitions, resulting in 1,696 inmates receiving clemency”), <https://oig.justice.gov/reports/2018/e1804.pdf>.
- 15 See, e.g., Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed. Cts. L. Rev. 39 (2018).
- 16 Gabriel J. Chin & David Schluskel, *Federal Certificate Offers New Hope for Americans in ‘Internal Exile’*, The Crime Report, Oct. 28, 2020, <https://thecrimereport.org/2020/10/28/federal-certificate-offers-new-hope-for-americans-in-internal-exile/>.
- 17 The Federalist No. 74 (Alexander Hamilton).
- 18 See *Ex parte Garland*, 71 U.S. 333, 341 (1866).

- 19 See U.S. Const. Art. II, Sec. 2 (exempting only “cases of impeachment”); *Schick v. Reed*, 419 U.S. 256, 263 (1974).
- 20 *Schick*, 419 U.S. at 266.
- 21 See *Ex Parte Garland*, 71 U.S. at 380 (“power of the President [to pardon] is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”).
- 22 See Samuel E. Schoenburg, Note, *Clemency, War Powers, and Guantánamo*, 91 N.Y.U. L. REV. 917, 935 (2016).
- 23 The Federalist No. 74 (Alexander Hamilton).
- 24 *Id.*
- 25 *Burdick v. United States*, 236 U.S. 79, 90 (1915).
- 26 *Shick*, 419 U.S. at 266 (emphasis added).
- 27 *Knote v. United States*, 95 U.S. 149, 154 (1877).
- 28 *Id.* at 153–54.
- 29 *Burdick*, 236 U.S. at 94.
- 30 The Federalist No. 74 (Alexander Hamilton).
- 31 *Id.*
- 32 *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (“History shows that the traditional remedy for claims of innocence based on new evidence . . . has been executive clemency”).
- 33 The Federalist No. 74 (Alexander Hamilton).
- 34 *Knote*, 95 U.S. at 153.
- 35 See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705, 1720 (2003).
- 36 The Federalist No. 74 (Alexander Hamilton); see generally George Lardner & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 13 Fed. Sent’g Rep. 212 (2004).
- 37 See Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 91 (Jeremy Travis et al. eds., 2014) (“Higher rates of black and Hispanic than white imprisonment . . . are partly caused and substantially exacerbated by the mandatory minimum sentence, three strikes, truth-in-sentencing, life without possibility of parole, and similar laws enacted in the 1980s and 1990s. All of these laws mandate especially severe—in recent decades unprecedentedly severe—punishments for offenses for which black and Hispanic people often are disproportionately arrested and convicted.”)
- 38 Love, *supra* note 35, at 1705.
- 39 The Federalist No. 74 (Alexander Hamilton).
- 40 Chin, *supra* note 5, at 1791.
- 41 *Id.* at 1790.
- 42 Logan, *supra* note 6, at 1106.
- 43 *Id.* at 1108–09; see also Damir S. Utržan & Julianna Carlson, *Children of Incarcerated Caregivers, Parental Incarceration and Children: A Review of Recent Findings* 5 (2017), <http://cicmn.org/wp-content/uploads/2016/06/CIC-Final-2017-Report-PDF.pdf>.
- 44 Borchetta, *supra* note 7, at 921.
- 45 Ponomarenko, *supra* note 7, at 12.
- 46 *Id.*
- 47 The White House, *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, Jan. 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.
- 48 Craigie et al., *supra* note 8, at 7.
- 49 *Id.* at 6.
- 50 *Id.*
- 51 *Id.* at 7.
- 52 *Id.*
- 53 See Jaboa Lake, Ctr. for Am. Progress, *Criminal Records Create Cycles of Multigenerational Poverty* (Apr. 15, 2020), <https://www.americanprogress.org/issues/poverty/news/2020/04/15/483248/criminal-records-create-cycles-multi-generational-poverty/#:~:text=A%20person's%20criminal%20record%20affects,with%20additional%20supports%20and%20needs.&text=Families%20of%20color%20and%20families,income%20and%20lowers%20poverty%20rates.>
- 54 Craigie et al., *supra* note 8, at 10–11.
- 55 *Id.* at 19.
- 56 Nat’l Research Council, *supra* note 37, at 91–100.
- 57 Craigie et al., *supra* note 8, at 6.
- 58 Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall Street J. (Aug. 18, 2014), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.
- 59 Craigie et al., *supra* note 8, at 6.
- 60 See United States Courts, *Just the Facts: Magistrate Judges Reach the Half Century Mark* (Feb. 20, 2019), <https://www.uscourts.gov/news/2019/02/20/just-facts-magistrate-judges-reach-half-century-mark#:~:text=There%20are%20541%20full%2Dtime,with%20four%2Dyear%20terms.>
- 61 See Office of the Inspector General, *Review of the Department’s Clemency Initiative* 15, 41 (Aug. 2018), <https://oig.justice.gov/reports/2018/e1804.pdf>; Sari Horwitz, *Lack of Resources, Bureaucratic Tangles Have Bugged Down Obama’s Clemency Efforts*, Wash. Post (May 6, 2016), https://www.washingtonpost.com/politics/courts_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d_story.html (describing how Deputy Attorney General Sally Yates took bags of clemency files home with her on the weekends to review).
- 62 168 F.Supp.3d 427 (E.D.N.Y. 2016).
- 63 *Id.* at 434–36.
- 64 *Id.* at 435, 436.
- 65 *Id.* at 437.
- 66 *Id.* at 441.
- 67 *Id.* at 442; see also Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 759 (2011) (noting that an optimal program to address collateral consequences “must acknowledge and forgive the crime rather than attempt to conceal and deny it, if only because modern technology makes it hard to have confidence in expungement and sealing schemes”); Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. Rev. 1701, 1746 (2010) (describing the “database of ruin,” which “is the worldwide collection of all of the facts held by third parties that can be used to cause privacy-related harm to almost every member of society”).
- 68 Love, *supra* note 67, at 232 (singling out Indiana “as having one of the most creative features aimed at regulating consideration of criminal record in employment and licensing, limiting the kinds of records that will result in disqualification and the duration of restrictions, and imposing procedural protections intended to discourage arbitrary decision making”).
- 69 *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016).
- 70 168 F.Supp.3d at 443.
- 71 *Id.* at 444; N.Y. Correct. Law § 703(7).
- 72 168 F.Supp.3d at 442.
- 73 168 F.Supp.3d at 445.
- 74 *Id.* at 429.
- 75 *Id.* at 441–42 (emphasis added).

⁷⁶ See Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 Wm & Mary L. Rev., 387, 431 (2017) (noting that the pardon process can take years).

⁷⁷ Cf. 168 F.Supp.3d at 428–29 (“I have weighed the equities in this case, which are grounded in my understanding of Doe’s *429 criminal conviction and sentence; I was the judge who presided over her jury trial and imposed punishment.”).

⁷⁸ See Barkow & Osler, *supra* note 76.

⁷⁹ See Davis, *supra* note 15, at 71, 74.

⁸⁰ *Id.* at 72 (noting the use of committees of prosecutors, defenders, and probation officers in the implementation of Amendment 782).

⁸¹ See generally Chin & Schlüssel, *supra* note 16.

⁸² *Id.*

⁸³ See generally Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 Marq. L. Rev. 233, 235–36 (2018).

⁸⁴ *Id.* at 236.

⁸⁵ See Neil Eggleston, *President Obama Grants 153 Commutations and 78 Pardons to Individuals Deserving of a Second*

Chance, The White House Blog (Dec. 19, 2016) (“[W]e must remember that clemency is a tool of last resort and that only Congress can achieve the broader reforms needed to ensure over the long run that our criminal justice system operates more fairly and effectively in the service of public safety.”); 3 The Attorney General’s Survey of Release Procedures: Pardon 295, U.S. Dep’t of Justice (1939) (pardon power is “the safety valve by which harsh, unjust, or unpopular results of formal rules could be corrected” and “the tool by which many of the most important reforms in the substantive criminal law have been introduced”); see also *Herrera*, 506 U.S. at 415 (“Executive clemency has provided the ‘fail safe’ in our criminal justice system”).

⁸⁶ See *supra* note 47.

⁸⁷ See Ohm, *supra* note 67, at 1748.

⁸⁸ Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory”).

⁸⁹ The Federalist No. 74 (Alexander Hamilton).