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## Post-Trial Plea Bargaining in Capital Cases: Using Conditional Clemency to Remove Weak Cases from Death Row

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# Post-Trial Plea Bargaining in Capital Cases: Using Conditional Clemency to Remove Weak Cases from Death Row

Adam M. Gershowitz\*

## *Abstract*

*Plea bargaining accounts for over ninety percent of criminal convictions and it dominates the American criminal justice system. Yet, once a defendant is convicted, bargaining almost completely disappears from the system. Even though years of litigation are on the horizon, there is nearly no bargaining in the appellate and habeas corpus process. There are two reasons for this. First, prosecutors and courts typically lack the power to alter a sentence that has already been imposed. Second, even if prosecutors had the authority to negotiate following a conviction, they would have little incentive to do so. Affirmance rates in ordinary criminal cases approach ninety-five percent in many jurisdictions. Because the government has little incentive to bargain, defendants slowly churn their way through the formal appellate and habeas process.*

*The lack of post-trial bargaining makes perfect sense in ordinary criminal cases. It does not make as much sense in death-penalty cases, however. Death sentences are followed by decades of litigation. And, more importantly, challenges to death sentences are often successful. Capital cases are reversed at alarming rates, and re-trials typically follow the reversals. Faced with years of appellate litigation that it might not win, and the prospect of a re-trial and another slew of appeals, the State should have an incentive to bargain in its weakest cases.*

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*And the convicted individual—faced with a death sentence—likely has an even stronger incentive to bargain.*

*This Article argues that governors should not simply think about clemency as a tool to prevent morally questionable executions. Rather, governors should regularly exercise their commutation power as a form of plea bargaining to clear weak cases out of the system. In exchange for inmates foregoing further appeals, governors could commute death sentences to terms of imprisonment. Clemency bargaining fits squarely within governors' unreviewable commutation power and would save tens of millions of dollars by ending decades of unruly litigation.*

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### *I. Introduction*

There are roughly 3,000 inmates on death row in the United States.<sup>1</sup> The number has declined slightly in recent

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1. See *Size of Death Row by Year*, DEATH PENALTY INFO. CTR. INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year> (last visited Sept. 7, 2016) (tracking the United States death row population from 1968–2016) (on file with the Washington and Lee Law Review).

years,<sup>2</sup> but by and large the size of death row has remained the same for two decades.<sup>3</sup> The reason for the backlog is obvious: juries sentence defendants to death, but executions are not carried out until, on average, fifteen years later.<sup>4</sup> Furthermore, executions are the exception. Inmates primarily leave death row not because they were executed, but because of successful appeals.<sup>5</sup> Indeed, the appellate process is so long and burdensome that hundreds of death-row inmates have died of natural causes before being executed.<sup>6</sup> Unlike during the first half of the twentieth century,<sup>7</sup> inmates rarely leave death row because a governor or pardon board has studied the case and decided to grant clemency. The numbers are staggering. Since the reinstatement of capital punishment in 1976, over 3,000 death sentences have been reversed by courts,<sup>8</sup> nearly 1,500 people have been executed,<sup>9</sup> and more than 400 inmates have died while awaiting their executions. Despite these staggering figures, there

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2. At its height, there were almost 3,600 people on death row in the United States. *Id.*

3. *Id.*

4. For instance, the average time from death sentence to execution for the inmates executed in 2013 was 186 months—over fifteen and a half years. See TRACEY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013: Statistical Tables, Tbl. 10, 14 (Dec. 2014) (charting by year the average time between sentencing and execution). In 2011, it was sixteen and a half years. *Id.*

5. See *id.* at 19 (indicating that as of 2013, 194 inmates had their convictions or sentences reversed in contrast to 1,359 executions).

6. See BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT—2009 Tbl. 20 (Dec. 2010) [hereinafter CAPITAL PUNISHMENT STATISTICS] (identifying 416 people who left death row because of a non-execution death from 1973 to 2009).

7. See Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 266 (1990–91) (noting clemency in one of five capital cases).

8. See CAPITAL PUNISHMENT STATISTICS, *supra* note 6 (detailing death row statistics).

9. See *Number of Executions Since 1976*, DEATH PENALTY INFO. CTR., INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited Sept. 7, 2016) (referencing a high of ninety-eight people executed in 1999) (on file with the Washington and Lee Law Review).

have been less than seventy individualized grants<sup>10</sup> of clemency.<sup>11</sup>

A system in which the government spends decades fighting to protect thousands of death sentences to see only a fraction of them carried out is inefficient. And that inefficiency is very expensive. States are spending millions of dollars litigating capital cases that do not end in executions.<sup>12</sup> There are, of course, approaches that could lead to a more efficient capital punishment system. Courts could affirm more death sentences. Judges could process appeals and habeas petitions more quickly.<sup>13</sup> States could abolish capital punishment altogether and allow death rows to empty out through a combination of a few executions, some reversals, and inmates dying of natural causes.<sup>14</sup> Similarly, juries could simply stop sentencing inmates to death. Or

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10. See Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 4 (2014) [hereinafter *Rethinking the Timing*] (advocating for a “threshold clemency determination” that occurs earlier in the criminal justice process).

11. There have been a handful of mass commutations in which governors emptied death row as they exited office. See Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 963 (2015) (“[C]lemency activity for death row inmates—never terribly notable since 1977—has remained flat, at best, or trended down slightly, save for explainable ‘spikes’ associated with mass clemency activity.”).

12. See Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required To Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 890–91 (2007) [hereinafter *Pay Now, Execute Later*] (discussing estimates that “large states such as California and Florida could save tens of millions of dollars per year by eliminating capital punishment”); see also Carol Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL. F. 117, 121 (discussing how New Jersey abandoned the death penalty in part because they were not actually executing anyone on death row and were spending a considerable amount of money on appeals).

13. This was part of the impetus for the Antiterrorism and Effective Death Penalty Act. See Lyn Entzeroth, *Federal Habeas Review of Death Sentences, Where Are We Now?: A Review of Wiggins v. Smith and Miller-El v. Cockrell*, 39 TULSA L. REV. 49, 52 (2003) (quoting President Clinton saying “[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served”).

14. This has happened in some states. Between 2005 and 2012, five states abolished the death penalty. See Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 408 (2013) (noting that the cost of the death penalty plays “a critical role in the decision to abandon capital punishment as the ultimate sanction”).

prosecutors could choose to seek the death penalty in only the rarest of cases.<sup>15</sup> Those approaches, however, require big changes by a huge number of actors in the criminal justice system. It is difficult to affect meaningful change when success depends on unifying the behavior of thousands of judges, prosecutors, legislators, or jurors.

This Article does not take a position on whether the death penalty is good or bad public policy. Nor do I suggest that we should have a larger or smaller number of executions. Instead, I take as a starting point the premise that we will have the same number of executions that the United States has carried out over the last few decades.

My argument is that we should have a better process for eliminating costly and legally debatable death sentences from the system earlier in the process. Prosecutors and defense lawyers should not spend fifteen years and thousands of work hours fighting over death sentences that are unlikely to be carried out. Instead, governors<sup>16</sup> should utilize their unique commutation power to remove weak cases—those that will eat up years of resources but probably not end in executions—from the criminal

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15. To a certain extent this is already happening. The number of new death sentences is down dramatically in the last few years. In 2013, there were eighty-two death sentences in the United States. In 2014, the number fell to seventy-three. And in 2015, it was only forty-nine. See *Death Sentences in the United States From 1977 by State and Year*, DEATH PENALTY INFO. CTR., INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited June 16, 2016) (tracking the decline in death sentences per year) (on file with the Washington and Lee Law Review). Of course, even those low numbers still exceeded the number of executions in each year. See *Number of Executions Since 1976*, *supra* note 9 (reporting thirty-nine executions in 2013, thirty-five in 2014, and twenty-eight in 2015).

16. Typically, the governor has the sole authority to grant clemency. In a few states, however, the pardon board has some or all of the authority. For a summary, see generally Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 787 (2013) (arguing that state clemency procedures “must satisfy minimal procedural due process”). The main thesis of this article—that governors should use clemency power to plea bargain—applies with equal force to pardon boards. Indeed, because they are more politically insulated, the argument should apply with even greater force to pardon boards.

justice system. And governors should utilize that power early in the appellate process.<sup>17</sup>

This Article proposes that governors engage in post-trial plea bargaining with death-row inmates. In the weakest cases—those where it seems likely that a conviction or death sentence might be reversed on direct appeal or habeas corpus—governors should offer a deal to the inmate. If the inmate drops all of his appeals and agrees not to file future habeas petitions, his death sentence will be commuted to life without parole or some other term of imprisonment. In the same way that prosecutors plead out weak cases before trial, governors should plead out weak capital cases during the appellate and habeas process.

The use of gubernatorial plea bargaining fits squarely in the American criminal justice system. Plea bargaining has become so important that the Supreme Court has recognized that it is no longer just an “adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>18</sup> Over ninety percent of criminal convictions result from plea bargaining.<sup>19</sup> Yet, there is virtually no post-trial plea bargaining in the American criminal justice system.<sup>20</sup> There are likely two reasons for this. First, prosecutors and courts likely lack the power to alter a sentence that has already been imposed.<sup>21</sup> Second, even if prosecutors had the

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17. Although pardons and commutations typically come on the eve of executions, there is no requirement that governors leave them until after the end of the appellate process. *See, e.g., In re Anderson*, 92 P.2d 1020, 1021 (Cal. Ct. App. 1939) (noting that California governors can grant clemency any time after conviction and even before a sentence is handed down); COLO. REV. STAT. 16-17-101 (2015) (authorizing capital commutations “when [the governor] deems it proper”).

18. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

19. *See* DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (compiling data that tracks how many criminal defendants per year received a conviction by agreeing to a plea bargain).

20. *See* Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 28 (2006) (“In the grand scheme of things, however, habeas settlements are very rare.”).

21. *See id.* at 37 (“The final—though important—explanation for the low prevalence of habeas settlements is that few state courts and no federal courts have the power to amend a sentence after sentencing.”). Professor Malani suggests that Congress amend Federal Rule of Criminal Procedure 35 “to permit

authority to negotiate following a conviction, they would have little incentive to do so. Affirmance rates in ordinary criminal cases are extremely high.<sup>22</sup> For example, in Harris County, Texas—the so-called capital of capital punishment<sup>23</sup>—the district attorney’s office has an overall affirmance rate in excess of ninety-five percent.<sup>24</sup> With such high affirmance rates, the government has little incentive to bargain after trial. This explains why plea bargaining is a pre-trial phenomenon and why defendants instead spend the post-trial process slowly churning their way through the formal appellate and habeas process rather than negotiating deals.

The same logic, however, should not hold for capital cases. Death sentences are followed by decades of litigation.<sup>25</sup> And that litigation often results in reversal of convictions and death sentences. In a path-breaking study, Professor James Liebman and his colleagues documented that between 1973 and 1995, sixty-eight percent of death sentences were reversed on direct appeal or habeas review.<sup>26</sup> Of course, as Professor Liebman and

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courts, upon the government’s motion, to amend a prisoner’s sentence if she drops her habeas claims, regardless of whether the modified sentence was within the statutory or guideline range for the prisoner’s offense.” *Id.* at 48. For another interesting bargaining proposal—this one on a systemic basis—see James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 332–34 (2002) (suggesting the exchange of procedural safeguards, such as videotaped confessions and more robust direct review, for foregoing some state and federal habeas review).

22. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291, 320–21 (2006) (noting that “reversals in criminal cases are quite rare”).

23. See Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L & CRIMINOLOGY 717, 718 (2009) (exploring the death penalty process in Harris County, Texas, and comparing it to other counties across the United States).

24. *Frequently Asked Questions*, OFF. OF THE DISTRICT ATT’Y, HARRIS COUNTY, TEX., <http://app.dao.hctx.net/FAQs/2/Appellate.aspx> (last visited Sept. 7, 2016) (describing other appellate avenues that are available to defendants in the event that their convictions are affirmed) (on file with the Washington and Lee Law Review).

25. See *supra* note 4 and accompanying text (describing how executions are not carried out until, on average, fifteen years after the initial sentencing).

26. See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* 422–28 (2002) (explaining that “the death penalty in this country is a broken system



other scholars have recognized in subsequent work, reversals have become less frequent in recent years.<sup>27</sup> Nevertheless, it remains quite common for capital convictions and death sentences to be reversed.<sup>28</sup>

It also almost goes without saying that capital cases are much more expensive than ordinary cases at the post-trial stages.<sup>29</sup> Unlike ordinary defendants, many death-row inmates are represented by counsel in the habeas process.<sup>30</sup> The death penalty bar specializes in capital litigation and files detailed appellate briefs that require considerable time and attention from the attorney general's office as well as judges and clerks.

We therefore know that (1) capital cases are much more expensive than ordinary cases and (2) states lose a considerable number of death penalty cases during the appellate and habeas process.<sup>31</sup> Now add two other facts: (3) states are struggling

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that is of rising concern to many Americans”).

27. See James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 337 n.415 (2011) (“Given Congress’s adoption of legislation in 1996 reducing federal prisoners’ access to federal habeas corpus review, it is likely that the reversal rate in federal court has declined recently.”); NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 61 (2007) (reviewing 267 capital cases filed between 2000 and 2002 and finding that twelve percent received habeas relief in federal district court).

28. See Jordan M. Steiker, *Peculiar Times for a Peculiar Institution*, 48 TULSA L. REV. 357, 365 (2012) (explaining that “reversal rates in capital cases reached astonishing levels in the first two decades following [*Furman v. Georgia*, 408 U.S. 238 (1972)] and remain significant (albeit diminished) today”).

29. See Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 544–45 (2013) (discussing studies indicating that, in Maryland, capital appeals cost five times more than non-capital cases, and that in Kansas, capital appeals cost twenty times more than non-capital appeals).

30. See KING ET AL., *supra* note 27, at 62 (2007) (noting that “all but seven percent of death row filers have counsel to assist them in seeking federal habeas relief, while all but seven percent of non-capital prisoners proceed pro se”).

31. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 65 (1997) (explaining that death-row inmates “often have very high-quality volunteer representation on habeas corpus” and as a result there “has been both a large volume of habeas litigation in capital cases and strikingly high success rates for capital defendants”).

financially,<sup>32</sup> and (4) while counties initiate capital prosecutions, it is typically the states that pay the bills for the appellate and habeas process.<sup>33</sup> Faced with these four facts, states should be willing to plea bargain after trial if they think a death sentence is unlikely to survive on appeal and actually result in execution. That plea bargaining should logically fall to the only executive branch actor with authority to stop the death penalty process—the governor.

Put another way, governors are elected to act in the best interests of their states. When they see a weak death sentence moving through the system that is likely to cost the state considerable litigation costs but not end in execution, the governor should step forward and cut a deal that eliminates the costly litigation. The inmate, in turn, should want the deal in order to eliminate the possibility of being executed.

Requiring an inmate to forego future appeals in exchange for clemency is what is called a “conditional commutation.”<sup>34</sup> Presidents and governors have sporadically used conditional commutations in the past. For instance, chief executives have commuted non-capital sentences in exchange for inmates renouncing terrorism, pursuing a high school degree, and even donating a kidney.<sup>35</sup> Although there is not a tremendous amount of case law, the Supreme Court of the United States has upheld conditional commutations in the past.<sup>36</sup> And because the condition would be the waiver of appeals—something that

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32. See Julie Bosman, *States Confront Cavernous Holes in Their Budgets*, N.Y. TIMES, (June 7, 2015), [http://www.nytimes.com/2015/06/08/us/states-confront-wide-budget-gaps-even-after-years-of-recovery.html?\\_r=0](http://www.nytimes.com/2015/06/08/us/states-confront-wide-budget-gaps-even-after-years-of-recovery.html?_r=0) (last visited Sept. 7, 2016) (discussing the major funding gaps confronting many state legislatures) (on file with the Washington and Lee Law Review).

33. See *Pay Now, Execute Later*, *supra* note 12, at 864 n.18 (offering several examples of states that pay for these appeals).

34. See Harold J. Krent, *Conditioning the President’s Conditional Pardoning Power*, 89 CAL. L. REV. 1665, 1668 (2001) (noting that “from President Washington on, presidents have attached conditions to many pardons and commutations”).

35. See *infra* notes 81–106 and accompanying text (discussing some of the more extreme restrictions that governors have placed on grants of clemency).

36. See *infra* note 108 and accompanying text (noting that the Supreme Court is not opposed to some of these odd clemency arrangements).

regularly occurs in pre-trial plea bargaining<sup>37</sup>—it is nearly certain that the conditional commutation would be well within governors' authority.<sup>38</sup>

In short, conditional commutations have occurred throughout American history, and they appear to be perfectly constitutional.<sup>39</sup> To date, however, governors have not used conditional commutations as a form of post-trial plea bargaining to improve the functioning of the criminal justice system. Of course, there are political reasons why governors are reluctant to exercise their clemency power.<sup>40</sup> But in an era when a few states have abolished capital punishment altogether because of its astronomical cost,<sup>41</sup> the exercise of capital clemency may not be the third rail of politics that it has long been.<sup>42</sup> Now may be the time for executive clemency to become a regular part of an efficient death penalty process.

This Article proceeds in five parts. Part II briefly reviews the paltry state of capital clemency. Part III describes not just the low number of death penalty commutations over the last forty years, but also how those commutations are typically reserved for claims of innocence or other defendant-specific characteristics, rather than to facilitate a functional criminal justice system. Part III then recounts some significant conditional commutations that have been issued over the years. Part IV explains why a deal in

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37. See Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1119 (2011) (“[M]ost guilty pleas waive defendants’ rights to appeal.”).

38. See *infra* notes 156–158 and accompanying text (explaining how some governors have experienced political fallout after granting clemency).

39. See *Conditional Pardons*, 1 U.S. Op. Att’y Gen. 482 (1821) (“The President has power to grant a conditional pardon to a convict, provided the condition be compatible with the genius of our constitution and laws.”).

40. See Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J. L. & POL. 669, 671 (2001) [hereinafter *The Diffusion of Responsibility*] (noting that governors seeking reelection rarely exercise their clemency power).

41. See *supra* note 14 and accompanying text (describing five states that have abolished the death penalty).

42. Indeed, Professor Michael Heise’s empirical work casts doubt on the conventional wisdom that politicians are completely unwilling to exercise their clemency power. See Heise, *supra* note 11, at 979–84 (listing governors who have emptied death row as they left office).

which a governor commutes a death sentence in exchange for the inmate foregoing any future appeals would be perfectly constitutional. Parts V and VI then address the most likely objections to my proposal. Part V explains how it would be possible for governors to know early in the appellate process of many capital cases that a reversal is more likely than an execution. Part VI then addresses the objection that politics will prevent governors from using their commutation power to plea bargain.

## *II. Capital Clemency Is Rare Overall and Used for Limited Reasons*

It is well known that capital clemency in the United States is rare. Governors dispense mercy from death sentences far less often than in decades past.<sup>43</sup> Moreover, governors typically grant capital clemency only for a narrow range of reasons. This Part briefly recounts the quantitative decline in capital clemency over the last century and explains how commutations are reserved for a very limited set of rationales.

As Professor Hugo Adam Bedau documented, capital clemency was fairly robust in the first half of the twentieth century. One out of every four or five death sentences was commuted.<sup>44</sup> For instance, between 1900 and 1958 there were 101 death sentences and thirty commutations in Massachusetts.<sup>45</sup> In New York from 1920 to 1936 there were 252 death sentences and eighty-three commutations.<sup>46</sup> Even southern states—today’s so-called death belt—had significant numbers of commutations. Texas alone commuted eighty-five death sentences between 1924 and 1968.<sup>47</sup>

Matters are far different today. In the forty years since capital punishment was reinstated in the United States—from

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43. See Bedau, *supra* note 7 and accompanying text (discussing the declining rate of clemency).

44. *Id.* at 266.

45. *Id.* at 265.

46. *Id.*

47. *Id.*

1976 to 2015—only 280 death row inmates have received clemency.<sup>48</sup> And that number is dramatically inflated by “mass commutations” in which a handful of governors have emptied death row.<sup>49</sup> Most notably, in 2003, Governor George Ryan commuted all of death row in Illinois (167 people) because of flaws in the state’s capital punishment system and an alarming number of exonerations.<sup>50</sup> Additionally, there have been smaller mass commutations that have emptied death rows in New Mexico, Ohio, New Jersey, Maryland, and a second time in Illinois.<sup>51</sup> In total, mass commutations account for roughly 210 of the 280 capital clemency grants over the last forty years.<sup>52</sup> In only about seventy cases over the last forty years have governors or pardon boards individually analyzed an inmate’s case and decided to commute a sentence or pardon the inmate.<sup>53</sup>

To put matters in perspective, consider the number of death sentences, executions, and individualized commutations over the last forty years. From 1977 to 2015, there were 7,867 death

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48. See *Clemency*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/clemency> (last visited Sept. 7, 2016) (noting that the humanitarian reasons for clemency include “doubts about the defendant’s guilt or judgments about the death penalty by the governor”) (on file with the Washington and Lee Law Review).

49. See *infra* notes 50–52 (discussing recent instances of mass commutations).

50. See Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003) <http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html> (last visited July 9, 2016) (describing Governor Ryan’s decision to commute the sentences of all inmates on death row) (on file with the Washington and Lee Law Review). Some observers (and prosecutors) have suggested that Governor Ryan commuted death row out of personal interest because he was facing indictment on criminal misconduct charges (for which he was subsequently convicted and incarcerated) and thought the commutations would help his reputation. See JAMES L. MERRINER, *THE MAN WHO EMPTIED DEATH ROW: GOVERNOR GEORGE RYAN AND THE POLITICS OF CRIME* 137 (2008) (“Prosecutors suggested, subtly but unmistakably, that Ryan’s blanket clemency for death row prisoners was designed to overshadow his impending indictment.”).

51. *Clemency*, *supra* note 48.

52. See *id.* (listing each commutation); see also *Rethinking the Timing*, *supra* note 10, at 13 (reviewing the sixty-six individualized commutations through 2014).

53. *Id.*

sentences in the United States, but only 1,422 executions.<sup>54</sup> Of the more than 6,000 remaining people who sat on death row (many of whom stayed there for many years), only about seventy people received an individualized commutation.<sup>55</sup>

The conventional wisdom for the small number of capital clemencies is well known: commutations and pardons are not good politics. Governors who aspire to run for president likely have great concern about the unpopularity of commuting death sentences.<sup>56</sup> The politics of crime became much more punitive in the second half of the twentieth century. Richard Nixon campaigned for the presidency on a law-and-order campaign in 1968.<sup>57</sup> Longer, harsher sentences became a fixture of the 1980s as rehabilitation went out of style and was replaced by retributivism and deterrence as the goals of punishment.<sup>58</sup> Led by President Clinton, Democrats eventually adopted the tough-on-crime rhetoric as well.<sup>59</sup> In an environment in which mercy and rehabilitation took a backseat to retribution and deterrence, it is not surprising that governors and their appointed pardon boards became less willing to grant clemency.<sup>60</sup>

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54. See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Sept. 8, 2016) (compiling the data on the race of death row inmates) (on file with the Washington and Lee Law Review).

55. *Id.*

56. See, e.g., Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2688–89 (2011) (discussing political dangers of clemency).

57. See generally Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking The Warren Court's Role in Criminal Procedure*, 152 U. PA. L. REV. 1361, 1364 (2004).

58. See Judge Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY, 691, 698 (2010) (“The public, and certain members of the academy, gave up on rehabilitation as a central purpose of sentencing, instead championing a philosophy known as ‘limited’ retribution.”).

59. See Sara Sun Beale, *What's Law Got To Do With It? The Political, Social Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 42–43 (1997) (noting the realization of Congressional Democrats in the 1990s that “their traditional support of more liberal crime policies had become a major political liability”).

60. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 NYU L. REV. 802, 815–18 (2015) [hereinafter *Clemency and*

The politics of crime help to explain the limited reasons why governors grant clemency. With the exception of sporadic mass commutations, governors have consistently adopted a fairly narrow set of reasons for granting capital clemency. In his 1991 article, Professor Bedau recounted the reasons for mercy in capital cases.<sup>61</sup> He found that governors granted clemency for possible innocence; proportionality with co-defendants' sentences; public opposition to the death penalty (in the 1960s); unconstitutionality of death penalty statutes; rehabilitation of the offender; mitigating factors about the inmate's background; and, in the case of one governor, a non-unanimous decision by the appellate courts about the legality of defendants' convictions.<sup>62</sup>

Matters have not changed much in the modern era. Not surprisingly, the most common reason for capital clemency over the last forty years has been doubts about an inmate's guilt. In roughly two-dozen of the seventy individualized commutations, the primary rationale for mercy was doubt about the guilt of the death-row inmate.<sup>63</sup> In other cases, governors have pointed to proportionality concerns (such as a co-defendant not being sentenced to death<sup>64</sup> or the inmate not being the trigger-person).<sup>65</sup> In some cases,<sup>66</sup> governors commuted sentences because of characteristics about the inmate, such as mental

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*Presidential Administration*] (explaining how the lack of parole and "tough on crime" attitudes reduced clemency).

61. See Bedau, *supra* note 7, at 259–60 (discussing a grant of clemency when the Supreme Court expressed concern about a death penalty sentence).

62. *Id.*

63. See *Rethinking the Timing*, *supra* note 10, at 7–12 (discussing nine cases in detail); *Clemency*, *supra* note 48 (summarizing clemency rationale in each case for the last forty years).

64. See, e.g., *Governor of Indiana Spares Death Row Inmate*, L.A. TIMES (July 3, 2004) <http://articles.latimes.com/2004/jul/03/nation/na-spare3> (last visited Sept. 8, 2016) (listing the governor's reasoning as unfairness, since another co-defendant only received a life in prison sentence) (on file with the Washington and Lee Law Review).

65. See Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES (Aug. 31, 2007) <http://www.nytimes.com/2007/08/31/us/31execute.html> (last visited Sept. 8, 2016) (detailing the commutation of Kenneth Foster) (on file with the Washington and Lee Law Review).

66. See *Clemency*, *supra* note 48 (summarizing clemency rationale in each case for the last forty years).

health problems,<sup>67</sup> abusive childhood,<sup>68</sup> or rehabilitation while in prison.<sup>69</sup> In a small number of cases, governors commuted sentences for less conventional reasons such as requests from the prosecutor,<sup>70</sup> the victim's family,<sup>71</sup> and even the Pope.<sup>72</sup>

Very few commutations have been granted over the last forty years because of flaws in the legal process of a case. In a few cases, governors appeared to base commutations in part on ineffective assistance of counsel.<sup>73</sup> However, in each of these

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67. See Donald P. Baker, *Va. Governor Commutes First Death Sentence*, WASH. POST (May 13, 1999), <http://www.washingtonpost.com/wp-srv/local/daily/may99/swann13.htm> (last visited Sept. 8, 2016) (detailing the commutation of Calvin E. Swann) (on file with the Washington and Lee Law Review).

68. See Randall Chase, *Del. Governor Spares Life of Killer*, ASSOC. PRESS (Jan. 18, 2012), [http://articles.philly.com/2012-01-18/news/30639619\\_1\\_pardons-board-commutation-death-sentence](http://articles.philly.com/2012-01-18/news/30639619_1_pardons-board-commutation-death-sentence) (last visited Sept. 8, 2016) (noting that the 4–1 decision of the parole board in favor of commutation influenced Governor Markell's decision to commute Robert Gattis' sentence) (on file with the Washington and Lee Law Review).

69. See Justin M. Norton, *Virginia Gov. Commute Death Sentence; Colorado Gov. Denies Clemency*, ASSOC. PRESS (Sept. 15, 1997), <http://www.apnewsarchive.com/1997/Virginia-Gov-commutes-death-sentence-Colorado-Gov-denies-clemency/id-63ebbf83bbfe750ebdeb591bb8a104fb> (last visited Sept. 8, 2016) (describing the commutation of William Ira Saunders) (on file with the Washington and Lee Law Review).

70. See Reginald Fields, *Ohio Gov. John Kasich Commutes Inmate's Death Sentence to Life in Prison*, PLAIN DEALER (July 10, 2012, 11:53 PM) [http://www.cleveland.com/open/index.ssf/2012/07/ohio\\_governor\\_commutes\\_inmates.html](http://www.cleveland.com/open/index.ssf/2012/07/ohio_governor_commutes_inmates.html) (last visited Sept. 8, 2016) (noting that the prosecutor's recommendation was one of multiple factors) (on file with the Washington and Lee Law Review).

71. See Ronald Smothers, *A Day Short of Death, a Georgia Killer Is Given Life*, N.Y. TIMES (Aug. 22, 1990) <http://www.nytimes.com/1990/08/22/us/a-day-short-of-death-a-georgia-killer-is-given-life.html> (last visited Sept. 8, 2016) (noting that the advocates for granting William Moore clemency included Mother Teresa and Rev. Jesse Jackson) (on file with the Washington and Lee Law Review).

72. See Stephanie Simon, *Pope's Appeal for Mercy Saves Murderer's Life*, L.A. TIMES (Jan. 29, 1999) <http://articles.latimes.com/1999/jan/29/news/mn-2872/2> (last visited Sept. 8, 2016) (describing how Pope John Paul II influenced the Missouri governor's decision to grant clemency to Darrell Mease) (on file with the Washington and Lee Law Review).

73. See Kristin M. Hall, *Tenn. Governor Commutes Death Sentence*, USA TODAY (Sept. 14, 2007), [http://usatoday30.usatoday.com/news/nation/2007-09-14-1360199315\\_x.htm](http://usatoday30.usatoday.com/news/nation/2007-09-14-1360199315_x.htm) (last visited Sept. 8, 2016) (noting that Governor Bredesen commuted an inmate's death sentence because of what he described as



cases, even though the rationale for clemency was a flaw (or perceived flaw) in the legal process, the governor seemingly granted clemency because the legal flaw rendered the execution morally questionable.

History therefore seems to tell us that clemency is limited to cases where governors think an execution would be morally questionable. This differs dramatically from the pre-trial plea bargaining process. History tells us that before trial it is perfectly appropriate for prosecutors to bargain to make the criminal justice system run smoothly. Over-crowded dockets are ameliorated by plea bargaining.<sup>74</sup> Weak cases are resolved by charge bargains to a lower-level offense or sentence bargains to a shorter term of imprisonment.<sup>75</sup> And plea bargaining is alive and well at the pre-trial stage in capital cases as well. Prosecutors regularly seek death—perhaps as a bargaining chip to induce a guilty plea<sup>76</sup>—but ultimately agree to a non-capital sentence in exchange for a guilty plea.<sup>77</sup> More crassly stated, prosecutors regularly consider resources and the efficiency of the criminal

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“grossly inadequate legal representation”) (on file with the Washington and Lee Law Review).

74. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 13 (2003).

75. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2500 (2004).

76. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 (2000) (explaining that a capital charge “provides the best plea-bargaining leverage imaginable”).

77. Professor John Douglass recently provided a startling description of Virginia’s capital charging:

Virginia prosecutors now charge about twenty cases of capital murder annually for each case that results in a death sentence. What happens to the other nineteen cases? Plea bargaining fills much of that gap. Today, even more than in years past, Virginia’s death penalty functions primarily as a bargaining chip in a plea negotiation process that resolves most capital litigation with sentences less than death.

John G. Douglass, *Death as a Bargaining Chip: Plea Bargaining and the Future of Virginia’s Death Penalty*, 49 U. RICH. L. REV. 873, 873–74 (2015); see also Thaxton, *supra* note 29, at 483 (analyzing charging decisions in Georgia from 1993 to 2000 and concluding that “my conservative estimate is that the threat of the death penalty increases the likelihood of reaching a plea agreement by approximately 20 percentage points”).

justice process before trial. By contrast, at the capital clemency stage, governors never appear to consider those factors.

There are three obvious reasons why governors do not engage in clemency bargaining after trial. First, they almost always consider clemency petitions at the very end of the road after courts have already rejected appeals and habeas corpus petitions.<sup>78</sup> At that point, there is no bargaining to be done because the inmate has nothing to give up. A governor who grants clemency on the eve of an execution gets nothing in return because there is no litigation left for the inmate to terminate. Second, and relatedly, clemency supposedly must be left until the end of the process because governors would lack the necessary information to make an informed determination in the middle of litigation. Third, as noted above, it is considered politically undesirable for governors to grant clemency. In order to protect their future political aspirations, governors avoid using their clemency power except in the most extreme cases.

As I explain in Parts V and VI below, I do not think the latter two explanations are insurmountable obstacles to using clemency as a plea bargaining tool. The objections may explain the current state of affairs, but they are not necessarily the approach that must guide us moving forward. Before addressing the practical objections to post-trial plea bargaining though, I turn in Part III to negotiated, or so-called “conditional,” clemency, which has been awarded in the past and, in Part IV, to the legality of such clemency deals.

### *III. Governors and Presidents Have Issued Conditional Clemency*

Governors and presidents have wide power to grant clemency.<sup>79</sup> The general public likely thinks of the clemency power as an all-or-nothing approach.<sup>80</sup> People might think that

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78. See *Rethinking the Timing*, *supra* note 10, at 2–3 (arguing that governors should not wait until the end of the process to consider clemency).

79. For a classic work on the history and scope of the clemency power, see generally KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989) (discussing pardons, reprieves, amnesty, and commutations).

80. See Stephanos Bibas, *Transparency and Participation in Criminal*

the president has the binary choice of pardoning an individual (and wiping out his conviction) or doing nothing. Or the public might think that a governor can choose only between commuting a death sentence or taking no action. This is the set of choices we are familiar with because this is what happens most often. Clemency usually takes the form of complete pardons or sentence reductions. In fact, however, the clemency power is not an all-or-nothing option. Rather, because the clemency power is so broad, governors and presidents actually have quite a bit of room to creatively exercise their authority. Some chief executives have done just that.

Some of the most famous conditional commutations have been issued by presidents. In 1971, President Nixon conditionally commuted the sentence of labor leader Jimmy Hoffa.<sup>81</sup> Mr. Hoffa had been convicted of obstruction of justice and fraud and was part way through serving a thirteen-year sentence.<sup>82</sup> President Nixon commuted Hoffa's sentence and granted him immediate release, but he imposed the condition that Hoffa "not engage in direct or indirect management of any labor organization prior to March 6, 1980."<sup>83</sup>

In 1999, President Clinton offered conditional clemency to sixteen members of the Puerto Rican nationalist group F.A.L.N.<sup>84</sup> The condition was that, in exchange for clemency, each individual would have to renounce the use of terrorism to achieve

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*Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006) ("A gulf divides the knowledgeable, powerful participants inside American criminal justice from the poorly informed, powerless people outside of it.").

81. See *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1225–45 (D.D.C. 1974) (exploring the historical development of the constitutional power to pardon and ultimately concluding that the pardon of Mr. Hoffa was lawful).

82. See *id.* at 1223–24 (noting that Mr. Hoffa first filed petitions for commutation in December 1971).

83. *Id.* at 1224. For a discussion of Hoffa's case, see Patrick R. Cowlishaw, Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 154–55 (1975) (arguing that a potential for abuse exists within the conditional commutation framework).

84. See Charles Babington, *Puerto Rican Nationalists Freed From Prison*, WASH. POST (Sept. 11, 1999), <http://www.washingtonpost.com/wp-srv/politics/campaigns/keyraces2000/stories/faln091199.htm> (last visited Sept. 8, 2016) (detailing how President Clinton offered the inmates clemency if they would renounce violence) (on file with the Washington and Lee Law Review).

independence for Puerto Rico.<sup>85</sup> Fourteen of the individuals accepted President Clinton's terms and had their sentences commuted.<sup>86</sup> Two other individuals refused the condition and declined the commutation.<sup>87</sup>

On his last day in office in 2001, President Clinton commuted the sentences of thirty-six drug offenders.<sup>88</sup> Those commutations included conditions. Some offenders had to take period drug tests and others were required to serve a period of supervised release.<sup>89</sup>

As Dean Harold Kent has described, many other presidents have issued conditional commutations:

From President Washington on, presidents have attached conditions to many pardons and commutations. President Lincoln's offer of amnesty to Southern secessionists on the condition that they take a loyalty oath marks one controversial example. . . . [P]residents have required, on pain of revocation of the pardon, that offenders make restitution, drop financial claims against the government or accept deportation. Perhaps more surprisingly, presidents have required that offenders not drink, not associate with undesirables, and provide their families with greater financial support.<sup>90</sup>

Some of those presidential commutations have attached dramatic and invasive conditions. For instance, President Coolidge commuted a prison sentence but required that the inmate

shall abstain from the possession and use of intoxicating liquor; shall not associate with persons of evil character; shall lead an orderly, industrious life; shall work and reside where

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85. See John M. Broder, *12 Imprisoned Puerto Ricans Accept Clemency Conditions*, N.Y. TIMES (Sept. 9, 1999), [http://www.nytimes.com/1999/09/08/us/12-imprisoned-puerto-ricans-accept-clemency-conditions.html?page\\_wanted=all](http://www.nytimes.com/1999/09/08/us/12-imprisoned-puerto-ricans-accept-clemency-conditions.html?page_wanted=all) (last visited Sept. 8, 2016) ("The conditions of their commutation include that they commit no further crimes and that they limit their association with other Puerto Rican nationalists who advocate violence.") (on file with the Washington and Lee Law Review).

86. Babington, *supra* note 84.

87. *Id.*

88. Krent, *supra* note 34, at 1667.

89. *Id.*

90. *Id.* at 1668.

the Attorney General of the United States, through the Superintendent of Prisons of the Department of Justice, shall direct; shall maintain and support his divorced wife and their children to the satisfaction of the Attorney General, and shall report his residence and occupation to the said Superintendent of Prisons between the first and fifth days of each month.<sup>91</sup>

Governors have likewise issued conditional commutations. In a famous case, Governor Douglas Wilder of Virginia offered conditional clemency to the basketball star Allen Iverson. While in high school (when he was already an All-American and sought after by colleges around the country), Iverson was involved in a brawl and was accused of striking a woman with a chair.<sup>92</sup> Iverson was convicted of multiple felony charges and sentenced to fifteen years, with ten suspended.<sup>93</sup> A few months later, after Iverson had served some jail time, Governor Wilder offered him conditional clemency: in exchange for release from prison, Iverson agreed to family counseling, a nightly curfew, and not playing sports while he finished high school.<sup>94</sup> Two weeks later, Governor Wilder granted conditional clemency to two other individuals convicted in the same brawl.<sup>95</sup> According to news reports, “[t]he men . . . agree[d] to enroll in college and attend classes regularly, receive family counseling, observe a curfew of 10:30 p.m. on

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91. *Ex parte Weathers*, 33 F.2d 294, 294 (S.D. Fla. 1929).

92. See Ken Armstrong, *Iverson Goes to Jail*, DAILY PRESS (Sept. 9, 1993), [http://articles.dailypress.com/1993-09-09/news/9309090205\\_1\\_iverson-and-three-allen-iverson-overton](http://articles.dailypress.com/1993-09-09/news/9309090205_1_iverson-and-three-allen-iverson-overton) (last visited Sept. 8, 2016) (describing Iverson’s conviction and sentencing) (on file with the Washington and Lee Law Review).

93. *Id.*

94. See *School Star Wins Clemency*, N.Y. TIMES (Dec 31, 1993), <http://www.nytimes.com/1993/12/31/sports/school-star-wins-clemency.html> (last visited Sept. 8, 2016) (noting that Iverson’s lawyers argued that there was reasonable doubt about his conviction) (on file with the Washington and Lee Law Review).

95. See *Wilder Grants Clemency to Men in Iverson Case*, WASH. POST (Jan. 15, 1994), <https://www.washingtonpost.com/archive/sports/1994/01/15/wilder-grants-clemency-to-men-in-iverson-case/f30790c2-1072-4034-8046-e4eb3fc4530b/> (last visited Sept. 8, 2016) (describing Governor Wilder’s decision to grant conditional clemency to the other men involved in the brawl) (on file with the Washington and Lee Law Review).

weekdays and midnight on weekends, and remain under Parole Board supervision.”<sup>96</sup>

Governor Haley Barbour made an even more overt—some would say extremely distasteful<sup>97</sup>—use of conditional clemency in Mississippi in 2010. Gladys and Jaime Scott had been sentenced to life imprisonment following an armed robbery involving only eleven dollars.<sup>98</sup> Their case had attracted considerable national attention because of the small amount of money, the steep punishment, and allegations of racial bias.<sup>99</sup> In addition, Jaime Scott was in poor health and needed a kidney transplant that likely would have been paid for by the state of Mississippi.<sup>100</sup> Governor Barbour acceded to the pressure to grant clemency, but attached a condition: in exchange for clemency, Gladys Scott would have to donate a kidney to Jaime Scott after release, thus shifting the costs to Medicaid and saving Mississippi from paying the costs of Jaime’s medical care.<sup>101</sup> While Governor Barbour’s kidney transplant condition drew objections from bioethicists,<sup>102</sup> the idea of conditioning commutation in the abstract drew little fire.<sup>103</sup>

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96. *Id.*

97. See Jamila Jefferson-Jones, *The Exchange of Inmate Organs for Liberty: Diminishing the “Yuck Factor” in the Bioethics Repugnance Debate*, 16 J. GENDER RACE & JUST. 105, 105–06 (2013) (noting that many people’s response to Governor Barbour’s grant of clemency was not rooted in a legal argument, but repugnance).

98. *Id.* at 126.

99. See Timothy Williams, *Sisters’ Prison Release Is Tied to Donation of Kidney*, N.Y. TIMES (Dec. 30, 2010), <http://www.nytimes.com/2010/12/31/us/31/sisters.html> (last visited Sept. 8, 2016) (describing the pressure that Governor Barbour was under to issue clemency) (on file with the Washington and Lee Law Review).

100. *Id.*

101. *Id.*

102. See Timothy Williams, *Jailed Sisters Are Released for Kidney Transplant*, N.Y. TIMES (Jan. 7, 2011), <http://www.nytimes.com/2011/01/08/us/08/sisters.html> (last visited Sept. 8, 2016) (noting that the kidney transplant was the sisters’ idea) (on file with the Washington and Lee Law Review).

103. Indeed, you can find run-of-the-mill language about conditional commutations on state criminal justice websites. See, e.g., *Clemency*, OHIO DEP’T OF REHABILITATION AND CORRECTIONS, <http://www.drc.ohio.gov/web/clemency1.htm> (last visited June 16, 2016) (noting that “[a] commutation may be conditional or unconditional”) (on file with the Washington and Lee Law Review).

Of course, most conditional commutations do not involve terrorists, the most famous labor leader in history, legendary basketball stars, or organ donation. Rather, most conditional commutations actually involve the subject of this article: capital commutations. Governors often commute death sentences with the condition that inmates remain in prison for life without the possibility of parole.<sup>104</sup> As I explain in the next Part, constitutional challenges to conditional commutations (including those involving the death penalty) have failed.

#### *IV. Clemency as Plea Bargaining Is Constitutional*

Would it be constitutional for a governor to strike a deal in which a death-row inmate agrees to forego all appeals and habeas petitions in exchange for a commutation to life imprisonment without parole? The answer appears to be “yes.”

To start with the obvious, presidents and governors<sup>105</sup> have the power to commute a death sentence to life imprisonment.<sup>106</sup> The Supreme Court held nearly one hundred years ago, in *Biddle v. Perovich*,<sup>107</sup> that the president need not

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Review).

104. For example, upon leaving office, President Eisenhower commuted the death sentence of a military prisoner on the condition that he never be eligible for parole. See *Schlick v. Reed*, 419 U.S. 256, 268 (1974) (holding “that the conditional commutation of his death sentence was lawful when made and that intervening events have not altered its validity”).

105. Most of the authority discussed in this section involves presidential clemency. Gubernatorial commutations would also have to pass muster under the relevant state constitutions. Generally speaking, it is clear that clemency clauses in state constitutions are equally broad and thus the outcome is very unlikely to be different under state constitutional law.

106. The Supreme Court’s decision in *Ohio v. Woodward*, 523 U.S. 272 (1998), which required that clemency procedures comport with a minimum standard of due process, reinforces the broad power of the executive. Chief executives cannot flip a coin or arbitrarily deny access to the clemency process, but beyond that a due process violation is extremely unlikely. As Professor Rachel Barkow has concluded in the presidential context “[t]he pardon power is, then, a sweeping constitutional power that is checked only by the political process and the power of voters to elect a new President should they disagree with the clemency decisions of the current one.” *Clemency and Presidential Administration*, *supra* note 60, at 813.

107. 274 U.S. 480 (1927).

even obtain the consent of an individual to commute his sentence from death to life.<sup>108</sup>

Presidents and governors can attach conditions to commutations. In 1960, President Eisenhower commuted the punishment of a military inmate from death to life imprisonment.<sup>109</sup> Because a pure commutation would have made Schick eligible for parole under military law, President Eisenhower imposed a condition that “Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States.”<sup>110</sup> More than a decade after the conditional commutation, Schick sought parole and eventually filed suit over his eligibility.<sup>111</sup> The Supreme Court rejected Schick’s challenge, explaining that “this Court has long read the Constitution as authorizing the President to deal with individual cases by granting conditional pardons.”<sup>112</sup> The Court further recognized that in adding conditions to clemency, chief executives are not required to choose among conditions in the sentencing statutes. As the Court explained, “Presidents throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute.”<sup>113</sup>

The next question is whether the president or governor can strike a deal in which the inmate agrees to a condition in exchange for a commutation. Once again, Supreme Court precedent clearly offers an affirmative answer. In 1852, President Fillmore offered to commute William Wells’ death sentence if he agreed to serve a life term.<sup>114</sup> Wells agreed,<sup>115</sup> but subsequently

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108. In a slightly contradictory earlier decision the Court allowed a newspaper editor who had invoked the Fifth Amendment to refuse a pardon that would have compelled him to testify. *See Burdick v. United States*, 236 U.S. 79, 94 (1915) (noting that it was Burdick’s right to refuse the pardon, and as such, it was his right to decline to testify).

109. *See Schick*, 419 U.S. at 257 (explaining that the inmate challenged the validity of the condition attached to his commutation).

110. *Id.* at 258.

111. *Id.* at 259.

112. *Id.* at 265.

113. *Id.* at 266.

114. *See Ex parte Wells*, 59 U.S. 307, 308 (1856) (noting that Wells accepted the conditional commutation on the same day it was offered). As the *Schick*



argued, *inter alia*, that the condition was illegal because he accepted it under duress.<sup>116</sup> The Supreme Court unequivocally rejected Wells' challenges to the condition and enforced his agreement.<sup>117</sup>

Thus far we have established that (1) chief executives can commute death sentences to life imprisonment without parole; (2) the president or governor can attach conditions to the commutations; (3) the conditions need not be affirmatively authorized by underlying statute or law; and (4) the condition can be the result of a bargained agreement with the inmate. The only remaining question for our purposes is whether certain conditions might be so egregious as to be unconstitutional and unenforceable. Here the answer is "maybe in some cases," but certainly not in the case of a condition that requires an inmate to forego future appeals.

There is far less precedent to determine whether certain conditions are constitutional. One could imagine that certain conditions would shock the conscience and be off-limits.<sup>118</sup> To date, there is no clear precedent forbidding certain conditions. On the other hand, there is precedent approving conditions that are far more questionable than requiring inmates to forego future appeals. President Nixon's conditional commutation of Jimmy Hoffa is the most instructive.

After serving about four years of a thirteen-year sentence, the infamous labor leader Jimmy Hoffa petitioned President Nixon for a commutation.<sup>119</sup> Hoffa contended that he would not be a drain on society if released because he could live on his

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decision later made clear, Wells' agreement was not necessary. *See supra* notes 104–109 and accompanying text (discussing *Schick*).

115. *Id.*

116. *Id.* at 315.

117. *Id.*

118. *See* Krent, *supra* note 34, at 1666 (arguing that granting clemency in exchange for a kidney is an example of an agreement that "shocks the conscience").

119. *See Hoffa v. Saxbe*, 378 F. Supp. 1221, 1224 (D.D.C. 1974) (noting that Mr. Hoffa represented in his petition that he "does not have routine problems usually faced by persons released from prison for the reason that he has a home, a devoted family, ties in the community, and adequate assurances of a continuing livelihood").

pension and that he “intend[ed] to enter the educational field on a limited basis as a teacher, lecturer or educator, as may be approved by your Excellency.”<sup>120</sup> Hoffa’s clemency petition thus insinuated that if he were released he would not return to labor organizing activities. President Nixon took Hoffa up on that offer. In December 1971, President Nixon commuted Hoffa’s sentence “upon the condition that the said James R. Hoffa not engage in direct or indirect management of any labor organization prior to March sixth, 1980.”<sup>121</sup> Hoffa was released from prison but a few years later he challenged the labor organizing condition on the ground that it violated his First Amendment rights to free speech and association.<sup>122</sup>

A federal district judge rejected Hoffa’s argument because “the history and nature of the pardoning power has always contemplated the type of broad discretion which would permit the repository of power to devise and attach lawful conditions to its clemency and to offer the same to the clemency applicant.”<sup>123</sup> The court applied a two-part test that assessed (1) whether the condition was directly related to the public interest and (2) whether it unreasonably infringed on Hoffa’s constitutional rights.<sup>124</sup> The court had “no hesitation” in finding that a restriction on Hoffa’s involvement in organized labor was directly related to the commutation of criminal offenses arising out of labor activities.<sup>125</sup> And because the Supreme Court had authorized legislatures to restrict the post-release work activity of felons, the court found that the President had the same authority as part of his commutation power.<sup>126</sup>

An even more startling condition was imposed by the governor of Ohio in 1980. Anthony Carchedi, who was serving a long prison sentence for armed robbery, sought parole and argued

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120. *Id.*

121. *Id.* at 1224.

122. *See id.* at 1240–41 (discussing how these claims had been raised by other prisoners based on conditions of their release set by statute).

123. *Id.* at 1234.

124. *Id.* at 1236.

125. *Id.* at 1237–38.

126. *Id.* at 1240 (citing *De Veau v. Braisted*, 363 U.S.144 (1960)).

that he was not a threat to the citizens of Ohio because he had no family there and would leave the state immediately upon release.<sup>127</sup> Although Carchedi was not paroled, the governor commuted his sentence on the condition that he not return to Ohio until the maximum term of his sentence had run (unless the parole board offered special permission).<sup>128</sup> Only eight weeks after being released though, Carchedi sought to re-enter Ohio to visit his fiancée.<sup>129</sup> The parole board rejected his request, setting up a challenge to the legality of what Cardechi called a “banishment” condition.<sup>130</sup> The federal court in Ohio explained how broad the clemency power is under the Ohio Constitution, and that a condition will not be invalidated unless it is “found to be illegal, impossible of performance, or contrary to public policy.”<sup>131</sup> The court recognized that the condition implicated constitutional rights of association and travel, but refused to find the condition illegal because Cardechi had willingly agreed to the condition.<sup>132</sup> According to the federal court, an agreement to abide by a condition in exchange for release “is no different from other agreements in which the government conditions its grant of a substantial benefit on the relinquishment of a known constitutional right.”<sup>133</sup> The court thus saw a conditional commutation as no different than a conventional plea bargain with a prosecutor in advance of trial.<sup>134</sup>

The leading scholarly analysis about conditional clemency supports the conclusion (if not all of the reasoning) in *Hoffa* and *Cardechi*. As Dean Krent has explained, it would seemingly be improper to uphold a bargain in which a president granted a

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127. See *Cardechi v. Rhodes*, 560 F. Supp. 1010, 1011–12 (S.D. Ohio 1982) (describing the conditions of Carchedi’s commutation).

128. *Id.* at 1012.

129. *Id.*

130. *Id.*

131. *Id.* at 1013.

132. See *id.* at 1017 (noting that Cardechi had initiated the parole conversation with the governor and had brought up the “no return” option himself).

133. *Id.* at 1016.

134. See *id.* at 1017–18 (analyzing Cardechi’s waiver and finding that he knowingly and intelligently agreed to the terms presented by the state).

pardon in exchange for money or for a president to require the recipient of a pardon to attend Presbyterian Church services (as opposed to those of some other religion). The former would violate laws enacted by Congress; the latter would run afoul of the First Amendment.<sup>135</sup> But absent cases in which the restriction of a constitutional right is so obvious that it “shocks society’s conscience,” the inmate’s autonomy interest in deciding whether to accept the condition should prevail.<sup>136</sup>

If it is constitutional for a conditional commutation to impose restrictions on travel, First Amendment speech, and organizational rights, it must be permissible for a condition to require an inmate to forego further appeals and habeas petitions. Plea bargaining is the engine that runs the American criminal justice system<sup>137</sup> and a key component of that system is that defendants waive most of their appellate rights in exchange for a charge or sentencing bargain.<sup>138</sup> If defendants can constitutionally waive their appellate rights in exchange for a pre-trial plea bargain, it stands to reason that death-row inmates can do the same after conviction.

Consider all of this in totality: (1) the federal and state constitutions grant sweeping clemency power to chief executives, (2) inmates have strong (and logical) autonomy interests in bargaining to avoid execution; (3) defendants are allowed to waive the very same appellate rights as part of a pre-trial plea bargain; and (4) courts have upheld even more questionable conditions, such as the ones in *Hoffa* and

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135. See Krent, *supra* note 34, at 1699 (describing a condition that a prisoner violated by association with “unsavory characters”). Another leading clemency expert suggests additional scenarios—such as requiring a contribution to a president’s campaign or library—as unenforceable. See Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS. L.J. 698, 718 (2012) (providing examples of likely unconstitutional conditions).

136. See Krent, *supra* note 34, at 1692 (noting that another rare instance that could trump an inmate’s autonomy is when a condition “lengthens the punishment meted out by a court”).

137. See Bibas, *Regulating the Plea Bargaining Market*, *supra* note 37, at 1121 (noting that, from 1970 to 2000, most criminal cases were resolved by plea bargain).

138. See Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 143 (1999) (arguing that, even with limitations, plea bargains would not work without waivers of rights).

*Carchedi*, that seemingly impinge on core constitutional principles. This combination of factors should leave little doubt that it is constitutional for a governor to condition a commutation on an inmate foregoing all further appeals and habeas corpus petitions.

*V. It Is Not Difficult to Identify (Some) Weak Capital Cases  
Early in the Appellate Process*

Having established the constitutionality of using clemency to engage in post-trial plea bargaining, the next question is would governors practically be able to identify the weak cases that should be commuted? In other words, would it be too difficult for governors to know early in the appellate process that a case is likely to be reversed on appeal? Some critics might object that the legal problems most likely to lead to an appellate or habeas reversal cannot be known early in a capital case. Indeed, some legal issues that account for a considerable number of reversals—for instance, ineffective assistance of counsel and *Brady* violations<sup>139</sup>—are typically not even brought until after a hearing in the habeas corpus process.<sup>140</sup>

The argument that governors won't know enough early in the process to make an informed decision about which sentences to commute has some merit, but it is certainly not fatal. It is true

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139. See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 90 (2005) (describing the findings of a study that looked at when these two arguments for reversal occur). See generally JAMES S. LIEBMAN ET. AL, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 (2000), [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf) (tracking the reasons for reversals in capital cases).

140. Some states do not allow ineffective assistance claims to be brought until after direct review is completed. See, e.g., Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007) (explaining that “the vast majority of jurisdictions do not allow defendants to open or supplement the trial court record to support [ineffective assistance] claims”); Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C.L. REV. 1069, 1097 & n.165 (2009) (noting that “the review of ineffective assistance review is largely limited to collateral attacks”).

that in many cases it would be very hard for governors to know whether a case will survive the appellate gauntlet. I am happy to concede that governors will not be able to perfectly predict which cases will be reversed. I concede that because my proposal does not require governors to weed out *all* of the weak cases or even *most* of them. My proposal is that governors should only select the obviously weak cases.<sup>141</sup>

Sometimes governors might guess wrong and allow a weak case to remain in the system. Sometimes they might remove a case from death row that could have survived appellate scrutiny. I certainly do not suggest otherwise. My argument is only that there are a sizeable number of cases in which governors' educated guesses are likely to be accurate, and those cases are worth millions in litigation costs.

So, how would governors know which cases to commute? The first obvious set of cases would be the ones in which an appellate court was divided on direct review. When judges dissent on direct review they typically write detailed opinions specifying their reasons. Governors could simply have their legal counsel read and analyze the dissenting opinions to see if they find the dissenting opinions convincing. In assessing the divided cases, governors could also consider other factors about the dissents. For instance, was the dissent written by a judge with a reputation for being skeptical of the death penalty? Or was the dissent authored by a judge who has regularly upheld death sentences in the past? Was there only one dissenting vote, or did multiple judges believe that a death sentence was unconstitutional? In short, governors could utilize some background knowledge about the judiciary, do some nose counting, and have their counsel's office do some legal analysis. In some cases this will be more than sufficient to hazard a good prediction that an inmate will probably not be executed.

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141. The number of weak cases will vary across the United States. In some jurisdictions it might be a large percentage of cases. Think of California, which executes almost no one. In other states it might be a small percentage of cases. Think of Texas, which is quite skilled at quickly getting from death sentence to execution. I am certainly not suggesting that each state should commute an equal percentage of death sentences.

A second set of cases governors would look closely at would be ones in which a problematic actor had been involved in the prosecution.<sup>142</sup> For instance, consider Dr. George Denkowski, a psychologist who examined at least sixteen defendants sentenced to death in Texas.<sup>143</sup> Denkowski testified as an expert witness for the State of Texas and told juries that defendants met the intelligence threshold to be executed.<sup>144</sup> Yet, psychologists and defense attorneys complained that Denkowski used unscientific methods that artificially inflated defendants' intelligence scores in order to make them death eligible.<sup>145</sup> In 2011, Dr. Denkowski reached a settlement with the Texas State Board of Examiners of Psychologists in which he agreed never to perform the tests again in exchange for complaints against him being dismissed.<sup>146</sup> At the time of the settlement, fourteen of the sixteen inmates Dr. Denkowski testified against remained on death row.<sup>147</sup>

After the rebuke of Dr. Denkowski, the governor of Texas could have, but did not, commute any of the death penalty cases Denkowski was involved in. Instead, costly litigation continued. For example, the Texas Court of Criminal Appeals remanded the case of John Matamoros to the trial court to re-examine the psychological evidence.<sup>148</sup> The trial court denied relief and the Texas Court of Criminal Appeals, over the dissent of two judges, affirmed.<sup>149</sup> The case then proceeded to wind its way through the

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142. I am grateful to Professor Lee Kovarsky for making this point to me.

143. See Brandi Grissom, *Texas Psychologist Punished in Death Penalty Cases*, TEX. TRIB. (Apr. 15, 2011), <https://www.texastribune.org/2011/04/15/texas-psychologist-punished-in-death-penalty-cases/> (last visited Sept. 8, 2016) (noting that Dr. Denkowski still defends his practices in evaluating inmates) (on file with the Washington and Lee Law Review).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See Brandi Grissom, *Death Sentence Reviews Leave Unsettled Issues in Texas*, N.Y. TIMES (May 13, 2012), [http://www.nytimes.com/2012/05/13/us/reviews-of-texas-death-row-cases-leave-unsettled-issues.html?\\_r=0](http://www.nytimes.com/2012/05/13/us/reviews-of-texas-death-row-cases-leave-unsettled-issues.html?_r=0) (last visited Sept. 8, 2016) (discussing the settlement agreement with Dr. Denkowski) (on file with the Washington and Lee Law Review).

149. See *Ex parte Matamoros*, Nos. WR-50791-02, WR-50791-03, 2012 WL 4713563, at \*1 (Tex. Crim. App. Oct. 3, 2012) (relying principally on the increased questioning of Dr. Denkowski's methods).

federal courts, where it remains today.<sup>150</sup> Perhaps Matamoros will ultimately be executed. But there stands a good chance that his case (and the other cases involving Dr. Denkowski) will not end in executions.

A third set of cases for governors to consider commuting are those likely to be effected by recent Supreme Court decisions. For instance, after the Supreme Court's decision in *Atkins v. Virginia*<sup>151</sup> forbidding the execution of the mentally retarded, it was unclear who qualified as mentally handicapped.<sup>152</sup> Almost any legal observer could have predicted that litigating that question would take years. And, indeed, in the nearly fifteen years since *Atkins* there has been a tremendous amount of legal wrangling. During that time, courts have reversed the death sentences of ninety-eight inmates because of a finding of mental handicap or retardation.<sup>153</sup> Some of those reversals might not have been predicted. But governors surely could have looked at the evidence in a number of those *Atkins* cases and predicted that the death sentences would be overturned. Indeed, in roughly a dozen of those cases, the inmates had IQ scores in the fifties.<sup>154</sup> Governors in these and other cases could have preemptively granted clemency to short circuit the time-consuming and expensive appellate process.

In asserting that governors can predict that certain death sentences are likely to be reversed, I do not want to over-claim. I am not asserting that governors will know the outcome of all or even most death sentences. And I am not guaranteeing that governors would always predict correctly without engaging in false positives or false negatives. I am asserting only that in some

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150. See *Matamoros v. Stephens*, 783 F.3d 212, 227 (5th Cir. 2015) (finding that Matamoros was competent to be executed).

151. 536 U.S. 304 (2002).

152. See *id.* at 304 (giving the authority to the states to determine how to evaluate mental handicap).

153. See *Defendants Whose Death Sentences Have Been Reduced Because of a Finding of "Mental Retardation" Since Atkins v. Virginia (2002)*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/2395> (last updated July 19, 2012) (last visited Sept. 8, 2016) (detailing the "wide variations among states in exempting defendants with intellectual disability from the death penalty") (on file with the Washington and Lee Law Review).

154. *Id.*



cases governors can make educated guesses that are very likely to be correct, and that those estimations would save the states a tremendous amount of time and money. If that is correct, the remaining question is whether governors would make those commutation deals or whether politics would stand in the way.

*VI. Politics Is Not a Fatal Obstacle to Post-Trial Plea Bargaining  
Via Executive Clemency*

The most significant objection to a proposal for governors to use their clemency power to plea bargain weak cases out of the system is that governors will not be willing to take the political risk. The conventional wisdom is that commutations are bad politics and that governors, who often want to be presidents, are not interested in anything that is bad politics. Thus governors try to pass the buck to pardon boards and the courts so as not to be responsible for executions.<sup>155</sup>

The paltry number of individualized commutations—roughly seventy in forty years—suggests that the conventional wisdom is correct. Moreover, when governors have gone out on a limb and commuted the sentences of murderers, they have suffered criticism and occasional electoral defeats. For instance, Governor Mike Huckabee was criticized for granting clemency to a man who went on to murder four police officers.<sup>156</sup> Decades earlier, Governor Michael DiSalle of Ohio likely lost re-election in part because he commuted six death sentences.<sup>157</sup> And although not a commutation, the furlough of convicted murderer Willie Horton in Massachusetts (who subsequently raped a woman) was

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155. See *The Diffusion of Responsibility*, *supra* note 40, at 671–73 (listing examples of governors, courts, and pardon boards all saying that it is one of the other group’s responsibility to determine clemency).

156. See *Clemency and Presidential Administration*, *supra* note 60, at 823 (explaining why some pundits thought this grant of clemency would limit Governor Huckabee’s chances at being elected to other political offices).

157. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 TEX. L. REV. 569, 607–08 (1991) (describing how the press mocked the governor for seeming “soft” on crime).

politically devastating to Governor Michael Dukakis as he ran for president.<sup>158</sup>

The argument for the conventional wisdom is strong, but there are reasons to be skeptical of the contention that governors will never embrace executive clemency. Starting with the non-capital context, governors with future aspirations have been more willing to grant clemency than people recognize. As Professor Rachel Barkow has explained, Governor Mike Huckabee granted clemency to more than 1,000 people, many during his first term in office.<sup>159</sup> Other governors with bright political futures—such as Tim Kaine of Virginia and Robert Ehrlich of Maryland—made robust use of their clemency power.<sup>160</sup> Indeed, even the most politically savvy politicians—such as Governor (and former head of the Republican National Committee) Haley Barbour—aggressively exercised clemency power in recent years.<sup>161</sup>

Turning to the capital context, Professor Michael Heise's careful empirical study of clemency grants found that political variables had no statistically significant impact.<sup>162</sup> A few anecdotal examples further the story. For instance, John Kasich was elected governor of Ohio in 2010 after a long political career in Washington, D.C. and with well-known aspirations to run for president. (In fact, Kasich did run for president in 2016.) Shortly

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158. See Carl Hulse, *Bipartisan Criminal Justice Overhaul Is Haunted by Willie Horton*, N.Y. TIMES (Jan. 16, 2016), [http://www.nytimes.com/2016/01/05/us/politics/bipartisan-criminal-justice-overhaul-is-haunted-by-willie-horton.html?\\_r=0](http://www.nytimes.com/2016/01/05/us/politics/bipartisan-criminal-justice-overhaul-is-haunted-by-willie-horton.html?_r=0) (last visited Aug. 29, 2016) (“Lawmakers are reluctant to campaign on a platform of letting felons out of prison . . .”) (on file with the Washington and Lee Law Review).

159. See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009) [hereinafter *The Politics of Forgiveness*] (observing that Governor Huckabee's “approach to clemency seems to have been driven in part by [his] religious faith and moral convictions”).

160. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 327 (2013) [hereinafter *Prosecutor Bias*] (explaining some of the motivations these governors expressed regarding their grants of clemency).

161. See Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U.L. REV. 1123, 1149–50 (2012) (noting that many of these grants of clemency are still being challenged in the courts).

162. See generally Heise, *supra* note 11, at 983–84.

after taking office, Governor Kasich commuted five death sentences. The reasons for the commutations were varied—level of involvement in the crime, abusive childhood, mental incapacity, lack of a life without parole option, and poor legal representation—but notably in none of the cases was there strong evidence of innocence.<sup>163</sup> These commutations therefore carried some political risk, but Governor Kasich granted the commutations anyway.

When Maryland abolished capital punishment in 2013, it did not do so retroactively, thus leaving four inmates on death row.<sup>164</sup> Governor Martin O'Malley, who had plans to run for president, could have ignored those four inmates, but he commuted their sentences to life without parole.<sup>165</sup>

Relatedly, over the last decade there has been a growing consensus that cost is a major factor in criminal justice decision-making. As Professor Cara Drinan has explained, “the economic downturn has forced even states with the toughest record on criminal sanctions to reconsider sentencing policy.”<sup>166</sup> Texas declined to build expensive new prisons and instead diverted offenders to treatment programs.<sup>167</sup> Multiple states have softened drug-sentencing laws to reduce the costs of incarceration.<sup>168</sup> Conservative politicians—a group formerly at the forefront of tough on crime politics—formed the “Right on

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163. *Clemency*, *supra* note 48.

164. See Alan Blinder, *Life Sentences for Last Four Facing Death in Maryland*, N.Y. TIMES (Dec. 31, 2014), <http://www.nytimes.com/2015/01/01/us/maryland-governor-omalley-commutes-death-sentences-emptying-death-row.html> (last visited Sept. 8, 2016) (describing Governor O'Malley's decision to “empty the state's death row”) (on file with the Washington and Lee Law Review).

165. See John Wagner, *Gov. O'Malley to Commute Sentences of Maryland's Remaining Death-Row Inmates*, WASH. POST (Dec. 31, 2014), [https://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175\\_story.html](https://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175_story.html) (last visited Sept. 8, 2016) (noting that Governor O'Malley's decision came “two years after he persuaded the legislature to repeal capital punishment”) (on file with the Washington and Lee Law Review).

166. Drinan, *supra* note 161, at 1150.

167. *Id.*

168. See Mary D. Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 173 (2013) (listing other reforms, such as rehabilitation programs, that states have also enacted).

Crime” movement in an effort to promote cost-effective criminal justice.<sup>169</sup>

I am not arguing that governors are now ready to robustly embrace capital clemency. Rather, I am making the more modest assertion that there are weaknesses in the conventional story that governors are petrified of commuting death sentences. And with the emerging recognition around the country that costs should factor into criminal justice decision-making, there is room for governors to consider using their power to engage in post-trial plea bargaining.

### VII. Conclusion

Only days before Robert Gattis was to be executed in early 2012, Governor Jack Markell of Delaware commuted Gattis’ death sentence because he had been physically and sexually abused as a child.<sup>170</sup> Governor Markell conditioned the commutation as follows:

(1) Mr. Gattis shall forever drop all legal challenges to his conviction and sentence, as commuted; (2) Mr. Gattis shall forever waive any right to present a future commutation or pardon request and agree to live out his natural life in the custody of the Department of Correction; (3) Mr. Gattis will be housed in the Maximum Security Unit . . . and (4) Mr. Gattis, after consultation with counsel, shall knowingly, willingly and voluntarily accept these conditions, as determined by the Superior Court.<sup>171</sup>

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169. See Randolph N. Jonakait & Larry Eger, *The Fiscal Crisis as an Opportunity for Criminal Justice Reform: Defenders Building Alliances With Fiscal Conservatives*, 28 GA. ST. U.L. REV. 1161, 1167–68 (2012) (arguing that, even if it is difficult to ally with people who formally were “tough on crime,” partnership is worth it).

170. See Bill Mears, *Delaware Governor Commutes Death Sentence*, CNN (Jan. 17, 2012), <http://www.cnn.com/2012/01/17/justice/delaware-death-sentence/> (last visited Sept. 8, 2016) (explaining that at the time of commutation, Gattis had already exhausted his legal appeals) (on file with the Washington and Lee Law Review).

171. STATEMENT OF GOVERNOR JACK MARKELL REGARDING THE COMMUTATION OF SENTENCE OF ROBERT GATTIS (Jan. 17, 2012), <http://news.delaware.gov/>

Gattis agreed to the conditions, the commutation moved forward, and Gattis was spared execution.

On the surface, Governor Markell's conditional commutation seems to be the approach I have advocated for in this Article. The governor and an inmate struck a deal whereby the governor granted commutation and the inmate agreed to forego future appeals. However, the Gattis commutation differed in a significant respect from the approach I have advocated. Governor Markell granted clemency *after* the appeals process had run its course and only days before Gattis was to be executed. As such, Governor Markell did not procure a tangible benefit for the State of Delaware in exchange for the commutation. While we can debate whether it would be morally preferable to execute or not execute Gattis, there is no question that Governor Markell's last-minute commutation did not save the State of Delaware money by reducing costly litigation.

This Article has argued that governors should not limit clemency simply to situations in which executions seem morally questionable. Governors should instead more broadly utilize their clemency power to improve the functioning of the capital punishment system. Capital clemency should be used as a form of post-trial plea bargaining in which governors weed weak cases out of the system. Governors should engage in clemency bargaining early in the appellate life of a capital case. When there is a good indication that a capital case will not end in execution, perhaps because judges dissented on direct review and foreshadowed a later appellate or habeas reversal, governors should strike a deal with the death-row inmate. In exchange for clemency, the inmate must give up all further appellate review of the case. Such conditional commutations would be perfectly constitutional. And in a sizeable number of cases, the deal would be in the best interests of the State and the death-row inmate.

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2012/01/17/statement-of-governor-jack-markell-regarding-the-commutation-of-sentence-of-robert-gattis/ (last visited Oct. 11, 2016) (on file with the Washington and Lee Law Review).