



# Taking Stock of Clemency in the Empire State: *A Century in Review*

Clemency in New York has long been declining, while the state's prison population has grown dramatically. Between 1914 and 1924, New York averaged roughly 70 commutations per year, equal to the total number granted between 1990 and 2019.<sup>1</sup> In 1928, Governor Al Smith granted 66 commutations from a total prison population of 7,819.<sup>2</sup> Had commutations been granted at an equivalent rate in 2019, there would have been approximately 373;<sup>3</sup> in actuality, there were two.<sup>4</sup>

As Part One of this report describes, the power to grant clemency in New York rests exclusively with the governor.<sup>5</sup> Although an Executive Clemency Bureau provides administrative support, New York remains one of the only states with no independent advisory board. This is significant because advisory boards serve at least two important functions: to provide political insulation for the governor's clemency's decisions, which may be unpopular, and to help the governor make better-informed decisions by vetting candidates and making substantive recommendations.

Part Two of this report accounts for clemency's decline by placing it in historical context. Until the 1930s, commutations and pardons were the primary means of discretionary release in New York. That was no longer true when the Division of Parole was established in 1930; the role of clemency was bound to change. Following a reduction in annual clemency grants in the 1930s, the clemency rate (*i.e.*, the number of commutations granted per 1,000 people incarcerated) remained steady for four decades, before spiking and dropping off again in the early 1980s. *See* Figure 2. This second drop-off coincided with emerging political forces that brought longer sentences and more incarceration in New York and across the nation.

As Part Three explains, all acts of clemency until the mid-1990s were recorded in the governor's annual "Public Papers," a set of documents memorializing policies and actions undertaken by the executive branch. These documents create an opportunity for rigorous historical assessment that does not exist in many other states, where clemency records are often incomplete or nonexistent. Part Three takes up that task by examining trends in the frequency of grants, the types of sentences commuted, and the rationale commonly cited in favor of granting clemency.

1 Clemency data for years 1992 through 2018 obtained via Freedom of Information Law request.

2 Public Papers of Al Smith, 1928 ; Bureau of Justice Statistics, Historical Statistics on Prisoners in State & Federal Institutions, 1925-1986.

3 DOCCS Fact Sheet, Jan. 1, 2020, <https://doccs.ny.gov/system/files/documents/2020/01/january-monthly-report.pdf> (reporting a prison population of 44,284 on January 1, 2020).

4 Press Release, Governor Cuomo Grants Clemency to 11 Individuals, (Jan. 3, 2020), <https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-11-individuals>. Of the eleven clemency recipients, nine were pardons and two were commutations.

5 N.Y. Const. art. IV, § 4. The clemency power extends to all cases except treason and impeachment.

We found that most commutations before the 1970s were granted to people convicted of homicide offenses. Since then, the overwhelming majority of grantees have been individuals convicted under New York’s infamous Rockefeller drug laws.<sup>6</sup> See Figure 6. Descriptions of individual grants often refer to recommendations of prosecutors, who (along with judges and corrections officials) are asked for an opinion each time somebody convicted in their jurisdiction applies for clemency. We found that the percentage of grantees who were supported by the district attorney decreased each decade from the 1940s through the 1980s, the last decade for which that information is available. See Figure 7. The Public Papers also reveal which factors were most commonly associated with favorable clemency decisions, such as participation in educational and vocational programs, active involvement in the prison community, and maintaining a clean institutional record. Examining these factors provides insight into how the criteria for granting clemency have changed over time.

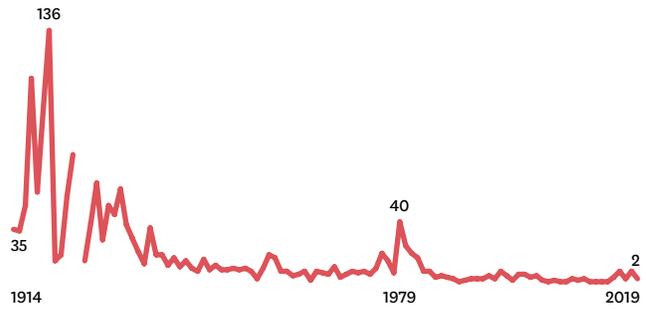
Yet, the history of discretionary release in New York shows how, in willing hands, clemency can be a useful tool for addressing unfair sentencing practices. When the state legislature amended the Rockefeller drug laws in 1977—reducing penalties for marijuana offenses, without making the changes retroactive—Governor Hugh Carey granted commutations to many individuals sentenced under the previous statute, in order to prevent unfair disparity in punishment. Hence, Governor Carey used clemency to promote fairness in sentencing by limiting the unintended consequences of sentencing reform.

More recently, in 2017, Governor Cuomo signaled that he would take a similarly active role in clemency by announcing an expanded partnership with private organizations to identify and assist promising clemency applicants. Sadly, as Part Four discusses, more than two years have elapsed since the announcement, without any increase in the number of commutations granted in New York.<sup>7</sup>

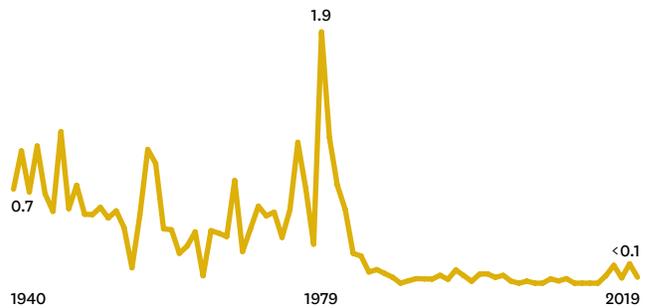
<sup>6</sup> Enacted in 1973, the Rockefeller drug laws imposed some of nation’s longest sentences for drug crimes. Under the original statute, selling two ounces or more of heroin, cocaine, or marijuana was punishable by a minimum prison term of 15 years to life. See Madison Gray, *New York’s Rockefeller Drug Laws*, TIME (Apr. 2, 2009), <http://content.time.com/time/nation/article/0,8599,1888864,00.html>.

<sup>7</sup> See David Leonhardt, *Cuomo Inspired Hope... and then let people down*, N.Y. TIMES, Jan. 29, 2020. See also Khalil Cumberbatch and Dominic Dupont, *Cuomo’s clemency imperative: New York should show mercy to far more criminals sentenced to long prison terms*, NEW YORK DAILY NEWS, Aug. 13, 2019.

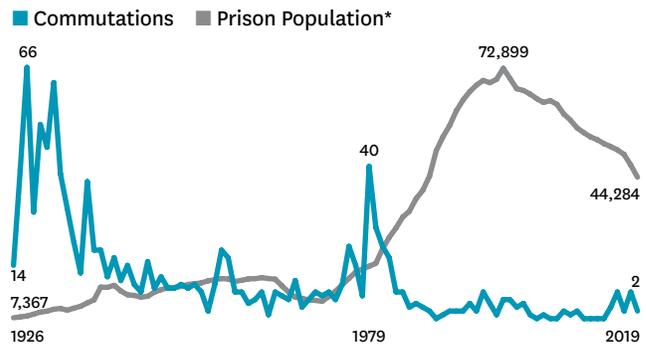
**Figure 1: Commuted Sentences in New York (1914–2019)**



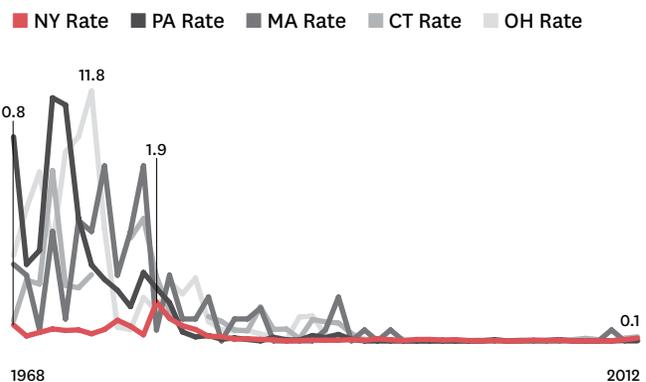
**Figure 2: Clemency Rate (1940–2019) (Commutations per 1,000 Incarcerated)**



**Figure 3: Commutations and Prison Population (1926–2019)**



**Figure 4: Modern Clemency Trends (Commutations per 1,000 Incarcerated)**



\*Population data collected from the Bureau of Justice Statistics and official state sources

# Part One

## New York's Clemency Process

The New York State Constitution establishes that the governor “shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment.”<sup>8</sup> In many states, the legislature has established an advisory board to recommend applicants or assist the governor in making clemency decisions, but no such advisory board exists in New York. The Executive Clemency Bureau, sitting within the Department of Corrections and Community Supervision, assembles information necessary for the governor to examine the merits of each application, but does not recommend which applications to grant or provide any substantive assessment of the applicants.<sup>9</sup>

A document titled Guidelines for Review of Executive Clemency Applications (the “Guidelines”) provides several clemency eligibility requirements. The Guidelines require that, to be eligible for clemency, an applicant serve at least one-half of an indeterminate sentence (or three-sevenths of a determinate sentence); that the sentence for which relief is being sought is longer than one year; and that the applicant will not be eligible for parole in the next year.<sup>10</sup> These threshold requirements are imposed by the governor, whose discretion cannot be limited either by statute or judicial ruling.<sup>11</sup> As part of Governor’s Cuomo’s clemency initiative, the Executive Clemency Bureau has worked alongside volunteer attorneys in recent years to identify suitable applicants, though the

project has yet to produce any increase in commutation grants.<sup>12</sup> For more information about Governor Cuomo’s clemency program, see Part Four of this report.

The Guidelines, which the governor may alter or rescind at any time, state that commutation is “extraordinary relief,” appropriate only if “clear and convincing” evidence shows an application falls within one of three categories. First, clemency may be granted for an applicant who has made “(a) exceptional strides in self-development and improvement ... (b) responsible use of available rehabilitative programs and has addressed identified treatment needs; and (c) commutation is in the interest of justice, consistent with public safety and the rehabilitation of the applicant.”<sup>13</sup> Second, clemency may be granted for an applicant who is suffering from a terminal illness or other chronic disability that would be “substantially mitigated by release from prison.”<sup>14</sup> Third, one may seek commutation if “further incarceration would constitute gross unfairness because of the basic inequities involved.”<sup>15</sup> The Guidelines do not offer examples of circumstances that would give rise to gross unfairness, but only that commutations in this category “will be rarely granted.”<sup>16</sup>

In each case, the Executive Clemency Bureau seeks a recommendation from the district attorney and the sentencing judge. In addition, the Bureau obtains a report concerning performance and behavior from each institution in which an applicant has been incarcerated. Pursuant to Directive 6901,<sup>17</sup> the report must describe the applicant’s institutional history (including work and program assignments, quality of participation in assignments, educational and vocational achievements, conduct within the facilities, and disciplinary background); psychological and psychiatric evaluations; visitation and correspondence (including computerized listings of the applicant’s visiting list and correspondence and telephone lists); a statement as to victim notification; and a “definite recommendation” by the facility Superintendent as to the propriety of clemency. An applicant is not entitled to view supplementary staff or volunteer recommendations provided to the Superintendent as part of the information-gathering process.

8 N.Y. Const. art. IV, § 4

9 Department of Corrections & Community Supervision, Dir. No. 6901 (Apr. 17, 2018), <http://www.doccs.ny.gov/clemency.html>. According to the DOCCS website, the Bureau serves three functions: (1) to determine whether an application meets the governor’s clemency eligibility requirements; (2) to gather materials relating to each petition; and (3) to field inquiries by petitioners and other interested parties.

10 Guidelines for Review of Executive Clemency Applications (hereinafter “the Clemency Guidelines”), <http://www.doccs.ny.gov/directives/GRECA.pdf>. The criteria set forth in the Guidelines have remained largely unchanged since the administration of Nelson Rockefeller. See Meah Dell Rothman, *The Pardoning Power: Historical Perspective & Case Study of New York & Connecticut*, 12 COLUM. J. L. & SOC. PROBS. 149, 176 (1976).

11 See *People ex rel. Page v. Brophy*, 248 A.D. 309, 313, 289 N.Y.S. 362, 364 (App. Div. 1936). Directive 6901 states that the requirements may set aside for “humanitarian reasons” at the governor’s direction.

12 See Cumberbatch & Dupont, *supra* note 7.

13 See Clemency Guidelines, *supra* note 10.

14 *Id.*

15 *Id.*

16 *Id.*

17 See Dir. No. 6901, *supra* note 9.

For the roughly 40% of incarcerated persons serving an indeterminate sentence,<sup>18</sup> a grant of clemency does not automatically terminate the applicant’s custodial sentence. Instead, that person becomes eligible for parole, and the Board of Parole determines whether release is warranted based on the risk of reoffending and the seriousness of the offense, among other factors.<sup>19</sup> For those serving determinate sentences, commutation automatically triggers release from prison.

For most of New York’s history, acts of clemency were announced roughly once per year, usually around Christmas. In 1976, Governor Hugh Carey introduced a practice of considering clemency applications on a continual basis throughout the year,<sup>20</sup> though to present day the majority of commutations are announced in December.

## Part Two Clemency’s Historical Decline in New York

Clemency has long been a political hot button in New York. Governors Charles S. Whitman and Alfred E. Smith commuted over 500 sentences between 1915 and 1920. As clemency reached its high water mark, however, the public was growing angry about rising crime and the perceived inefficacy of law enforcement. Just as they would do in the 1980s and 1990s, New York lawmakers in the early twentieth century responded to the furor by increasing penalties and sending more people to prison.<sup>21</sup>

There were also specific commutations that provoked increased scrutiny of clemency in New York. In 1920, Governor Smith commuted the sentence of John J. “Bum” Rogers, who in 1917 was sentenced to a fourteen-year prison term for assault. The commutation drew immediate and intense criticism after Rogers returned to prison in connection with a string of armed robberies.<sup>22</sup> Governor Smith’s clemency record was closely scrutinized in local newspapers, and his stance on crime became a liability when he campaigned for president in 1928.<sup>23</sup> Meanwhile, a 1927 New York sentencing scheme known as Baumes Laws imposed an automatic life sentence for a fourth felony conviction; this led inevitably to more individuals needing relief through clemency, even as granting such relief grew more politically risky.

Distrust was directed not only at clemency, but also at the state’s rapidly growing parole system. The following statement by Governor Herbert H. Lehman suggests that, at least in some ways, the dialogue around discretionary release has been remarkably persistent over the last century:

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18 See New York State Department of Corrections and Community Supervision, Profile of Under Custody Population as of January 1, 2018 (Oct. 2018).

19 N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2.

20 Public Papers of Hugh L. Carey, 1976.

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21 Assembly Passes Crime Wave Bills: Measures Drastically Increase Penalties for Robbery, Grand Larceny and Burglary, NY TIMES (Mar. 8, 1921).

22 Carolyn Strange, Pardon and Parole in Prohibition-Era New York: Discretionary Justice in the Administrative State, 54 OSGOOD HALL L.J. 907, 926 (Spring 2017).

23 See *The Tradition of Granting Clemency, and Second-Guessing It*, NY TIMES, Dec. 2, 2009.

Even though under parole there may be 100 cases of successful readjustment and only 5 failures, those 5 are frequently enough to damn the system of parole in the eyes of the public, particularly if they are of a character which lend themselves readily to sensational exploitation. But 5 or 50 or even 100 failures, regrettable as they may be, are few in comparison with the many thousands of cases handled and should not of themselves condemn the general principle of soundly administered parole.<sup>24</sup>

Governor Lehman's observations reflect that the media's penchant for sensationalizing crime dates back to at least the early twentieth century, when discretionary release was still in its relatively infancy. Such coverage cultivates fear and distorts decision-making around clemency and parole. Lehman's observations demonstrate why it is vital to establish institutions capable of withstanding the vicissitudes of public opinion. Yet, more than 80 years later, New York remains among the minority of states with no independent advisory board for clemency.<sup>25</sup>

Although executive discretion has drawn protest over the years, at times it has proved useful for New York's governors. In 1957, Governor Averell Harriman granted 11 commutations to individuals incarcerated at Rikers Island who helped rescue survivors of a commercial airliner that crashed into the island in February of that year.<sup>26</sup> In 1976, Governor Hugh Carey commuted the sentences of eight school teachers incarcerated for violating a state statute that prohibited public employees from striking.<sup>27</sup> Most significantly, Carey later granted commutations to 29 individuals incarcerated under provisions of the Rockefeller drug laws that had since been revised, a use of the clemency power described in further detail below.

## Clemency and the Rockefeller Drug Laws

Enacted in 1973, New York's infamous Rockefeller drug laws mandated life sentences for a broad range of low-level drug offenses.<sup>28</sup> The law was partly modified by the 1977 Marijuana Reform Act, which decriminalized possession of small amounts of marijuana and reduced penalties for possession of larger amounts and for the sale of marijuana.<sup>29</sup> The revised statute did not apply retroactively or create a right to resentencing, however, which meant that individuals convicted of the same crime were serving vastly different sentences based on when they were convicted. Seeing this as an opportunity to exercise his clemency powers, Governor Carey conducted a case-by-case review of people serving time under the 1973 statute; Carey ultimately granted seven commutations to individuals who would have been prosecuted for misdemeanors under the revised statute.

As the legislature further amended the Rockefeller laws to ameliorate their harshness, Governor Carey continued to use executive discretion to plug the gaps left by the legislature. In 1979, legislators modified the sentencing statute as applied to first-time drug offenders; the change allowed for resentencing of individuals incarcerated for A-II and AIII offenses. Because resentencing was not provided to Class A-I offenders, some people convicted under the pre-1979 statute were left serving minimum 15-year sentences for conduct that, after the reform, was punishable by a minimum term of 3 or 6 years.<sup>30</sup> In order that the "the revised law might be applied in an equitable and nondiscriminatory manner," Governor Carey waived the normal threshold eligibility requirements for clemency and conducted a case-by-case review of A-I drug sentences under the supervision of Richard A. Brown, the Governor's Counsel and a former State Supreme Court Justice.<sup>31</sup> In 1979, the "special review" resulted in commutations for 27 A-1 offenders and 13 others prosecuted under New York's drug laws. Dozens more drug offenders were commuted by Carey through the end of his administration in 1982. More sentences were commuted between 1979 and 1982 than would be commuted over the following 36 years combined.

<sup>24</sup> Gov. Herbert H. Lehman, *Our Parole System*, New York State Bar Association Bulletin, Dec 1, 1937.

<sup>25</sup> As explained in Section 1, the Executive Clemency Bureau performs an administrative role but does not issue recommendations to the governor.

<sup>26</sup> Public Papers of Averell Harriman, 1957.

<sup>27</sup> Public Papers of Hugh L. Carey, 1976.

<sup>28</sup> N.Y. Penal Law § 220.10 (McKinney) (repealed).

<sup>29</sup> N.Y. Penal Law § 221.00 (McKinney)

<sup>30</sup> Public Papers of Hugh L. Carey, 1979.

<sup>31</sup> *Id.*

By using commutations to correct structural unfairness, Carey leveraged the power and versatility of clemency to a degree that few other governors have accomplished. Yet, the spurt of commutations between 1976 and 1982 also illustrated the modern limitations of clemency.<sup>32</sup> For one, the expansion of clemency for drug offenders corresponded with fewer commutations for people convicted of homicide crimes, even though such individuals became no less deserving of clemency. Unfortunately, because of political considerations, clemency is treated as though it were an exhaustible resource, even without structural limitations on the number of people who can receive it.

## Sentencing and Parole Reform in the 1990s

Governor George Pataki spearheaded a series of legislative changes in the 1990s that made parole less available and increased certain prison terms in the name of “truth in sentencing.” Specifically, the Sentencing Reform Act of 1995 eliminated parole for individuals classified under New York’s penal code as second-time violent felony offenders.<sup>33</sup> The 1995 law also required people to serve at least 85% of the statutory minimum sentence, and greatly increased the severity of sentences for “persistent violent felony offenders.”<sup>34</sup> In 1998, Jenna’s Law eliminated parole for first-time violent felony offenders. Instead of serving an indeterminate sentence and being released on parole, individuals would serve determinate sentences to be followed by a period of post-release supervision. As anticipated, these reforms were followed by a dramatic decline in the number of people paroled in New York.<sup>35</sup>

At the same time, the media fixated more than ever on crimes committed by formerly incarcerated persons. For instance, Jenna’s Law was named for Jenna Grieshaber, a 22-year-old nursing student murdered by a parolee in Albany.<sup>36</sup> Passed during an election year, when the emotional intensity surrounding crime control and discretionary release had reached a fever pitch, Jenna’s Law belonged to a cohort of 50 state laws named after crime victims enacted during an 18-month period.<sup>37</sup>

The passage of Jenna’s Law was in keeping with the media’s capitalization on violent crimes committed by formerly incarcerated persons. A year after being paroled in 1989, a man named Arthur Shawcross was arrested in connection with twelve murders in the Rochester area. Although Shawcross was nearing the end of his sentence when he was paroled and would have been released by the time he committed most of the murders, the decision to parole him was perceived as evidence of the Board’s perceived incompetence. In 1992, 32-year-old New York parolee Nathaniel White was arrested on suspicion of murdering six female victims, one of whom was just 14 years old. In 1994, Reginald McFadden, who had been serving a life term in Pennsylvania until his sentence was commuted by Governor Mark Singel, was arrested in New York in connection with two murders and a rape. Such crimes, however rare, became public obsessions, and the media’s fixation on them created an atmosphere in which Pataki’s “tough” crime policies were easy to advance.<sup>38</sup>

32 From 1975 to 1976, excluding grants to participants in a school strike, 14 of 20 commutations went to people convicted of first-degree murder. From 1977 to 1982, Carey commuted 119 more sentences, but only four of these sentences were imposed for first-degree murder. See Public Papers of Hugh L. Carey, 1975-1982.

33 Correction Law § 803(1)(c), as amended by Laws of 1995, ch. 3, § 27.

34 N.Y. Penal Law § 70.08 (McKinney)

35 See John Caher, ‘Dismantling Parole’: Parole Release Rates Plunge Under Pataki’s Tough Policy, *New York Law Journal* (Jan. 31, 2006), available at <https://www.law.com/newyorklawjournal/almID/1138628122760/>.

36 Evelyn Nieves, *Lost Crusader Inspires ‘Jenna’s Law’*, *N.Y. TIMES*, May 3, 1998, at 43-44.

37 Dale Russakoff, *Out of Grief Comes a Legislative Force*, *WASHINGTON POST*, June 15, 1998, at A01.

38 See *No More Willie Hortons*, *N.Y. TIMES*, Dec. 13, at 1991, A38; Robert Hanley, *Parole Board Under Scrutiny in Murder Suspect’s Release*, *N.Y. TIMES*, Jan. 13, 1990, at 30.

# Part Three

## Who Receives Clemency in New York, and Why

This Section uses data culled from the Governor’s Public Papers and other publically available sources to examine which types of sentences are most often commuted, the extent to which prosecutors have supported or opposed clemency, and the reasons most commonly cited in favor of granting clemency.

### Commutations by Type of Offense

Since 1940, people convicted of homicide and drug crimes have received about the same number of commutations, together accounting for roughly three quarters of all grantees. See Figure 5. Yet the distribution of commutations across categories of crimes has changed dramatically over time. From the 1940s to the 1960s, murder was by far the most common offense committed by those who received commutations. Since then, most commutations have gone to people convicted of drug crimes. See Figure 6. Governor Hugh Carey, in office from 1975 to 1982, was especially active in using clemency to prevent sentencing disparities that resulted from changes to the Rockefeller drug laws.<sup>39</sup>

The shift in commutations toward people convicted of drug offenses demonstrates both the capacity and the limitations of modern clemency practices. On one hand, Governor Carey’s relatively expansive use of clemency in the early 1980s shows that clemency can be an effective remedy for draconian sentencing policies, particularly when combined with legislative reform. Unfortunately, the increase in the number of commutations for drug sentences coincided with a decrease in commutations for people convicted of homicide crimes. Of course, there is no reason why individuals from both groups cannot be considered for clemency simultaneously. Unfortunately, however, clemency is often administered as though it were a finite, exhaustible resource. Even though the number of suitable candidates has likely increased as more people have been incarcerated, commutation grants have declined.

Figure 5: Commutations by Offense Type (1940-2018)

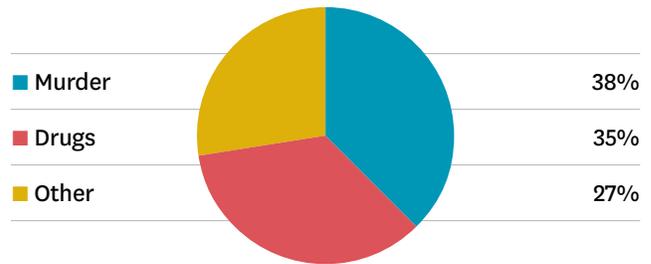


Figure 6: Commutations by Offense, Decade

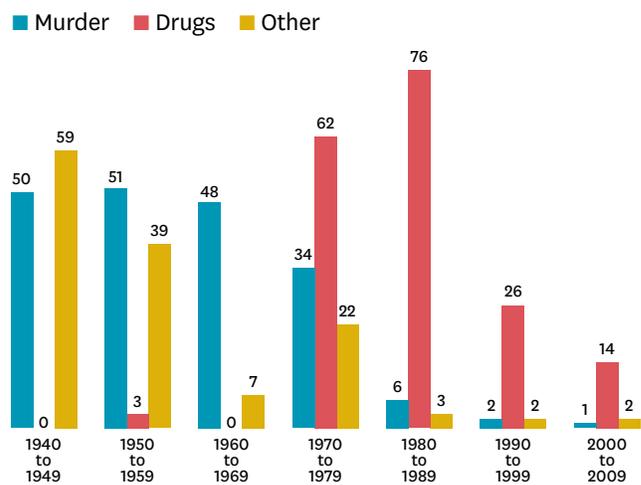
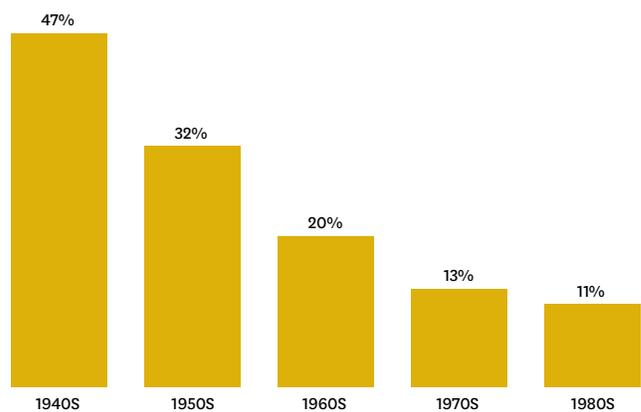


Figure 7: Percentage of Commutation Grants Supported by DAs



<sup>39</sup> Recent statistics reflect a more balanced distribution of commutation grants: ten of the sixteen commutations granted between 2016 and 2018 went to individuals convicted of murder or attempted murder. Response to FOIL Request (on file with author).

## Prosecutor Recommendations

Prosecutors in New York are elected, as they are in most states. In recent decades, candidates have staked their campaigns on whatever policies appear “toughest” on crime.<sup>40</sup> This political reality probably explains why prosecutors today rarely express support for clemency applicants, even those for whom further incarceration seems unnecessary. This was not always true.

Prosecutorial support for clemency was frequently noted in the Governor’s Public Papers, which listed each pardon and commutation granted during a calendar year. In fact, summaries of a number of grants indicate that it was the district attorney who initiated the clemency process on behalf of an applicant.<sup>41</sup> Almost half of the 109 individuals who received commutations between 1940 and 1949 were supported by the district attorney in whose county the crime was prosecuted. As the twentieth century progressed, however, prosecutors became less likely to recommend clemency. The percentage of annual grants supported by a district attorney fell over five consecutive decades, from 47% in the 1940s to 11% in the 1980s, the last decade for which such information was collected.<sup>42</sup>

## Reasons for Granting Clemency

It is often difficult to predict who will be granted clemency or why. The New York State Constitution directs the governor to report all acts of clemency to the legislature each year, including each individual’s offense and prison sentence.<sup>43</sup> Until 1995, this information was included in each governor’s annual Public Papers, a set of documents memorializing policies and actions undertaken by the executive branch. Although a governor is not legally required to explain clemency decisions, it is customary to briefly summarize the reasons for each grant.

Because governors have not issued Public Papers since 1994,<sup>44</sup> the Center instead examined press releases, news clippings and other public statements in order to ascertain the rationale for commutations during years 1995 or later.

The Center identified the most commonly mentioned factors within twenty-year intervals, beginning in 1940. *See* Appendix 1. The results show that certain factors have become more common over time, while others have become less so. For example, educational achievement (i.e. participation in educational programs while incarcerated) was the single most common factor cited in favor of clemency for the periods 1960-1979, 1980-1999, and 2000-2019. Three other factors were also among the top five in at least three of the four periods examined; these were community involvement (volunteer, community-oriented activities), vocational development, and institutional record (disciplinary history and overall adjustment while incarcerated). These findings align broadly with the existing Clemency’s Guidelines, which emphasize “exceptional strides in self-development and improvement ... and responsible use of available rehabilitation programs.”<sup>45</sup>

Some factors, such as the “circumstances of the crime,” were once frequently mentioned but became less common over time. The term “circumstances of the crime” here refers to aspects of the crime thought to bear on culpability, including age at the time of offense, provocation by a victim or third party, intoxication, and an individual’s role in carrying out the crime. The movement away from this type of explanation aligns with Governor Cuomo’s stated intent to prioritize evidence of post-offense rehabilitation as opposed to the nature of the crime.

<sup>40</sup> *See* Rachel Barkow, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 112-13 (Harvard University Press 2019).

<sup>41</sup> *See* Public Papers of Nelson Rockefeller, 1970, at 907-908 (describing commutation of David Wright). It remains standard procedure for the governor to solicit recommendations from the sentencing judge and prosecuting district attorney, though the recommendations are not separately made public. Governors are not required to record the prosecutor’s recommendation in each case, so it is possible that not all favorable recommendations are reflected in the Public Papers. *See* the Clemency Guidelines, *supra* note 10.

<sup>42</sup> These percentages were calculated by excluding mass clemency grants. Data was not available for the year 1971.

<sup>43</sup> N.Y. Const. Art. IV § 4.

<sup>44</sup> The practice was abandoned in favor of an annual “state of the state” address beginning in 1995.

<sup>45</sup> *See* the Clemency Guidelines, *supra* note 10.

# Part Four

## Recent Clemency Trends and Governor Cuomo's Clemency Project

The number of applications for clemency in New York has increased significantly in recent years, while grants remain historically low. Between 1967 and 1973, 43 commutations were granted from a pool of 391 applicants, amounting to a success rate of roughly 11%.<sup>46</sup> By comparison, between 2007 and 2013, 5 of 2,059 applicants received clemency—a 0.2% success rate.<sup>47</sup> The likelihood of success was therefore 50 times greater among those applying for clemency between 1967 and 1973 compared with those who applied between 2007 and 2013.

In October of 2015, Governor Andrew Cuomo announced the creation of a pro bono clemency program, which grew out of a partnership with the National Association of Criminal Defense Lawyers (NACDL) along with several local bar associations and legal aid organizations.<sup>48</sup> The project, which Cuomo announced along with the first two commutations of his administration, was expanded in 2017 through a new partnership with the NACDL, Families Against Mandatory Minimums (FAMM), and the Foundation for Criminal Justice (FCJ).<sup>49</sup> The purported goal of the program is to “help[] incarcerated individuals get access to the resources they need to apply for clemency, make the case for their rehabilitation and have the opportunity to contribute to and re-enter society.”<sup>50</sup>

The NACDL for its part “agreed to assist in the implementation of the program by providing technical assistance and training of the pro bono attorneys.”<sup>51</sup> By working with the Executive Clemency Bureau, NACDL committed to using its resources to “identify those deserving of a second chance” and “provide a steady supply of high-quality clemency applications to the Governor’s Counsel’s Office to review,”<sup>52</sup> with the understanding that clemency decisions would be determined by evidence of rehabilitation rather than the type of offense committed.<sup>53</sup> Lawmakers and leaders from across the legal community expressed enthusiasm and support for the project, and the NACDL and FAMM hoped the project would become a template for public-private clemency partnerships across the country.<sup>54</sup>

As of March 2020, returns have been underwhelming. Although the 21 commutations issued from 2015 to 2019 are certainly an improvement over the zero granted in Governor Cuomo’s first term, the frequency of grants remains low by historical standards, especially in relation to the size of New York’s prison population. Notwithstanding current efforts of volunteer organizations to identify viable applicants and prepare thorough applications, the average commutation rate (i.e. commutations per 1,000 incarcerated persons) between 2015 and 2018 was roughly one sixth of the average commutation rate between 1940 and 1980.<sup>55</sup> With scores of clemency applications still pending, it is unclear what the immediate future holds for clemency in New York.

46 For data on the number of applications between 1967 and 1973 (excluding 1970), see Meah Dell Rothman, *The Pardoning Power: Historical Perspective & Case Study of New York & Connecticut*, 12 COLUM. J. L. & SOC. PROBS. 149, 176 (1976).

47 See Office of the New York State Comptroller, *New York State’s Aging Prison Population*, 6 (April 2017).

48 Press Release (Oct. 22, 2015), *Governor Cuomo Grants Clemency to Four Individuals and Launches Pro Bono Clemency Program*, <https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-four-individuals-and-launches-pro-bono-clemency-program>. The organizations listed in connection with the Governor’s 2015 announcement were the New York City Bar Association, the New York County Lawyers Association, the New York State Bar Association, the Legal Aid Society, Prisoners’ Legal Services of New York and the NACDL.

49 Press Release (Aug. 21, 2017), *Governor Cuomo Announces First-in-the-Nation State Partnership with National Organizations to Expand Successful Pro Bono Clemency Initiative*, <https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-state-partnership-national-organizations-expand>.

50 See *id.*

51 Press Release (Oct. 22, 2015), *Governor Cuomo Grants Clemency to Four Individuals and Launches Pro Bono Clemency Program*, <https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-four-individuals-and-launches-pro-bono-clemency-program>.

52 Press Release (Aug. 21, 2017), *supra* note 49.

53 See *State Clemency Project*, An Introduction from Steven Logan, <https://stateclemency.org/training/>.

54 See *NACDL/FAMM State Clemency Project*, [stateclemency.org](http://stateclemency.org).

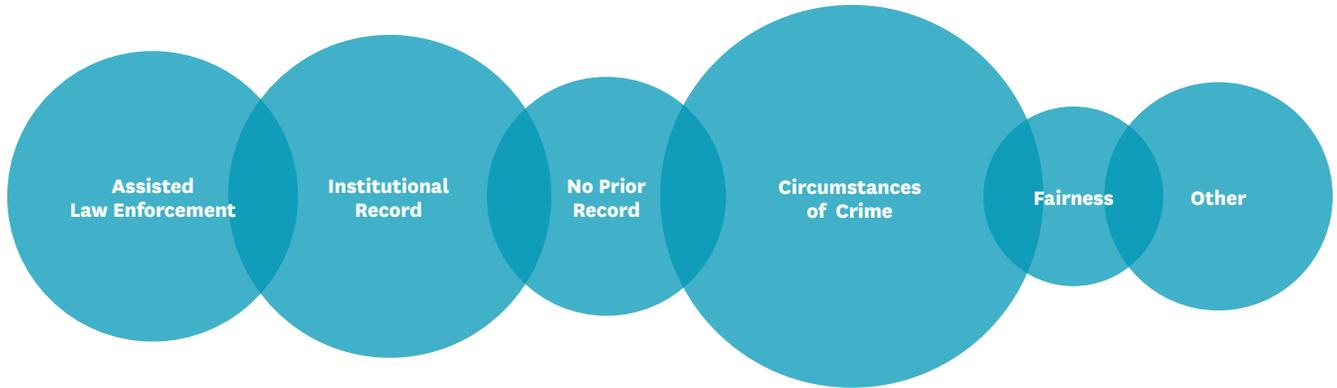
55 From 1940 to 1980, commutations were granted at rate of .58 per 1,000 persons incarcerated. From 2015 to 2018, approximately 0.095 commutations per 1,000 individuals were granted.

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# Appendix 1: Reasons cited for granting clemency\*

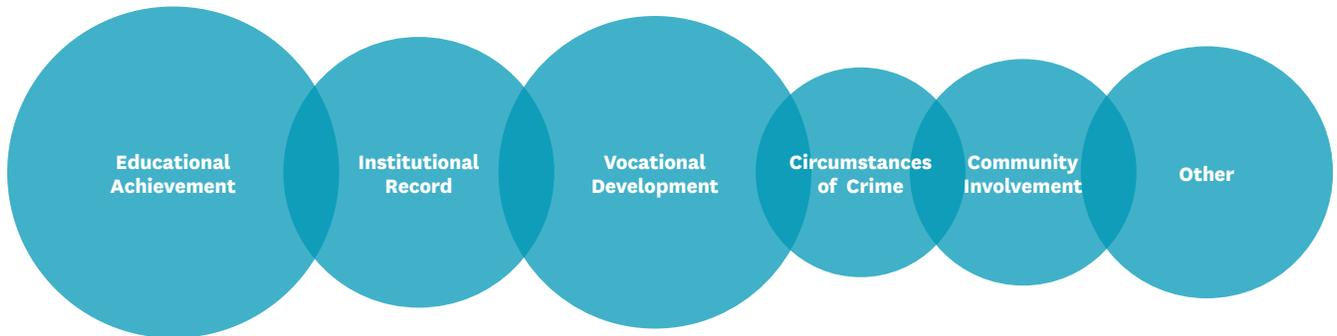
## 1940-1959

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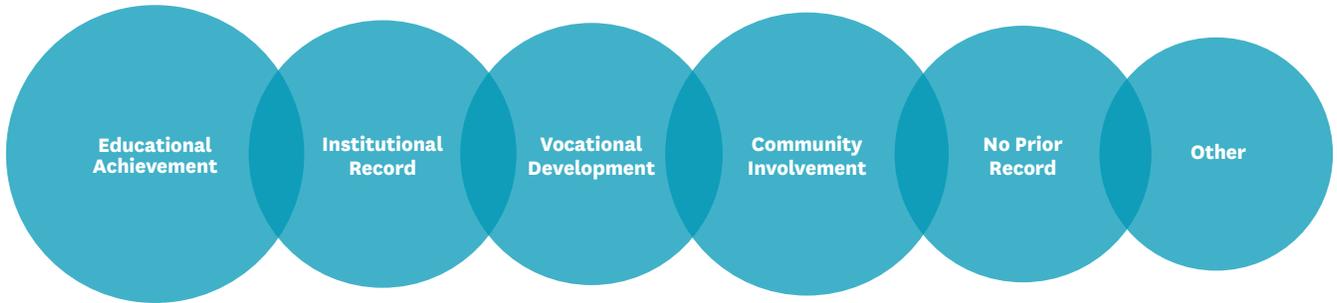
## 1960-1979

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\*The category "other" refers to factors such as religious activity, status as a military veteran, and rehabilitation from substance abuse.

1980-2000



2000-2019



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