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EXECUTIVE CLEMENCY: THE LETHAL ABSENCE OF HOPE¹

Jonathan Harris* and Lothlórien Redmond**

Executive clemency is an act by a governmental chief executive that relieves in whole, or in part, the consequences resulting from a criminal conviction.² Although not limited to death penalty cases, the concept of clemency is most commonly associated with the decision by a sitting state governor whether to commute a sentence of death to a lesser sentence, usually to life imprisonment.³ It is in that context that this article examines the meaning and process of clemency.

Samuel Johnson's Dictionary of the English Language, first published in 1775, defined clemency as "mercy, humanity, tenderness" and pardon as "to excuse, to forgive, to remit."⁴ At the time Dr. Johnson published his dictionary, the pardon power was already well-established in England as a discretionary power of the crown. The pardon or clemency power, exercised today by the President and the governors of the fifty states, is a direct descendent of that power of the English king.⁵

We begin, however, with an interpretation of clemency that strays far from Dr. Johnson's definition of "mercy, humanity, tenderness" and that has gained predominance in this country since the Supreme Court's 1976 decision in *Gregg v. Georgia*⁶ restored the death penalty. Under this interpretation, although the executive may have broad statutory discretion to consider all available information and circumstances, executive clemency should be granted *only* where the convicted petitioner can: (1) establish actual innocence, or at least raise more than compelling doubts about guilt, or (2) demonstrate a failure of legal due process.⁷ In other words, the discretionary exercise of the clemency power should be limited to cases where the petitioner's conviction and death sentence is either fatally flawed on the facts or in meaningful violation of legal process.

This current interpretation of clemency has the perceived advantage of appearing, on first thought, as fair, judicious, rational, and respectful of the judicial process and the role of the jury in that process. It positions clemency as a type of fail-safe; a final review by the governor to make sure that the state is executing those actually guilty and properly convicted. However, the seeming legitimacy of this meaning disappears once probed beneath the surface.

Limiting clemency to this meaning – actual innocence or deprivation of due process – is: (1) entirely at odds with a clemency process established in virtually all states that grants the governor broad discretion to consider the widest possible range of factors and information; (2) inconsistent with the historical, legal and moral role of clemency under the common law and the Constitution of the United States; (3) inappropriately deferential to the judicial process and, as such, shields executives from their responsibility to evaluate the need for mercy; and (4) ultimately results in a clemency process devoid of any meaning. Rather, to have any real force, the meaning of clemency must include, incorporate, and embody the values expressed in Dr. Johnson's definition of mercy and humanity.

To properly analyze and define the scope of the clemency power, it is both necessary and instructive to first examine the source of that power. While now formally set forth in statutes, the executive clemency power possessed by the governors of the fifty states flows directly from long-standing common law principles and traditions⁸ -- the same principles and traditions that form the foundation of the pardon power bestowed upon the President by the Founders in Article II,

Section 2 of the Constitution.⁹ In 1833, Chief Justice John Marshall described the basis and scope of the Presidential pardon power in the following sweeping terms:

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate . . .¹⁰

Since 1833, the Supreme Court has consistently reiterated and reinforced this interpretation of the pardon power and executive clemency as being a discretionary act encompassing information and factors outside the court system. As stated in 1998 by Chief Justice William Rehnquist in terms that echoed Chief Justice Marshall's words:

[T]he heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.¹¹

Against this guidance and instruction from the Supreme Court, we look at the two-part clemency test that has now become widely accepted: First, can the petitioner prove his or her innocence? Or second, can the petitioner prove a failure of due process?

Looking at this test afresh, but mindful of the Supreme Court's words, we can all agree that when a convicted and condemned prisoner proves his or her actual innocence (presumably after years on death row), it is no great act of grace to grant that prisoner freedom. Nor is it an act of mercy or humanity, rather, it is simply what is due. The release of a person wrongfully convicted of a crime is no act of discretion, but rather, is mandatory. It is not clemency, but exoneration.

The same holds true for a person wrongly convicted, imprisoned, and sentenced to death as a result of a violation of legal due process. Again, it is no great act of grace, mercy, or humanity to halt the execution of a person wrongfully convicted. Rather, it is what is due. It is not discretionary, but mandatory that the execution of the death sentence in such a case be withheld pending further and appropriate legal proceedings.

Therefore, if clemency is constrained to mean an inquiry and process solely directed at sparing the wrongfully convicted — either legally or factually — from a death sentence, then we have so limited the meaning, scope, and exercise of the clemency power as to define it virtually out of existence. Simply put, there is no executive discretion to be exercised, no grace, mercy, or humanity to be had in sparing the wrongfully convicted from execution. This is what the law minimally requires, and limiting clemency to this inquiry effectively reduces the clemency process to, at its most robust, a final review by the governor as to whether the state intends to execute an innocent man or woman. In other words, under this limited meaning, clemency is entirely coterminous with the minimal due process requirement that the state not execute the wrongfully (factually or legally) convicted.

Historically, however, clemency has meant much more: a broadly discretionary act by an executive free to examine sources of information and circumstances beyond the ken of the courts and the jury, including mitigating circumstances, rehabilitation and redemption, the wisdom, justice and proportionality of the death sentence, and the mental state of the petitioner — in short, not just innocence or guilt, but mercy and humanity.

In this light, we address two fundamental questions here: How has the definition of clemency changed since our Founding Fathers wrote it into the Constitution? And, what does the current definition mean for the future of clemency?

We address these questions through first reviewing the foundations of the clemency power through history, common law and the U.S. Constitution. Second, we evaluate the Supreme Court's remarkably consistent views on clemency, both substantively and procedurally, as articulated in Supreme Court opinions spanning almost 175 years. Third, we discuss shifting views of criminal justice in the latter half of the twentieth century, as those views affect clemency, particularly, the dramatic decline in the use of clemency to commute death sentences since *Gregg v. Georgia*. Finally, as a case study, we consider the clemency process in California, and the effect of that process on the practical meaning of clemency.

Part 1: The Foundations of the Clemency Power

While the source of clemency power in the United States is directly traceable to common law foundations, and this article focuses on the meaning and process of clemency in that legal context, it is nevertheless necessary to recognize that the common law clemency power did not spring from a vacuum. The exercise of clemency power by the executive has existed as long as recorded history. Indeed, it unquestionably pre-dates written laws, to a time when cavemen sat around the fire and a tribal leader was charged with final authority whether to inflict expulsion or death upon a member who had transgressed the tribe's code of behavior, or whether to show mercy.¹² The clemency power, in short, has existed wherever and whenever the power to decide the fate of another rested in one individual's hands. In terms of written codes, the pardon power of the executive explicitly appears in the Code of Hammurabi, one of the earliest known written codes of laws, promulgated by the ruler of Babylon in approximately 1780 BCE and carved into a stone monument on public display. The Code of Hammurabi, which could perhaps be best described as a set of rules for regulating the affairs of society, combined elements of both a civil and criminal code. In the context of marital transgressions, it provided: "If a man's wife be surprised (in flagrante delicto) with another man, both shall be tied and thrown into the water, but the husband may pardon his wife *and the king his slaves.*" (emphasis added).¹³ It is interesting, for our purposes, that the written text of the Code of Hammurabi places no restrictions on the king's decision whether to grant a pardon, but appears to leave it to the discretion of the king.

Moving forward in time, the Romans had highly developed customs of issuing pardons, granting great discretion to the executive, and Caesar, renowned for his generalship and toughness, was equally lauded (not least, by himself) for his exercise of compassion and clemency.¹⁴ Numerous other

examples of clemency are found in ancient sources including, of course, multiple incidents of the denial or granting of clemency in the Old and New Testaments.

This long history of clemency — and the power immortal of kings, governors and other executives to grant clemency in the exercise of their discretion — is reflected in the English common law foundations of the clemency power.

The Clemency Power at Common Law

Under English criminal law, the clemency or pardon power of the king was discretionary, largely unfettered and viewed as an act of mercy. As defined by Lord Coke, a pardon was "a work of mercy, whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment [or] execution."¹⁵ Similarly, William Hawkins writes in his famous treatise, *Pleas of the Crown*, in the context of whether the king could issue conditional pardons, "It seems agreed, that the King may extend his mercy of what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit."¹⁶

William Blackstone (while taking note of some specific limitations on the king's pardon power) clearly expressed the general nature of the king's pardon power and its foundation in the concept of mercy, in his chapter, *Reprieves and Pardons*. After discussing possible bases for a judicial reprieve, Blackstone writes:

If neither pregnancy, insanity, non-identity, nor other pleas will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is the king's most gracious pardon; the granting of

which is the most amiable prerogative of the crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his scepter is mercy.¹⁷

The king's pardon power was delegated to his governors in the American colonies. As with the king's clemency, the clemency power of the colonial governors was not governed by any rules but was purely discretionary.¹⁸

The Framers of the Constitution

After gaining their independence from the British crown, many of the original colonial governments were understandably reluctant to vest unrestrained power in a chief executive. Thus, many of the newly independent states delegated the clemency responsibility to the legislature or to a combination of the legislature and the governor. Concerns about vesting the clemency power in the chief executive remained very much alive at the time of the Constitution Convention, where there was a meaningful debate whether to place the pardon power in the hands of the chief executive or the legislature. Ultimately, the Framers vested the pardon power in the presidency, but only after considering and rejecting several suggestions to restrict the scope of the president's pardon power, including a motion

that would have allowed the President to grant pardons only with the consent of the Senate.¹⁹

However, and more importantly, while there was disagreement over residing the pardon power with the president or the legislature, “the Framers were aware that the pardoning power should be delegated so as to be *independent of the judiciary*, and therefore act as a check on the courts.”²⁰ Indeed, the Framers understood the pardon power to be *an obligation of the office* and a vital check on Congress and the Judiciary.²¹

Alexander Hamilton and future Supreme Court Justice James Iredell, influenced by the writings of John Locke,²² were two of the most vocal proponents of the pardon power resting in the unfettered hands of the executive, with discretion to act in the interests of justice, broadly defined. Hamilton wrote in *The Federalist Papers* No. 74:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law.²³

James Iredell argued strongly in favor of the exercise of mercy within the pardon power, and the use of clemency to protect against injustices:

[T]here may be many instances where, though a man offends against the letter of the law, yet particular circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice. For this reason, such a power ought to exist somewhere; and where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people?²⁴

Iredell, while recognizing the risks of executive power,²⁵ also strongly argued for an unrestricted pardon power as shielding against arbitrary limitations and limiting the exercise of wisdom in circumstances where all “possible contingencies” could not be foreseen:

When a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it, for men must have a greater confidence in their own wisdom than I think any men are entitled to, who imagine they can form such exact ideas of all possible contingencies as to be sure that the restriction they propose will not do more harm than good.²⁶

The state clemency power was reallocated into the hands of most state governors as state constitutions adopted pardon provisions that largely mirrored the federal provision in the newly ratified Constitution.²⁷

Part 2: The Supreme Court and Clemency

In an unbroken line of cases dating back to 1830 that

is most striking for its consistency, the Supreme Court has interpreted and framed the executive clemency power as a discretionary act of grace, stemming from the common law pardon power of the English king.²⁸ In this line of cases, the Court has characterized and positioned this discretionary clemency power, both procedurally and constitutionally, as an integral part of our criminal justice system that nevertheless resides outside of the judicial system where it is neither (a) burdened by the constraints of the judicial process in terms of the type of information that may be considered or the process applied, nor (b) subject to any meaningful review by the courts.²⁹

The Pre-Furman Cases

In 1830, *United States v. Wilson*³⁰ was the first clemency case to reach the Supreme Court. President Andrew Jackson, for reasons not given in the opinion, gave a presidential pardon to a mail-robber named Wilson after he was convicted of robbery and sentenced to death. However, Wilson apparently did not want the pardon and did not present it to the court below. The Court, using language from contract law, and reasoning that the pardon had to be presented to the court below for it to be effective, held the pardon power could not be used to save Wilson’s life if Wilson did not want his life saved.³¹ In reaching this conclusion, Chief Justice Marshall discussed the history and exercise of the pardon power, writing: “The power of pardon, in criminal cases, has been exercised from time immemorial by the executive of that nation whose language is our language, and . . . it is a constituent part of the judicial system . . .”³² The Chief Justice further made clear, (as quoted in full in the introduction, above) that the pardon power was an act of “grace” within the discretion of the President.³³

Twenty-two years later in *Ex parte Wells*,³⁴ President Fillmore pardoned Wells on the condition that Wells remain in prison for life, bringing before the Court the issue whether the President could grant a conditional pardon. Relying in primary measure upon the right of the English king to grant conditional pardons, the Court upheld the conditional pardon granted to Wells. In his opinion for the Court, which drew heavily upon English common law sources and commentary, Justice James Wayne described clemency as a mechanism to *both* correct mistakes and exercise mercy:

Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy.

* * *

A pardon is said by Lord Coke to be a work of mercy, whereby the kind, either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution. . . And the king’s coronation oath is ‘that he will cause justice to be executed in mercy.’ It is frequently conditional, and he may extend his mercy upon what terms he pleases . . .³⁵

In *Ex parte Garland*,³⁶ decided in 1866, the Court rejected the notion that the coordinate branches of government could limit the executive’s pardon power. Justice Stephen Field wrote for the Court:

The [pardon] power thus conferred is unlimited, with

the exception [in cases of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.³⁷

In 1925, in *Ex parte Grossman*,³⁸ the Court continued its course of affirming the value and discretionary nature of executive clemency. Chief Justice William Howard Taft interpreted the clemency power broadly at the expense of the judiciary in holding that the President must have full discretion in exercising the clemency power, even when granting clemency for criminal contempt of court:

The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it; but whoever is to make it useful must have full discretion to exercise it.³⁹

Two years later, in *Biddle v. Perovich*,⁴⁰ the Court affirmed, again, the President's power to grant a conditional pardon: in this case, upholding the commutation of a death sentence to life in prison, where the convicted petitioner asserted he had not consented to the condition. In reaching this result, Justice Oliver Wendell Holmes continued the theme first sounded by Chief Justice Marshall, writing that clemency was an integral part of the justice system: "It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment had fixed."⁴¹

In *Solesbee v. Balkcom*,⁴² decided in 1950, the Court addressed the important role played by clemency in our criminal justice system in the context of a challenge to the constitutionality of the state of Georgia's process for reviewing the sanity of a prisoner scheduled to be executed. Petitioner was convicted of murder, and appealed to the Georgia governor to postpone his execution on the grounds that he had become insane while in prison. Under the applicable Georgia statutes, which gave the governor broad discretion how to proceed, the governor appointed three physicians to examine the petitioner and all three "declared him sane." Petitioner argued that he was entitled under the due process clause to a more judicial style hearing — i.e. an adversarial style hearing with representation by counsel and the right to present evidence and examine witnesses.⁴³ In upholding the constitutionality of the state's process, Justice Hugo Black distinguished the process of determining post-conviction sanity from a trial procedure (to which full due process protection would presumably attach) and drew a parallel instead to clemency, which traditionally has been essentially

beyond review by the courts. He reasoned:

Postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon . . . Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts.⁴⁴

In considering the lack of an adversarial hearing as bearing upon the evidence considered by the governor, Black noted the lack of any record as to whether the governor had declined to hear "any statements on petitioner's behalf" and then stated what must have seemed like an obvious assumption: "We would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases where human lives depend upon their decision."⁴⁵

Furman and Gregg

While executions in the United States were relatively commonplace early in the twentieth century, executions steadily declined from 1930 until the 1960s.⁴⁶ Indeed, public support of the death penalty reached its lowest level in 1966 at forty-two percent — a decline often attributed to a reaction to the Second World War and the movement of many allied nations to either abolish or restrict the death penalty.⁴⁷ Against a backdrop of decreased public support for the death penalty, the civil rights movement and the Vietnam War, the Supreme Court decided *Furman v. Georgia*⁴⁸ in 1972 and *Gregg v. Georgia*⁴⁹ in 1976 — a pair of cases defining the standards of capital punishment under the Constitution. Although technically not clemency decisions, *Furman* and *Gregg* are integral to any current discussion of clemency. Indeed, in many ways, those decisions were the twin triggers that initiated the shift in meaning of clemency from an act of "grace" carrying broad discretion to a limited review focused on actual innocence and legal error.

In *Furman*, the Court upheld a challenge to the death penalty of several states, ruling that the death penalty, as applied by those states, was unconstitutional because of the "arbitrary and capricious" manner in which the penalty was imposed.⁵⁰ In response, many state legislatures re-wrote their death penalty statutes in an effort to satisfy *Furman's* concerns about arbitrariness. During this period, when the constitutionality of the death penalty was in question and the procedure under which individuals on death row had been sentenced had been declared unconstitutional, a number of states commuted the sentences of their entire death row. However, four years after *Furman*, the efforts of states to rewrite their death penalty statutes proved successful, when the Court upheld the death penalty statutes of Florida, Texas and Georgia in *Gregg v. Georgia* — a decision that was understandably viewed as both the Supreme Court's stamp of approval on the constitutionality of the death penalty and a green light to restart executions.

Even though the Court had stressed the importance of clemency in no less than seven cases before *Gregg*, and has continued to reiterate the importance of clemency since *Gregg*, grants of clemency have declined precipitously

since that decision. The best statistics available indicate that clemencies were granted at a rate of about twenty-five percent for the first two-thirds of this century,⁵¹ but since *Furman* and *Gregg* that rate has dropped to less than six percent⁵² with fewer than two percent being granted for humanitarian reasons.⁵³

Understanding this decline in the granting of clemency and the reasons behind it are critical to any discussion of the appropriate meaning and process of clemency. A series of factors starting with the decision in *Gregg* and including shifting theories of criminal justice, a perception that the fairness of the legal system has increased overall, and the politics of the death penalty, appear to explain in main part the decline in the exercise of the clemency power. Furthermore, these factors collectively illustrate the view that clemency should be limited to situations of actual innocence or legal denial of due process. The factors leading to this decline are discussed in some detail in Part 3, below, following a discussion of the two significant post-*Furman*, post-*Gregg* Supreme Court cases addressing clemency, including *Ohio Adult Parole Authority v. Woodard*.⁵⁴ the only case in which the Supreme Court has directly addressed the question of whether clemency decisions are subject to due process review by the courts.

The Post-*Furman* Cases

In *Herrera v. Collins*,⁵⁵ the Supreme Court again addressed the importance of clemency in the context of a case challenging the constitutionality of a death sentence. At issue in *Herrera* was whether a condemned capital prisoner's claim of innocence based on newly discovered evidence was sufficient by itself (without another claim of a constitutional violation) for federal habeas review.⁵⁶ The Court's opinion, authored by Chief Justice Rehnquist, has been interpreted as holding that even actual innocence was insufficient and has been widely criticized.⁵⁷

In reaching its result in *Herrera*, and in rejecting *Herrera*'s claim that he deserved a new trial to consider exculpatory evidence, the majority relied on executive clemency as a fail-safe; as being the mechanism available for vindicating those who are actually innocent.⁵⁸ Indeed, some of the most sweeping and widely quoted language in support of clemency comes from the pens of Chief Justice Rehnquist writing for the *Herrera* majority, and Justice Scalia's concurrence. Chief Justice Rehnquist explained:

Clemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing miscarriage of justice where judicial process has been exhausted. In England, the clemency power was vested in the Crown and can be traced back to the 700s . . . Executive clemency has provided the 'fail safe' in our criminal justice system . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.⁵⁹

Justice Scalia echoed the majority's reliance on clemency by declaring: "With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon."⁶⁰

Finally, in *Ohio Adult Parole Authority v. Woodard*, the Court directly considered whether clemency could be subject to due process review. At issue in *Woodard* was the constitutionality of the state of Ohio's clemency procedures. Under the Ohio Constitution and statutes, the governor had the ultimate and discretionary power to grant clemency as he or she deemed

appropriate, however, the first stage of review was delegated to the Ohio Adult Parole Authority.⁶¹ Within forty-five days of a scheduled execution, the Parole Authority was required to conduct a clemency hearing, prior to which the condemned inmate could request an interview with one or more of the parole authority members without counsel for the inmate present. Following the hearing, the Parole Authority was required to make a recommendation to the governor.⁶² Petitioner challenged the constitutionality of the interview process – including the lack of any right to have counsel present – asserting it violated the due process clause. On proceedings below, the Eight Circuit held that some level of minimal due process was, in fact, required for the clemency proceedings, and remanded to the District Court to determine whether Ohio's procedures met those minimal standards. The Supreme Court granted certiorari.

The issue squarely before the Court was whether condemned inmates had a protected life or liberty interest in state clemency proceedings such that they were subject to due process review, and, if so, what level of review was required. While *Woodard* is generally, and we believe properly, read as requiring some very minimal due process review, the Court was unable to produce a clear majority opinion on this question.⁶³ Procedurally, there was a clear majority to reverse the decision of the Eight Circuit. Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, wrote the core opinion for the Court, holding that state clemency procedures were not subject to any due process review.⁶⁴ In coming to this conclusion, the Chief Justice again stressed, as he had in *Herrera*, the discretionary nature of clemency and its place outside the judicial system:

An examination of the function and significance of the discretionary clemency decision at issue here readily shows it is far different from [a first right to appeal.] Clemency proceedings are not part of the trial – or even the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch, independent of direct appeal and collateral relief proceedings. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally 'been the business of courts.'⁶⁵

Indeed, Justice Rehnquist's opinion may be read to argue that to subject clemency to a high due process threshold would be to effectively extinguish it. Drawing on the Court's traditional view of clemency, Rehnquist stated that "the heart of executive clemency is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations."⁶⁶ Later in the opinion, Rehnquist contrasts this view of clemency with that proposed by the petitioner: "Here, the executive's clemency authority would cease to be a matter of grace . . . if it were constrained by the sort of procedural requirements that respondent urges."⁶⁷

In an opinion concurring in part and in the judgment, Justice O'Connor joined by Justices Souter, Ginsburg and Breyer, while not disagreeing with the view of clemency posited by Justice Rehnquist, found that the Eighth Circuit had been correct in concluding that some "minimal procedural safeguards apply to clemency proceedings."⁶⁸ As an example, Justice

O'Connor noted that judicial intervention "might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where a State arbitrarily denied a prisoner any access to its clemency process."⁶⁹ Similarly, Justice Stevens, concurring in part and dissenting in part, argued that clemency proceedings could, under certain circumstances, violate due process, pointing to procedures "infected by bribery, personal or political animosity, or the deliberate falsification of false evidence."⁷⁰

No court has yet found a violation of due process applying the *Woodard* standard. Although the lack of any meaningful due process review may have harsh outcomes,⁷¹ this is generally consistent with the historical role of clemency as a discretionary act of grace residing outside of the judicial system.

Part 3: The Decline of Clemency

As described above, since the Supreme Court's decision in *Gregg* opened the doors for states to resume executions, there has been a meaningful decline in the exercise of clemency, and a steady narrowing of the scope of clemency review to situations of actual innocence or violation of legal due process. In broad measure, the decline in the use of clemency can be traced to three causes; a shift from a redemptive to a retributive theory of justice, a perception that the court system has achieved a greater degree of overall fairness, and the politics of the death penalty.

Shifting Theories of Criminal Justice

During the 1950s and 1960s, a redemptive theory of justice was largely prevalent throughout the criminal justice system and evidenced in clemency decisions.⁷² For instance, the following statement made by Illinois Governor Otto Kerner when commuting the sentence of convicted murderer Paul Crump in 1962 captures the rehabilitative ethos of that time:

The most significant goal of a system of penology in a civilized society is the rehabilitation of one of its members who, for a variety of complex reasons, has violated the laws of the society. If that premise were to be denied, solely because it is a capital case, a great disservice would be done to what we hopefully embrace as the ultimate goal of this system.

What has troubled me is how the concept of rehabilitation can be judged and evaluated in a case where the process of law, after the extensive review permitted every defendant by our concern for justice, has determined that a man committed a crime so repugnant as to merit a sentence of death.

* * *

We must, however, be able to hold forth to others the hope that they can look forward to a useful life – to life itself – if they will make the necessary effort to face squarely their past actions and the alternatives.⁷³

At the time of his conviction for murder during an armed robbery, Paul Crump's own attorney called him a "beastly, animalistic, illiterate criminal." However, while in prison, Crump read widely, studied the Bible and became a person of faith, helped care for other prisoners, and defended a guard who was attacked

by another inmate.⁷⁴ In commuting Crump's sentence, Governor Kerner recognized that, "[u]nder these circumstances, it would serve no useful purpose to society to take this man's life."⁷⁵

The redemptive theory of justice was similarly echoed by Terry Sanford, Governor of Georgia from 1961 to 1965, in his description of the clemency process:

The courts of our state and nation exercise in the name of the people the powers of administration of justice. . . . The executive is charged with the exercise in the name of the people of an . . . equally important attitude of a healthy society – that of mercy beyond the strict framework of the law. The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation . . . It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state. I fully realize that reasonable men hold strong feelings on both sides of every case where executive clemency is indicated. I accepted the responsibility of being Governor, however, and I will not shy away from the responsibility of exercising the power of executive clemency.⁷⁶

However, in the years since the Supreme Court decided *Furman* and *Gregg*, rehabilitation has been widely discarded as a goal of the penal system. In its place, a retributive theory of justice – of "just desserts" – where the measure of the punishment should be a function of the seriousness of the crime and the culpability of the offender, has largely taken over.⁷⁷ The Federal Sentencing Guidelines is but one example of the retributive theory of justice in action – a misguided attempt (and one ultimately found unconstitutional by the Supreme Court)⁷⁸ by a Congressionally authorized federal sentencing body to impose sentences and judge human beings by matrix. This matrix took into account, for example, the crime and the amount of the loss by the victim, but made virtually no allowance for the character of the accused as reflected in provable good deeds or service to this country.⁷⁹

Since the 1970s, retributivists have advocated for reforming clemency in keeping with a retributivist criminal justice philosophy. This philosophy includes replacing executive discretion with substantive, normative standards that would control who receives clemency.⁸⁰ According to retributivists, mercy can only be shown by someone who has been wronged or to whom a debt is owed, and therefore, the government is not in the best position to grant mercy, as it is not the one who has been wronged.⁸¹ Moreover, to retributivists, nothing the offender does after sentencing is relevant to clemency.⁸² If retributivism is accepted, then clemency as grace, mercy or a reflection of our common humanity is never justified.⁸³ Rather, the only grounds for clemency are innocence, denial of due process, or excessive punishment when measured against the crime.⁸⁴

The Perception Of Legal Fairness

It is likely that clemency has declined in part because of the widespread perception that courts have resolved legal

problems in the application of the death penalty.⁸⁵ This perception (the truth of which is, of course, another matter) stems from, among other reasons: a reduction in the number of offenses for which a convicted defendant may receive the death penalty, including the distinction between degrees of murder; the end of mandatory death sentences and the discretion to determine life or death being put in the hands of the jury; the introduction of bifurcated capital trials, which divide the deliberation over guilt from the deliberation over sentencing; the latitude given to the defense to introduce mitigating evidence during sentencing; and recent limitations on the classes of individuals eligible for death, e.g., minors.⁸⁶

In addition, there is the perception that appellate courts will rectify legal injustices and order new trials and proceedings as appropriate. While over half of all death sentences are now reversed in state or federal appellate courts, this could be read to show either how well appellate review functions in catching errors,⁸⁷ or simply that many errors exist in death sentences. Either way, there can be little question that “the perceived performance of trial and appellate courts in capital cases is a powerful factor in rationalizing gubernatorial refusal to commute death sentences.”⁸⁸

The accuracy of trial court convictions resulting in death sentences, and the efficacy of the review of those convictions and sentences in the appellate courts, is beyond the scope of this article. However, we must note the obvious and the well-documented fact that over 200 convicted men and women have now been fully exonerated on the basis of DNA evidence alone, including 15 death row prisoners.⁸⁹ The courts are human institutions, and it is not now, and never will be, possible to say that all criminal trial convictions are just, or that the appellate process rights all wrongs. That criminal defendants facing capital charges now receive a better trial, or have increased appellate review, is certainly important and meaningful, but it is no reason to limit clemency review to innocence or denial of due process.

Politics

Clemency is, and has always been, a highly political exercise of power. Historically clemency has been used to reward political supporters and fulfill campaign promises, to raise money for the executive and to “endear the sovereign to his subjects.”⁹⁰ “From ancient Athens to post-Vietnam America, timely extensions of mercy have often been used in moments of turmoil to bind together a social fabric in danger of rending.”⁹¹

Politics is always a consideration in clemency cases, and to pretend otherwise is to be willfully naïve.⁹² The last three decades in particular have seen the rise of politicians who are “tough on crime,” which is often equated with being in favor of the death penalty.⁹³ Since the defeat of Michael Dukakis in the 1988 presidential election, all presidential candidates from both major parties have unequivocally supported the death penalty.⁹⁴ Following suit, the accepted political wisdom for governors is that a position against the death penalty can end a governor’s political future.⁹⁵ Also consistent with the national get tough on crime rhetoric is a focus on the victim in both the political and legal arenas.⁹⁶

One of the main political considerations militating against clemency is the belief that governors should not replace the decisions of judges or juries.⁹⁷ Raymond Theim, Deputy United States Pardon Attorney during the Carter, Reagan, and

George H.W. Bush administrations, succinctly summed up this view: “The feeling is that we should do as little as possible to grant relief . . . It’s a dangerous trend for the executive to override the function of the courts and the parole system too much, both from the point of view of balance of power and of possible corruption.”⁹⁸

This assertion, when taken to its logical conclusion, culminates in the view, so clearly expressed by George Bush as Governor of Texas, that decisions about the death penalty “are primarily the responsibility of the judicial branch,” and that the job of the governor is not to “replace the verdict of a jury,” but “to ask two questions: is the person guilty of the crime? And did the person have full access to the courts of law?”⁹⁹

Part 4: The State Clemency Process

As a general matter, the clemency processes adopted by the fifty states are consistent not with the limited view of clemency (innocence or denial of due process), but with the traditional meaning of clemency as described by the Supreme Court; a discretionary process, where the governor may review the broadest spectrum of information and circumstances, is not required to expound upon his or her reason for granting or withholding clemency, and where a grant of clemency may take different forms including the grant of a reprieve, stay, commutation of a sentence of death, or full pardon.

This general statement holds essentially true even though we must, of course, recognize that each state has its own system of clemency, and that any general discussion about clemency necessarily oversimplifies the fact that there are

really fifty-two different state clemency schemes and that these schemes are applied differently in different cases. Further, many states allocate at least some of the clemency power to state pardon boards or similar bodies. In total, fourteen states are almost directly modeled after the federal pardon power and give the governor sole authority without the advice and/or consent of a board; ten states allow the governor to make a pardon decision with the non-binding advice of a board; eleven states have a shared power model where the governor sits on the pardon board with other officials or is required to have a recommendation from a board or advisory group; and three states vest their pardon and parole boards with final pardon decision making authority, bypassing the governor all together.¹⁰⁰

As a case study for purposes of this article, we look at the clemency procedures used in California, which currently has the largest number of death row prisoners of any state¹⁰¹ and whose stated procedure of vesting sole authority over clemency decisions with the governor is consistent with the traditional meaning and role of clemency.

The California Clemency Process

As a matter of history, the death penalty was reinstated in California in 1977. However, no execution took place in California until 1992. Since that time, thirteen individuals have been executed in California. Most recently, Clarence Ray Allen was executed by lethal injection on January 19, 2006. The last governor of California to grant clemency was Ronald Reagan in 1967.¹⁰²

Ultimately, whether to grant clemency is an entirely discretionary decision of the California governor, and he or she has broad discretion whether to hold any sort of clemency hear-

ing and may consider or ignore any of the information presented to him. However, the state has set out a process that allows for a certain formality, should the governor so desire. We look here first at the “formal process,” recognizing that it is ultimately highly discretionary and variable depending upon the wishes of the governor. Next, we examine the process actually used by California Governor Schwarzenegger in the five clemency appeals that have come before him since he took office in 2003.

The Formal Process

The formal process of applying for clemency begins with contacting the Governor’s office in Sacramento and obtaining an Application for Executive Clemency.¹⁰³ The application may be requested at any time, and the petitioner does not need to wait for an execution date to be set to request an application. The application includes the action being requested, personal information about the petitioner, information about petitioner’s felony convictions, and a statement requesting clemency, including the circumstances of the offense, rehabilitation efforts while incarcerated, prison record, and the reasons the request should be granted. In accordance with California Penal Code section 4804, a Notice of Intention to Apply for Executive Clemency must be sent to each district attorney in each county where the petitioner was convicted of a felony.¹⁰⁴ The district attorney must complete and sign the Acknowledgment of Receipt portion of the Notice. In capital cases where certiorari has been sought from the Supreme Court, the State of California will ordinarily move immediately upon a denial of certiorari to set an execution date. Setting an execution date requires a hearing before the court in the district where the petitioner was convicted. The petitioner must be given at least ten days notice of this hearing, with the court having limited discretion to set an execution date up to sixty days after the hearing.¹⁰⁵ At the time of the hearing, the various state offices involved in the execution process will have ordinarily already conferred with the Governor’s office, San Quentin prison officials, and frequently the State Supreme Court and already decided upon an execution date. This leaves the state court judge presiding over this hearing with little, if any, discretion.

Once the execution date is set, the Governor’s Legal Affairs Secretary asks the petitioner’s counsel if clemency is to be sought and sets due dates for; (1) the Application / Clemency Petition, (2) the district attorney’s opposition, and (3) petitioner’s reply to the opposition. While some petitioners may do little more than complete the Application for Clemency, in all cases of which we are aware, petitioners, through their counsel, have submitted meaningful clemency petitions setting forth both traditional and novel reasons for the granting of clemency including evidence of innocence or wrongful conviction, mitigating personal factors, evidence of mental illness, service to this country, statements from the families of victims, and evidence of rehabilitation. At any time, the Governor may in his or her discretion refer the petitioner’s clemency application to the Board of Prison Terms (BPT), and may request an investigation, a recommendation, or both from the BPT.¹⁰⁶

In actual fact, the BPT typically does not wait for a request from the Governor to begin an investigation, but begins that process once a condemned inmate’s direct legal appeals are over. Indeed, we have been informed that the BPT has frequently completed its investigation and prepared its report by the time the Application is received. In conducting its review, the BPT would ordinarily contact, among others, the prosecuting attorney for the original offense, the judge who presided at

the petitioner’s trial, and the families of victims to obtain statements. Once their review is complete, the BPT’s report would typically offer a summary of the offense, prior convictions, and prison behavior, provide information regarding decisions in the case, offer a biographical sketch of the petitioner and the petitioner’s criminal history, and consider psychological and medical records.

While the petitioner may request a hearing in front of the BPT, the petitioner no right to any hearing, but rather this is within the discretion of the Governor. If the Governor grants a hearing, it will ordinarily be held within a week or two of the scheduled execution. In the past, BPT hearings have typically been open forums, where any “interested party” could address the Board. However, the Governor may direct that the BPT hearing be held in private. Similarly, the Governor may set such time limits and other rules for the hearings as he wishes. We are not aware of any recent case where the petitioner has physically attended the hearings, due to apparent security concerns, but petitioners have appeared by videotape to make an appeal.

Following their review, including any hearing, the BPT submits a non-binding, private recommendation to the Governor. The Governor has complete discretion whether to take the Board’s recommendation or to make it public. If it is not made public, the petitioner will not be notified of the Board’s recommendation. In lieu of, or in addition to a review by the BPT, the Governor may schedule his or her own clemency review including a hearing. In such event, the Governor would ordinarily meet with counsel for petitioner and the district attorney in his office. The Governor may also invite family members of the victims or other interested parties to such a hearing, and may seek a statement from the petitioner. In all cases, whether to hold a hearing, and what format such a hearing would take, is completely discretionary with the Governor. Similarly, the Governor may consider or disregard whatever information he or she wishes.

If the governor grants clemency, the California Department of Justice and the Federal Bureau of Investigations are notified, the clemency is filed with the Secretary of State, reported to the Legislature, and becomes a matter of public record. If the governor decides not to grant clemency, the execution will proceed on schedule unless a court or the President of the United States intervenes. It is typical for California governors to issue written statements explaining their grant or denial of clemency.

The Process Used by Governor Schwarzenegger

In his four years in office, Governor Schwarzenegger has presided over five clemency applications, establishing different procedures for each.¹⁰⁷

1. Kevin Cooper

Less than three months after taking office, on January, 2004, Governor Schwarzenegger was faced with his first petition for clemency from Kevin Cooper. Cooper had been convicted on four counts of first-degree murder and one count of attempted murder after escaping from prison in 1983. His clemency appeal raised, in main part, questions about the validity of his conviction, including the destruction of a potentially significant piece of evidence by the police, and requested a stay to allow additional laboratory testing of key evidence to be performed. It also discussed his rehabilitation while in prison.

Governor Schwarzenegger denied Cooper's petition without seeking any recommendation from the BPT and without holding any hearing of his own, thus making Cooper the first death row prisoner to be denied a clemency hearing since the death penalty was reinstated in California in 1978. In denying clemency for Cooper, Schwarzenegger wrote, "I have carefully weighed the claims Evidence establishing his guilt was overwhelming, and his conversion to faith and his mentoring of others, while commendable, does not diminish the cruelty and destruction he has inflicted on so many. His is not a case for clemency."¹⁰⁸ Cooper's life was spared when the Ninth Circuit unexpectedly intervened at the last moment to allow a new evidentiary hearing and for the laboratory testing Cooper sought.

2. Donald Beardslee

The next clemency appeal to come before Governor Schwarzenegger was that of Donald Beardslee. Beardslee was convicted on two counts of first-degree murder in California while on parole for murder in Missouri. Beardslee's clemency petition raised no claims of innocence. Instead, he presented evidence of his profound, lifelong brain damage and his excellent behavior while in prison. Governor Schwarzenegger referred Beardslee's petition to the BPT, which recommended denying clemency. Following the recommendation of the BPT, and without holding a hearing of his own, Governor Schwarzenegger denied clemency. He found that Beardslee could tell the difference between right and wrong at the time of the crime and, writing of Beardslee's model behavior in prison, "I expect no less."¹⁰⁹ Beardslee was executed in January 2005.

3. Stanley Tookie Williams

In late 2005, Governor Schwarzenegger was faced with a petition for clemency from Stanley Tookie Williams, one of the founders of the Crips street gang, who had been convicted of four homicides in 1981. While on San Quentin's death row for twenty-five years, Stanley Williams had educated himself and had become a well-known anti-gang activist and author. While there was very limited credible evidence of Stanley Williams's guilt, and although Stanley Williams had maintained his innocence for twenty-five years there was also no clear evidence that could establish his innocence. The basis for his clemency petition was his personal redemption and, most significantly, the impact of his good work on others, and the symbol of hope his rehabilitation offered.¹¹⁰

At the request of Stanley Williams's counsel (the authors of this article), the Governor held a private two hour hearing in his office. The Governor denied a request to meet with Stanley Williams in person, however, an audiotape message from Mr. Williams to the Governor was played at the clemency hearing. Following this hearing, Governor Schwarzenegger again denied clemency, in a written opinion focusing on evidence of Mr. Williams's guilt and Mr. Williams's refusal to accept responsibility for the crimes of which he was convicted and which he denied committing.¹¹¹ Stanley Williams was executed on December 13, 2005.

4. Clarence Ray Allen

Within approximately a month after the execution of Stanley Williams, a fourth clemency petition was presented to Governor Schwarzenegger on behalf of Clarence Ray Allen. Allen, who was seventy-six years old, had been convicted of orchestrating the murders of three people, including one who

was a witness against him, while he was serving a life sentence for another murder. He was blind, diabetic, nearly deaf, and confined to a wheelchair at the time his petition was filed. He sought clemency on the basis of his age and infirmities, and alleged flaws in his trial and questions as to his guilt.

After initial indications that Governor Schwarzenegger would allow a private hearing for Clarence Ray Allen's clemency petition, on January 4, 2006, Schwarzenegger announced that he would not hold any kind of clemency hearing for Allen. Nine days later, Schwarzenegger denied clemency stating, "[m]y respect for the rule of law and review of the facts in this case led to my decision."¹¹² Allen was executed on January 17, 2006.

5. Michael Morales

The month following Clarence Allen's execution, Michael Morales petitioned for clemency. Morales was convicted of murder in 1981 when a jury found that he beat, strangled, stabbed, and raped his victim in a particularly vicious manner. As with Clarence Ray Allen, Schwarzenegger chose not to grant Morales a hearing, relying on documents submitted from the defense and the prosecution to make his decision. On February 17, 2006 Governor Schwarzenegger issued a Statement of Decision denying Michael Morales's petition for clemency.¹¹³ Morales's execution has been stayed indefinitely following challenges to the state of California's procedures for carrying out executions, and a decision of the District Court for the Northern District of California which ordered prison officials to have medical personnel present to take part in the execution.¹¹⁴

In sum, each of these petitions for clemency raised different legal and moral claims, presented the Governor with different social and political issues, and the Governor followed a different process for each. Indeed, in reviewing California's clemency process it becomes clear that there is little substantive process at all. Once the proper paperwork has been filed with the appropriate agencies, the Governor has discretion to make whatever decision he sees fit based on all or none of the evidence before him and whatever facts or personal preferences influence him. In other words, the state of California has set up a process that is open to the broad exercise of the Governor's discretion. It is up to the Governor what he or she makes of that discretionary process.

In the case of Governor Schwarzenegger, to the extent he has declined to look beyond the determination of guilt or innocence as found by a jury (and, other than the narrow window offered by his clemency decisions, only the Governor ultimately knows what he has considered in making his determinations), such a self imposed limitation would, we submit, be at odds with the historical and moral role played by clemency.

Conclusion

*A people confident in its laws and institutions should not be ashamed of mercy.*¹¹⁵

The exercise of the clemency power is, and has always been, a discretionary act of the executive founded in notions of grace, mercy and humanity. While some may believe this to be at odds with our highly procedural judicial system, clemency is -- by its inherent nature -- a uniquely unbound act residing both alongside and apart from the criminal justice process. Indeed, we believe it is a fundamental misapprehension, as to the essence of clemency, to limit its meaning to actual innocence or legal denial of due process.

While such a two part test seems both respectful of the justice system and process oriented in appearance, in reality, it serves only to shield the executive from responsibility for the clemency decision — other than being a last resort against the execution of the wrongfully convicted. The importance of the governor’s role as a fail-safe against the execution of the wrongfully convicted cannot be gainsaid and is one of the reasons why clemency has historically existed. But it is no great act of discretion, mercy or humanity. Rather, the executive’s action in such cases is no more than what is minimally required. Clemency calls for more.

While the criminal justice system has arguably moved toward an increasing emphasis on procedure, with the intent of increasing fairness in the system as a whole, clemency is more properly viewed as the very human act of an executive exercising discretion in light of all available information and circumstances. Clemency, as repeatedly emphasized by the Supreme Court, is not, and never has been, merely a failsafe or a substitution of the executive’s judgment for that of the courts; it is something much broader, encompassing concepts beyond the ken of the courts, and asking more of the governor than a review of factual or legal guilt.

In closing, we point to an apt description of the traditional role of clemency in the criminal justice system from former Governor Winthrop Rockefeller of Arkansas:

Some would characterize executive clemency as little more than grace, to be bestowed by a governor on the basis of personal whim or caprice. This view is totally wrong. In a civilized society such as ours, executive clemency provides the state with a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which it intends to inflict. . . . clemency far from being an extra legal device, is an intimate and necessary part of a fair and impartial system of justice.¹¹⁶

¹ The phrase “lethal absence of hope” is taken from an October 31, 2005 letter written by Father Gregory J. Boyle, S.J., the founder of the largest gang rehabilitation program in the United States, appealing to California Governor Arnold Schwarzenegger to exercise his discretion as Governor and grant clemency to Stanley Tookie Williams. A founder of the Crips street gang who was convicted of four homicides, Stanley Williams became a prominent anti-gang spokesman, author, and Nobel Prize nominee during his twenty-five years on San Quentin’s death row. Father Boyle’s letter spoke of Stanley Williams as a man who had “transformed his gang past into a beneficial presence” and become a symbol of hope and redemption to others. Father Boyle wrote: “Redemption is [the] only hope in reconstructing lives . . . The hope of beginning anew is the bright promise we offer. By exercising your power, you can send the right signal of hope to those for whom hope is foreign. . . . Your decision to spare Stanley Williams’ life will touch that *lethal absence of hope* in my community.” (emphasis added). The authors of this article were *pro bono* clemency counsel for Stanley Williams along with other dedicated attorneys. Governor Schwarzenegger declined to exercise his discretionary power to grant clemency, and Stanley Williams was executed by the State of California on December 13, 2005. The process followed by Governor Schwarzenegger in reviewing Stanley Williams’ petition for clemency is discussed in Part 4 of this article. The clemency petition for Stanley Williams is available at www.savetookie.org and at [\[p.com/clemency.htm\]\(http://p.com/clemency.htm\).](http://www.cm-</p></div><div data-bbox=)

² See *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“A pardon . . . exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”).

³ While arising from the same power, commutation of a death sentence is distinct from a pardon. As stated by Justice Marshall in a dissenting opinion in *Schick v. Reed*, 419 U.S. 256, 273 n.8 (1974), “[a]lthough pardon and commutation emanate from the same source, they represent clearly distinct forms of clemency. Whereas commutation is a substitution of a milder form of punishment pardon . . . relieves the recipient of all the legal consequences of the conviction.”

⁴ SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN MINIATURE 46, 163 (1817), available at <http://books.google.com>.

⁵ See *Wilson*, 32 U.S. at 160 (“The constitution gives to the president, in general terms, ‘the power to grant reprieves and pardons for offences against the United States’ as this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon . . .”).

⁶ 428 U.S. 153, 206 (1976).

⁷ For example, as Governor of Texas, George W. Bush, who allowed 152 executions to proceed, was explicit in describing the process he used to evaluate petitions for clemency. Asked about the exercise of the clemency power, Bush stated simply: “[M]y job is to ask two questions: Is the person guilty of the crime? And did the person have full access to the courts of law? And I can tell you, looking at you right now, in all cases those answers were affirmative.” George Lardner, *The Role of the Press in the Clemency Process*, 31 CAP. U. L. REV. 179, 183 (2003) (quoting Governor George W. Bush (Texas), during the 2000 Presidential campaign debates, in Doug McGee, *Bush – Rush to Judgment*, THE NATION, November 13, 2000). In his autobiography, Bush added that to go beyond these two criteria would be to impinge upon the authority of the jury: “I believe decisions about the death penalty are primarily the responsibility of the judicial branch. . . . The executive branch is much more limited. I view it as a failsafe, one last review to make sure that there is no doubt the individual is guilty and that he or she has had the due process granted by our Constitution and laws and I don’t believe my role is to replace the verdict of the jury.” See Elizabeth Rappaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1507-08 (2000) (quoting GEORGE W. BUSH & KAREN HUGHES, A CHARGE TO KEEP 148 (1999)). Others have investigated, and we do not address here, the *bona fides* or accuracy of the process Bush employed as Governor to answer the two questions posed by his own analytical structure. See Alan Berlow, *The Texas Clemency Memos*, THE ATLANTIC, July/August 2003, available at <http://www.theatlantic.com/doc/200307/berlow> (“Yet a close examination of the written execution summaries he prepared for Bush certainly raises questions about the thoroughness of Gonzales’s approach – and, ultimately, given the brevity of the summaries and the timing of their arrival at the governors office, about the level of attention Bush could possibly have devoted to the clemency process.”). See also Sister Helen Prejean, *Death in Texas*, THE NEW YORK REVIEW OF BOOKS, January 13, 2005, available at <http://www.nybooks.com/articles/17670> (“When Berlow asked Gonzales directly whether Bush ever read the clemency petitions, he replied that he did so ‘from time to time.’”).

⁸ In some states, including Texas, the clemency power of the Governor is exercised at least somewhat in concert, to a greater or lesser extent, with a state pardon board or similar authority.

For purposes of this article, except where the clemency process of a specific state is being discussed or it is otherwise of material significance, we direct our analysis to the usual circumstances -- that, whatever role may be played by a pardon board or similar body, the sitting governor has the final and ultimate clemency authority.

⁹ “The President ... shall have Power to Grant Reprieves and pardons for Offenses against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2.

¹⁰ *Wilson*, 32 U.S. at 160.

¹¹ *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281 (1998).

¹² The history of clemency is discussed at length in *Ex parte Wells*, 59 U.S. 307, 309-13 (1855) and *Ex parte Garland*, 71 U.S. 333, 341-52 (1866) and other sources cited herein. We include here only that background necessary to provide context for our discussion that the meaning of clemency has become unduly limited since *Gregg v. Georgia*, 428 U.S. 153 (1976) and must be re-opened to encompass the historical concepts of clemency: the exercise of discretion, grace, mercy and humanity.

¹³ Code of Hammurabi 129, available at www.wsu.edu/~dee/MESO/CODE.HTM.

¹⁴ See Russ VerSteg, *Law and Justice in Caesar's Gallic Wars*, 33 HOFSTRA L. REV. 571, 598 (2004) (“Meier notes that Caesar ‘was famed for his clemency and compassion’ and that ‘Caesar won fame through giving, helping, and forgiving.’”); JULIUS CAESAR, THE GALLIC WARS (W.A. McDevitte & W.S. Bohn trans.), available at <http://classics.mit.edu/Caesar/gallic.html>.

¹⁵ 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 233 (8th ed. 1680).

¹⁶ 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 547 (6th ed. 1824).

¹⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND, Chapter 31 (1765-69). The full text of Blackstone's Commentaries on the Law of England is available at <http://www.lonang.com/exlibris/blackstone/>.

¹⁸ See STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 55 (2002) (“Clemency was governed by no rules. It was purely within the discretion of colonial and state governors, who could grant or deny a pardon for any reason or no reason.”).

¹⁹ See DANIEL KOBIL, *The Evolving Role of Clemency in Death Penalty Cases, in America's Experiment with Capital Punishment* 675 (James R. Acker, et al. eds., 2d ed. 2003) [hereinafter Kobil, *The Evolving Role of Clemency*]; Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 578, 590-92 (1991) [hereinafter Kobil, *The Quality of Mercy Strained*] (“Thus, it was the British clemency model . . . that Alexander Hamilton was following when he objected to the Virginia and New Jersey plans and proposed that a supreme executive ‘have the power of pardoning all offences except Treason; which he shall not pardon without the approbation or rejection of the Senate.’”).

²⁰ See CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 15 (2002) (quoting Melvin M. Belli, *The Story of Pardons*, 80 CASE AND COMMENT 26, 30 (1975) (emphasis added)).

²¹ See Jerry Carannante, *What to do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y. L. SCH. L. REV. 325, 347-48 (2003) (“The clemency power is itself an executive check on Congress and the Judiciary.”).

²² On the pardon or clemency power, Locke wrote: “Many things there are, which the law can by no means provide for, and those must necessarily be left to the discretion of him, that has the executive power . . . the ruler should have a power, in many cases to mitigate the severity of the law and pardon some offenders. This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power . . . is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities. . . or to make such laws as will do no harm, if they are executed with an inflexible rigor, therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.” *Id.* at 343 (quoting JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 384-86 (Peter Laslett ed. 1960) (1690)).

²³ ALEXANDER HAMILTON, THE FEDERALIST NO. 74, at 34 (Hallowell ed. 1842).

²⁴ Kobil, *The Quality of Mercy Strained*, *supra* note 19, at 592 (quoting Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 THE FOUNDERS' CONSTITUTION 17, 18 (P. Kurland & R. Lerner eds. 1987)).

²⁵ See Carannante, *supra* note 21, at 353; Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 282 (1993) (“It follows that some kinds of reasons do not justify a pardon and so pardons granted on those grounds constitute an abuse of the pardoning power.”). True affirmative abuses of the power have been relatively rare. Only Governor J.C. Walton of Oklahoma, has been impeached for selling pardons. Governor Ray Blanton of Tennessee while not impeached for his practice of selling pardons, was eventually prosecuted federally for taking kickbacks on liquor licenses. See Rappaport, *supra* note 7, at 1517; Kobil, *The Quality of Mercy Strained*, *supra* note 19, at 607; AUSTIN SARAT, MERCY IN TRIAL 34 (2007).

²⁶ Carannante, *supra* note 21, at 325 (quoting Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 THE FOUNDERS' CONSTITUTION 17, 18 (P. Kurland & R. Lerner eds. 1987)). See also James Iredell, *Answer to Masons Objections*, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 350, 351-52 (Paul Leicester Ford ed. 2000) (1787).

²⁷ See Kobil, *The Evolving Role of Clemency*, *supra* note 19, at 675 (“The development of state constitutions and, presumably, the influence of the newly adopted federal constitution led to the abolition of the legislative council and an increase in the governor's clemency powers in a number of states. The idea that the executive branch was the proper repository of the clemency power rapidly gained popularity, and most of the new states admitted to the Union allocated the power to the governor alone.”).

²⁸ See, e.g., *Ex parte Wells*, 59 U.S. 307, 311 (1855) (“We must then give the word [pardon] the same meaning as prevailed here and in England at the time it found a place in the constitution.”).

²⁹ See *id.* (determining whether the President can grant a pardon and whether this decision is binding on the court).

³⁰ 32 U.S. 150 (1833).

³¹ *Id.* at 160-61.

³² *Id.* at 150.

³³ *Id.* at 160.

³⁴ 59 U.S. at 310.

³⁵ *Id.* at 311.

³⁶ 71 U.S. 333 (1866).

³⁷ *Id.* at 380. The case-and-controversy before the Court stemmed from a post-civil war pardon of a former confederate legislator. The legal issue (as opposed to the complex political considerations) was fairly straightforward: whether a Presidential pardon of a former confederate legislator exempted the legislator from an act of Congress conditioning the practice of law [in the federal courts] upon the swearing of an oath that the applicant had never supported a government hostile to the United States. The political and social value of the Presidential pardon power took on perhaps its greatest importance in this country following the Civil War, when Presidents Lincoln, Andrew Johnson, and Ulysses S. Grant repeatedly issued amnesties to individuals who had fought against the union on the condition that they take an oath to uphold the new Constitution. See Kobil, *The Quality of Mercy Strained*, *supra* note 19, at 593-94; Carannante, *supra* note 21, at 331.

³⁸ 267 U.S. 87 (1925).

³⁹ *Id.* at 120-21.

⁴⁰ 274 U.S. 480 (1927).

⁴¹ *Id.* at 486.

⁴² 339 U.S. 9 (1950).

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 11-12.

⁴⁵ *Id.* at 13.

⁴⁶ Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C. L. & C. R. 191, 191-92 (2003) [hereinafter Burnett, *The Failed Failsafe*].

⁴⁷ *Id.*

⁴⁸ 408 U.S. 238 (1972).

⁴⁹ 428 U.S. 153 (1976).

⁵⁰ *Furman*, 408 U.S. at 305.

⁵¹ Burnett, *The Failed Failsafe*, *supra* note 46, at 192. These rates of granting clemency are estimates. A centralized system for keeping track of executions was only developed in 1930 and the Justice Department only began collecting nationwide data on death sentences commuted in 1960. In the 1960s, about 15% of those sentenced to death had their sentences commuted. When considered next to state specific data, this appears to be a decrease in commutations from previous decades. This may be in part due to the increased number of criminal appeals that were won in the 1960s. See Banner, *supra* note 18, at 245 (noting that the rates of commutations have continued to drop since the 1960s).

⁵² Rappaport, *supra* note 7.

⁵³ Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 239 (2002). See <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> for a list of clemencies granted for humanitarian reasons including doubts about the defendant's guilt or a governor's concerns

regarding the death penalty process since 1976.

⁵⁴ 523 U.S. 272 (1998).

⁵⁵ 506 U.S. 390 (1993).

⁵⁶ *Id.* at 393.

⁵⁷ For a detailed critique of *Herrera*, see Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 151 (2005) (quoting Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 87 (2003)). In subsequent cases, including *House v. Bell*, 545 U.S. 1151 (2006), the court has carved out an exception to the limitations on habeas review for "miscarriages of justice."

⁵⁸ See *Herrera*, 506 U.S. at 391 ("History shows that executive clemency is the traditional fail safe remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion.").

⁵⁹ *Id.* at 415.

⁶⁰ *Id.* at 428. Leon Torres Herrera did not receive executive clemency and was executed by the State of Texas on May 12, 1993.

⁶¹ *Woodard*, 523 U.S. 272, 276 (1998).

⁶² *Id.* at 276-77.

⁶³ Petitioner also asserted that the interview process violated his Fifth Amendment right to remain silent. That argument was rejected by a clear majority of the Court. *Id.* at 273.

⁶⁴ *Id.* at 288.

⁶⁵ *Id.* at 284 (citations omitted).

⁶⁶ *Id.* at 280-81. In reaching this conclusion, Chief Justice Rehnquist's opinion relied heavily upon *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), in which the court held that a Connecticut inmate with a life sentence had no protected "liberty interest" in a commutation or parole, even where the Connecticut parole board granted approximately seventy-five percent of applications for commutations, such that the Connecticut parole board had to explain its reasons for denying petitioner's application for commutation. In *Dumschat*, the Court wrote: "Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." 452 U.S. at 464.

⁶⁷ *Woodard*, 523 U.S. at 285.

⁶⁸ *Id.* at 289 (O'Connor, J. concurring) (italics in original).

⁶⁹ *Id.*

⁷⁰ *Id.* at 290-91

⁷¹ See generally *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993) (denying a claim that Nebraska's clemency process violated due process where the clemency board was made up of three voting members including the Nebraska Attorney General whose office had been responsible for convicting the petitioner, and which made a presentation opposing clemency before the board). In reaching its result, the Court reasoned that no due process attached to Nebraska's clemency proceeding. *Id.* at 1129 n.3. This decision is particularly notable in that one of the two independent members of the board had voted in favor of clemency, so that the Nebraska Attorney General's vote against clemency was the deciding vote.

⁷² See Rappaport, *supra* note 7, at 1507 (contrasting the mindset of governors today and in the 1960's, and claiming that today's clemency decisions are more likely to respect the jury's

decision, whereas forty years ago, governors believed that clemency was a greater executive role).

⁷³ Stuart Lichten, *Executive Clemency in Capital Cases* 23 (unpublished article from the Ohio Public Defender's Office on file with authors).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Sarat, *supra* note 25, at 36 (quoting Governor Terry Sanford, *On Executive Clemency*, in MESSAGES, ADDRESSES AND PUBLIC PAPERS OF GOVERNOR TERRY SANFORD, 1961-1965, at 552 (1966)).

⁷⁷ See Rappaport, *supra* note 7, at 1512-14 (describing the retributive theory as rejecting the viewpoint that the sentence functions to rehabilitate the offender or reward future acts, and instead advocating the objective of punishing the offender for his or her past action). We note that the retributive theory of justice finds what is perhaps its most elegant and famous description in the Code of Hammurabi, where it co-exists with the king's pardon power. As the Code puts it rather simply: "If a man put out the eye of another man, his eye shall be put out. . . . If he breaks another man's bone, his bone shall be broken." Code of Hammurabi, *supra* note 13, at 196, 197.

⁷⁸ See, e.g., *United States v. Booker*, 543 U.S. 220, 242-44 (2005) (recognizing that, while jury fact finding may not be as efficient as simply deferring to a predetermined matrix, it better promotes the ideals of fairness).

⁷⁹ 2004 Federal Sentencing Guideline Manual, §5H1.11, Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Records of Prior Good Works (Policy Statement).

⁸⁰ See Rappaport, *supra* note 7, at 1501-02 (stating that retributivists advocate abandoning the discretionary executive power in favor of reviewable standards).

⁸¹ See *id.* at 1503-04 (presenting the argument that public figures do not have the power to offer forgiveness on behalf of the private victim, regardless of the crime's harm to the public good).

⁸² *Id.* at 1518-19 (offering the point of view that the only information relevant to clemency is available at the time of initial sentencing).

⁸³ *Id.* at 1503.

⁸⁴ *Id.* at 1519.

⁸⁵ See HUGO ADAM BEDAU, KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA 69-70 (2004) (arguing that there is a current perception that "death sentences are now meted out by trial courts with all the fairness that is humanly possible, even if in the dark pre-*Furman* past they were not").

⁸⁶ *Id.*

⁸⁷ The argument that appellate courts or the clemency process will rectify wrongful convictions, and that this is a mark of the success of the criminal justice system, was picked up recently by Supreme Court Justice Clarence Thomas in *Kansas v. Marsh*, 126 S. Ct. 2516, 2536 (2006) (the only Supreme Court death penalty opinion to mention clemency since *Woodard*). In *Kansas v. Marsh*, Thomas writes: "Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success." *Id.*

⁸⁸ Bedau, *supra* note 85, at 69-70.

⁸⁹ The Innocence Project, Facts on Post Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Nov. 9, 2007).

⁹⁰ Kobil, *The Quality of Mercy Strained*, *supra* note 19, at 571 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 391 (1765-69)).

⁹¹ *Id.*

⁹² The inevitability of politics playing a part in the process is reflected in the following statement from Edward Hammock, the former chairman of the New York State Board of Parole: "[W]ith the governor, it's not the individual case he's looking at. He picks a few from that pool of eligible individuals on the basis of a political statement he wants to make." Hammock further explained: "To get your application looked at, you need a groundswell of support. You need mail, petitions to the governor, rallies. . . . [I]t's like trying to become president. You can be the finest candidate in the country, but you have to be able to get the people to vote for you." *Id.* at 610 (citations omitted).

⁹³ Michael King, Editorial, *Executions in Texas about Politics Not Justice*, HOUS. CHRON., Mar. 6, 2003, at A29 (capturing the political nature of clemency and capital punishment in general in this cynical but possibly accurate statement: "In the end, capital punishment is not about justice. It's about politics. The Texas capital-punishment system still performs its primary function quite well: It helps elect prosecutors, judges and state politicians.").

⁹⁴ Burnett, *The Failed Failsafe*, *supra* note 46, at 194. This is not a partisan phenomenon: during the 1992 presidential campaign, candidate Bill Clinton flew home to Arkansas specifically to preside, as Governor, at the execution of Ricky Ray Rector, a mentally retarded man who was convicted of killing two people, one of whom was a police officer, during a robbery of a convenience store in 1981. Rector eventually turned the gun on himself, shooting himself in the head and leaving him with an I.Q. of approximately 70. See Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105, 132.

⁹⁵ See Burnett, *The Failed Failsafe*, *supra* note 46, at 198-99 (mentioning several Governors including Pat Brown, Edwin Edwards and Mario Cuomo whose anti-death penalty stance were successfully used by their challenger to win the election).

⁹⁶ See Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 436-37 (1999) (noting that the political consequences of clemency decisions are intensified by regulations passed by state legislatures). Many states have statutes requiring notice of pardons to certain individuals: "thirty states require or permit the victim or the victim's representative to be notified of a pardon application so that they can either attend the hearing or somehow register their feelings about the application. Twenty-four states require that the trial or sentencing judge be notified, thirty-one states notify the prosecutor; eight notify the sheriff or police chief, and twelve require that there be a public posting . . . a notice in the newspaper of the county of conviction, or in the newspaper that serves as the state's official legislative journal." As might be expected, "[t]he more rigorous and expansive the notice requirement statutes, the more reluctant the state appears to be in granting pardons." *Id.*

⁹⁷ See Banner, *supra* note 18, at 291-92 (noting that "[w]here the sentence had been affirmed as constitutional at all stages of judicial review, however, the assumption within governors' offices tended to be that the sentence ought not to be disturbed,

an assumption very different from the one that prevailed for the preceding several centuries, when the executive branch was supposed to exercise its independent judgment as to the propriety of an execution. When the courts moved in, the governors moved out”).

⁹⁸ Kobil, *The Quality of Mercy Strained*, *supra* note 19, at 602-03.

⁹⁹ Rappaport, *supra* note 7, at 1507-08 (quoting GEORGE W. BUSH, *A CHARGE TO KEEP* 148 (1999)).

¹⁰⁰ Death Penalty Information, Clemency Process by State, <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13#process> (last visited Nov. 9, 2007).

¹⁰¹ Death Penalty Information, Death Row Inmates by State, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state> (last visited Nov. 9, 2007). California currently has 660 prisoners on death row. The state with the next greatest number of death row prisoners is Florida with 397. Texas is a close third with 393 prisoners on death row at the time of publication. *Id.*

¹⁰² As Governor of California, Ronald Reagan granted one capital clemency, commuting the death sentence of Calvin Thomas to life in prison on June 29, 1967, when medical tests conducted after Thomas’ trial revealed significant brain damage. Reagan, a death penalty proponent who encouraged the California legislature to pass the revised death penalty statute after *Furman* and *Gregg*, did not discuss his views on clemency at length and denied the only other clemency application that came across his desk. He made the following statement about the difficulty of the clemency decision: “There is no question about it, [clemency] is one of the worst features of the job It is not an easy task to be the last resort. . . . This is about the toughest decision anyone will ever have to make.” Lichten, *supra* note 71, at 1.

¹⁰³ The process followed by California in clemency proceedings is set out in the California Department of Corrections website (www.cdcr.ca.gov), the relevant sections of the California Constitution and the California Penal Code. In addition, information set forth in this article was obtained from the Criminal Justice Policy Foundation website (CJPF) (www.cjpf.org), and from the authors own experience in acting as clemency counsel for Stanley Williams, including conversations with individuals in the Governor’s Legal Affairs Office, The Bureau of Prison Terms (BPT), and the Habeas Corpus Resource Center (HCRC).

¹⁰⁴ CAL. PENAL CODE § 4804 (2007).

¹⁰⁵ *Id.* § 1227.

¹⁰⁶ At the time of Stanley Williams’ clemency petition, the Board of Prison Terms (BPT) was given the authority to review clemency applications and make recommendations. Since that time, the BPT as been folded into the Board of Parole Hearings, which now has this authority. See Board of Parole Hearings, http://www.cdcr.ca.gov/Divisions_Boards/BOPH/index.html (last visited Nov. 14, 2007). Because this article was written upon reflection of the authors’ unique experience as attorneys for Stanley Williams, we will continue to refer to the authority here as the Board of Prison Terms.

¹⁰⁷ See *supra* note 1.

¹⁰⁸ Press Release and Statement of Decision, Arnold Schwarzenegger, Governor Schwarzenegger Denies Clemency to Convicted Murderer Kevin Cooper, *available at*

<http://gov.ca.gov/index.php?/press-release/3248/>.

¹⁰⁹ Press Release and Statement of Decision, Arnold Schwarzenegger, Governor Schwarzenegger Denies Clemency to Convicted Murderer Donald Beardslee, *available at* <http://gov.ca.gov/index.php?/press-release/2342/>.

¹¹⁰ According to the Death Penalty Information Center (<http://www.deathpenaltyinfo.org/article.php?did=126&scid=13>), of the 231 commutations granted for humanitarian reasons since *Furman* and *Gregg*, (184 of which were granted by three governors) there are very few strong examples where an individual was so changed by his years in prison that his rehabilitation was given as a reason for his clemency.

¹¹¹ See Press Release and Statement of Decision, Arnold Schwarzenegger, Governor Schwarzenegger Denies Clemency to Convicted Murderer Stanley Williams, *available at* <http://gov.ca.gov/index.php?/press-release/1155/>. The Governor’s reliance on Stanley Williams’ refusal to accept responsibility for the crimes of which he was convicted, and which he denied committing, creates a double-edged sword for those inmates who maintain their innocence, as they run the risk of being judged for not taking responsibility for the crimes they maintain they did not commit.

¹¹² Susanne Herel, *Governor Denies Clemency for Allen*, SAN FRANCISCO CHRON., January 13, 2006, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/13/MNGF9GN5P25.DTL>.

¹¹³ Press Release and Statement of Decision, Arnold Schwarzenegger, Governor Schwarzenegger Denies Clemency to Convicted Murderer Michael Morales, *available at* <http://gov.ca.gov/index.php?/press-release/463/>.

¹¹⁴ See Stacy Finz, et al., *State Postpones Morales Execution*, SAN FRANCISCO CHRON., Feb. 22, 2006, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/02/22/MNGSUHCJFB1.DTL> (reporting that the Judge stayed the execution to avoid a “botched and painful execution”).

¹¹⁵ Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

¹¹⁶ Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94, 95, 102 (1971). Rockefeller was governor of Arkansas from 1966-1970.

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