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Gubernatorial Clemency Powers: Justice or Mercy?

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GUBERNATORIAL CLEMENCY POWERS

JUSTICE or MERCY?

By Kathleen (Cookie) Ridolfi and Seth Gordon

Just days before leaving office on January 11, 2003, Illinois Governor George Ryan commuted the sentences of every inmate on Illinois' death row. In total, 167 convicts were taken off death row and given life sentences without the possibility of parole. It was not an act of mercy. Governor Ryan's actions came in the wake of a three-year study showing that the State of Illinois had executed 12 people since the reinstitution of the death penalty in 1977, and during the same period, the state had released 13 people based on new evidence that demonstrated their innocence. Given that Illinois had exonerated more men than it had executed, Governor Ryan professed the Illinois criminal justice system broken. Speaking at Northwestern University School of Law, Governor Ryan said, "Our capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die." In justifying his actions, Governor Ryan recognized that he was the last resort in the criminal justice system for those facing the ultimate penalty in his state and said he was constitutionally mandated under the state constitution to ensure that justice was served. Invoking his broad executive power, Ryan stated:

> The Governor has the constitutional role in our state of acting in the interest of justice and fairness. Our state constitution provides broad power to the Governor to issue reprieves, pardons and commutations. Our Supreme Court has reminded inmates petitioning them that while errors and fairness questions may actually exist and cannot be recognized under judicial rules and procedural mandates, the last resort for relief is the Governor.

(Gov. George H. Ryan, Clemency Address, Northwestern University School of Law, Jan. 11, 2003.)

Governor Ryan's rebuke of the Illinois capital punishment system and his subsequent grant of clemency were broad both in scope and in justification, expressing the view that Illinois governors are constitutionally mandated under the state constitution to exercise their power to effectuate justice. If the justifications for the exercise of executive clemency were placed on a continuum of ideological frameworks through which clemency has or should be based, Governor Ryan's actions in 2003 exist on the polar end of the continuum. On the other end of the continuum—and the basis on which most acts of clemency are justified today—is the idea that clemency is an executive act of mercy, not a continuation of the criminal justice process. This view was articulated by former California Governor Pete Wilson in the Brenda Aris case.

In 1993, Governor Wilson commuted the sentence of Brenda Aris, a woman convicted of murder in the shooting death of her husband, a batterer who had subjected her to horrendous abuse for 12 years. Aris, who was held captive in her own home by her drug and alcohol abusing spouse, suffered debilitating injuries such as cracked ribs and a broken jaw as well as psychological abuse. (People v. Aris, 215 Cal. App. 3d 1178 (Cal. Ct. App. 1989).) After serving nearly five years of her sentence, Aris petitioned Governor Wilson for clemency, arguing that because the trial court had refused to allow an expert to testify about the effects of "battered woman's syndrome" she had been denied a fair trial.

Unlike Governor Ryan, Governor Wilson did not interpret his executive clemency power broadly. Instead he ex-

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pressed the view that clemency is a matter of mercy reserved for those demonstrating remorse and rehabilitation and not a mechanism through which judicial deficiencies may be reviewed. In response to Aris's application, he said, "clemency is not a continuation of the criminal justice process. . . . Mercy is not about a legal analysis of [battered woman's syndrome] [and] I am not in a position to retry criminal cases or to speculate as to what might have been if different evidence were before the jury." (Office of the Governor, State of California, Decision in the Matter of the Clemency Request of Brenda Aris 4 (May 27, 1993).) In the end, Wilson did have mercy on Aris and commuted her sentence from 15 years to life to 12 years to life—releasing her for time served. He said, "I have considered and sympathized with the pain and terror [Brenda Aris] must have suffered during the many episodes of violence she most certainly endured" (*Id.*)

The U.S. Supreme Court has made clear that the states are not constitutionally required under the federal Constitution to provide any clemency mechanism, and that each state is free to adopt its own clemency scheme. (*See* Herrera v. Collins, 506 U.S. 390, 414 (1993).) Although it might appear, in comparing the statements of Governors Ryan and Wilson, that the Illinois Constitution grants broader clemency power than the California Constitution, this is not true. The language of the two provisions is nearly identical. With limited exceptions, both Article V, § 13 of the Illinois Constitution and Article V, § 8 of the California Constitution bestow upon the governor the sole authority to issue pardons, reprieves, and commutations "on such terms as he thinks proper" in Illinois, and "on conditions the Governor deems proper" in California. The difference is ideological, not semantic.

The ideological tension between the two views, that clemency is a pure act of mercy on the one hand, and Governor Ryan's assertion that the pardoning power is "constitutionally mandated" and integral to the criminal justice system on the other, is significant. The "mercy" interpretation presupposes that the judiciary got it right; that the person receiving clemency (whether it be a full unconditional pardon or the commutation of a death sentence) committed the criminal act and was properly convicted. Notwithstanding this presumption of correctness, under the "mercy" interpretation, clemency may be warranted due to mitigating circumstances, such as in the *Aris* case (where fairness dictated that the imposed sentence was overly harsh), or due to a finding of rehabilitation (where a person has demonstrated exemplary behavior postconviction and should be forgiven in the eyes of the law). The "constitutional mandate" interpretation on the other hand, does not assume the system always gets it right. It presumes instead that in any system of laws unanticipated circumstances arise that the legal system is unable to correctly and justly resolve and that the purpose of the executive pardoning power is to serve as a safety net when that happens.

Exercising his executive power strictly on the basis of mercy, Wilson expressed compassion for Brenda Aris's suffering. Under the "constitutional mandate" analysis, however, he could also have found clemency legally mandated. Without an expert to help the jurors understand Aris's fear from the standpoint of her experience, the jury did not have the tools it needed to fairly consider her defense. While the crucial nature of the expert's testimony may not have been commonly understood at the time Aris was tried, psychological studies supporting her claim were widely known when Governor Wilson considered her clemency petition. An expert testifying today would testify that a woman in Aris's situation, with her history of abuse and facing a new threat from her abuser, could reasonably fear serious bodily harm or death in circumstances that might appear unreasonable to someone outside the relationship. Had Wilson acted under the "constitutionally mandate" theory, he would have been exercising his executive power in a manner consistent with what Chief Justice Rehnquist explained as its intended purpose, an "historic remedy for preventing miscarriages of justice . . . deeply rooted in our Anglo-American tradition of law." (U.S. v. Herrera, 506 U.S. at 411-12.)

Whatever views one holds on the fallibility of the criminal justice system, the ideological differences exhibited by Governors Ryan and Wilson create a false dichotomy. The rationale underlying the clemency power is not an "either/or" proposition. The historical reality is that the clemency power is extraordinarily broad—having constitutional underpinnings, yet premised on the idea that the executive should possess tremendous discretion in this area—and encompasses both rationales. (*See* Kathleen Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 52-64 (1998) (discussing the evolution of the rationale underlying the federal clemency power in the U.S. Supreme Court and the debate during the California Constitutional Convention of 1849); *see also*, pages 9-12 *infra*.) The point is that the clemency power is not only flexible enough to be exercised as both an act of mercy and as the "fail-safe" for an imperfect criminal justice system but there is ample support from both the Supreme Court and the Constitution that dictates it be exercised broadly.

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For reasons that include its existence outside the judicial process and its potential political cost to the executive who exercises it, clemency has too often been passed over as an avenue for postconviction relief. This article intends to encourage the use of this vital resource, so critical now given the severe limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We begin by defining the terminology—often confused by courts and legislators and include both a historical overview and an overview of current state procedures underscoring its value as a method of relief in postconviction innocence cases. (*See* Table *infra*, (providing a list of the constitutional and legislative provisions governing the clemency power in each state; the clemency structure in each state, i.e., whether the state constitution vests the clemency power in the governor, an executive board, or some combination of the two; and a brief overview of the steps an applicant must take under each state's procedural rules governing clemency).)

Definition and Types

While the term "clemency" may first bring to mind an act of grace, or a deed of mercy, leniency, or forgiveness, "clemency" has had much broader application. The National Center for State Courts (a not-for-profit organization that provides data to state courts and receives funding from governmental entities such as the Department of Justice) has identified the following grounds pursuant to which clemency has been granted:

- to correct hard cases (even under optimum conditions, exceptional cases arise that cannot be left to legally prescribed rules; laws cannot be drafted that will fit every conceivable situation);
- to correct unduly severe sentences;
- for mitigating circumstances;
- for innocence or dubious guilt;
- in death penalty cases;
- for physical condition;
- to restore civil rights;
- to prevent deportations;
- for political purposes and for reasons of state;
- for turning state's evidence; and
- for services to the state.

(National Center for State Courts, Clemency: Legal Authority, Procedure, and Structure xvi (Dec. 1977).)

The term "clemency," sometimes used interchangeably with "pardon," is actually an umbrella term encompassing the various mechanisms through which an executive can remit the consequences of a crime. These mechanisms include a pardon, commutation of sentence, reprieve, or remission of fines and forfeitures.

Pardon. A pardon is the broadest of the clemency mechanisms and is an official nullification of punishment or other legal consequences of a crime. "The term pardon is first found in early French law and derives from the Late Latin *perdonare* ('to grant freely'), suggesting a gift bestowed by the sovereign. It has thus come to be associated with a somewhat personal concession by a head of state to the perpetrator of an offense, in mitigation or remission of the full punishment that he has merited." (Leslie Sebba, *Amnesty and Pardon*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 59 (Sanford H. Kadish ed., 1983).) Like all legal concepts, the definition and scope of the pardon power has evolved over time. Recognizing the "mercy" and "constitutional mandate" rationales described above, *American Jurisprudence* defines the pardon as:

> . . . an act of grace, bestowed by the government through its duly authorized officers or department, and is designed to relieve an individual from the unforeseen injustice, because of extraordinary facts and circumstances peculiar to the case, of applying the punishment provided in a general statute which, under ordinary circumstances, is just and beneficial. However, a pardon is more than a mere act of private grace proceeding from an individual having the power to exercise it, and is a part of the constitutional scheme; properly granted, it is also an act of justice, supported by a wise public policy.

(59 AM. JUR. 2D PARDON AND PAROLE § 11 (internal citations omitted).)

Commutation. A commutation of sentence "is a permanent reduction in degree or amount of punishment." (Way v. Superior Court, 74 Cal. App. 3d 165, 176 (1977).) A commutation of punishment differs from a pardon in that a commutation changes one sentence to another whereas a pardon "absolves a defendant of the crime altogether." (Colwell v. State, 112 Nev. 807 (1996).)

Reprieve. A reprieve is the most limited form of clemency and temporarily postpones the execution of a sentence for a definite time. A reprieve does not "defeat the ultimate execution of the judgment of the court, but merely delays it temporarily." (59 AM. JUR. 2d § 4.)

Evolution of the Clemency Power

In the arena of postconviction remedies "the power to pardon is the law's oldest mechanism for securing the release of an offender, dating back to the time when a supreme monarch possessed absolute control over the power to punish." (Clifford Dorne and 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. CON. 413, 417 (1999).) One of the leading legal scholars in the field has described clemency as "a living fossil, a relic from the days when an all-powerful monarch possessed

the power to punish and to remit punishment as an act of mercy." (Daniel T. Kobil, *The Quality of Mercy Strained*, 69 TEX. L. REV. at 575.)

Although exercises of the clemency power can be traced back to antiquity, like most American law, the U.S. conception of clemency derives from our English common-law heritage. At the time of the Declaration of Independence in 1776, more than 200 crimes carried mandatory death sentences in England. (Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1829 (2002).) "To offset the harshness and rigidity of mandatory death sentences, wide discretion to give clemency was granted to the executive." (*Id.*) It has been noted that one of the purposes of exercising the clemency power under these circumstances "was to consolidate the monarch's power" by endearing the sovereign to his subjects. (Kobil, *Quality of Mercy*, *supra*, at 586.) Like modern day presidents and governors, the monarchs of eighteenth century England wielded the clemency power as a political device.

Following the American Revolution, the first American states rejected the British model. "Eight of the thirteen states vested the authority to remit punishment in an executive legislative council and the governor jointly, or in the legislature alone." (Kobil, *Quality of Mercy*, *supra*, at 604-05.) However, with the development of the federal Constitution, which vested the clemency power in the president alone, and the subsequent adoption of state constitutions, the trend among the states was to abolish legislative control over clemency and instead, vest the power in each state's chief executive. (*Id.*) "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." (*Id.*)

The California Constitutional Convention of 1878-1879 provides insight into what one state's representatives had in mind concerning the clemency power at the time of the state's inception. Contrary to Governor Wilson's view in 1993 that it would be inappropriate to look into cases where the applicant is claiming error during his or her judicial proceeding, in 1878, the founders of the California Constitution specifically contemplated the executive clemency power as a tool to correct both legislative and judicial deficiencies.

Concerning judicial deficiencies, Delegate McCallum argued:

> When men shall devise a perfect government, when there shall be no mistakes made in the administration of government, then there will be no need of pardons in any case, because there would be no suppositions that there could be any injustice done in any case. But we are all liable to err. Jurors are liable to commit errors; Judges are liable to commit errors; witnesses are liable to make mistakes and misstatements. All human testimony is fallible.

(Debates and Proceedings of the Constitutional Convention of the State of California, 1878-79.)

Concerning legislative deficiencies, Delegate Terry stated rhetorically that "[t]here may be mitigating circumstances which excuse [an] offense. . . . A man may commit murder . . . and be technically guilty, but in such cases why should not the Governor be allowed to pardon him?" (*Id.*) Incorporating both concerns, Delegate Howard argued:

> A power to pardon seems indeed indispensable under the most correct administration of the law by human tribunals, since otherwise men would sometimes fall prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and Courts.

(*Id.*)

Although recent California governors have expressed views to the contrary, the drafters of the California Constitution made crystal clear that both legislative and judicial deficiencies can give rise to the justifiable exercise of the clemency power and such power is "indispensable under the most correct administration of the law."

Four U.S. Supreme Court cases track how the perception of the clemency power has evolved in U.S. jurisprudence. In 1833, Chief Justice John Marshall described the pardoning power as "an act of grace, proceeding from the power entrusted 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." (United States v. Wilson, 32 U.S. (7 pet.) 150 (1833).) Nearly 100 years later, in *Biddle v. Perovich*, the Court reversed course with Justice Holmes writing that "a pardon . . . is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme and 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 was fixed." (274 U.S. 480 (1927).)

Then, in 1993, the Court issued *Herrera v. Collins*, one of its most troubling cases in the area of habeas corpus jurisprudence. Chief Justice Rehnquist, writing for the plurality, denied habeas relief to death row inmate Leonel Herrera. In denying Herrera relief, Justice Rehnquist held that actual innocence, absent some other procedural violation in the convict's underlying case, is not a constitutional ground for relief. (506 U.S. at 400.) In reaching this conclusion, Rehnquist opined that executive clemency, rather than the court system, is the proper mechanism for assessing claims of innocence. According to Rehnquist, clemency—not the court system—is the "fail safe" in our criminal justice system for those wrongfully convicted.

The problem with the Court's decision in *Herrera* is that it

PARDON ME

By Richard A. Ginkowski

The quirky world of executive clemency—each state and the federal government have their own guidelines and procedures—is a place few criminal lawyers visit yet it may be one of the most important stops for a convicted client.

The disabilities associated with convictions, such as loss of voting rights or eligibility for state licenses, vary by jurisdiction as well and a criminal law practitioner should know what they are in his or her state as well as the procedures for restoration. For the moment, let's focus on the broadest form of executive clemency, the pardon.

For whatever reason, many criminal defense attorneys unfortunately overlook counseling their convicted clients about how to get back on the right track after their sentence is discharged. In some cases, the ability to obtain restoration of civil rights, particularly via a pardon, can make a significant impact in a person's life and society as a whole. There are lawyers, police officers, nurses, and others holding meaningful jobs today because a youthful indiscretion has been forgiven.

The lawyer's role in the pardon process is important but necessarily different than in traditional adversarial advocacy. The pardon authority (usually the governor and his or her pardon advisors) most likely doesn't want to hear from an applicant's lawyer. The applicant has to make his or her own case, which means the attorney must function more as a teacher and coach.

Pardons aren't handed out like candy. Pardon authorities have at least three major assessments that must be satisfied: Does the applicant need a pardon? Is the person a good risk for clemency? Does the public's interest favor clemency?

These are commonsense factors. No governor in his or her right mind wants to pardon someone who is going to commit a serious crime afterward. Nor does the pardon authority want to be burdened with a slew of meritless or marginal applications.

Counsel's first step should be to learn his or her state's pardon process. Chances are the governor's office will have "pardon packets" available that include necessary forms and often helpful "suggestions" that should be thought of as "hints" for a successful application. Applications should be filled out completely and correctly, as incomplete or inaccurate information will likely "deep six" the application in short order. A helpful rule is "when in doubt, disclose."

The authority most often will want to know about the crime, the applicant's attitude about his or her former lifestyle, what the applicant has done with his or her life since being convicted and, most important, why a pardon is necessary.

For example, a young single mother working as a grocery store cashier concealed some of her income while receiving public aid leading to her felony conviction for welfare fraud. Afterward she continued to work at the grocery store, successfully completed probation, paid full restitution, remained crime-free and—but for her felony conviction—has a chance for a full-time career at the bank inside the grocery store.

In this case, the successful applicant was able to demonstrate remorse for her crime, an exemplary crime-free lifestyle, and had support from her present employer, the sentencing judge, the prosecutor in the case, and the prospective employer. The applicant demonstrated that she was a good risk for clemency, the pardon was necessary for her career advancement, and that the public interest would be served by favorable action.

The role of the attorney in this case was to make sure that "the ducks were in a row" before the application was submitted, i.e., documentation of all relevant facts, support letters enclosed, and court obligations satisfied. While the attorney could not represent her at her pardon interview, he was able to guide her about questions that might be asked and the information the advisory board

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presupposes that the governor will actually hear the evidence of innocence and take action in appropriate cases. Although the statistics on the issue are sparse, the anecdotal evidence tends to show that Rehnquist's presumption is factually unsupported. As one observer has noted, "[w]hile a politically accountable representative or body is now substituted for the king as the dispenser of clemency, the pardoning power is still exercised in an ad hoc fashion, with little regard to principled decision making or, for that matter, consistency." (Kobil, *Quality of Mercy, supra*, at 574.)

As a general matter, the Court has held that states are not constitutionally required to provide clemency under the federal Constitution, and that even where a state does provide such a mechanism, the proceeding is not subject to procedural due process. However, in *Ohio Adult Parole Authority v. Woodard*, the Court held that state clemency proceedings *in capital cases* are subject to minimal constitutional protections, suggesting that "judicial intervention might, for example, be warranted [if] a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." (523 U.S. at 289 (O'Connor, J., concurring).)

Despite its historical roots (or perhaps because of them) the clemency power has frequently been misunderstood, and with even greater frequency underutilized. Both an advantage and a disadvantage, one problem is that clemency is by definition extrajudicial, a power vested in either the state governor or an executive administrative body. Yet, the U.S. Supreme Court has characterized clemency as an integral part of the criminal justice system. *Herrera*'s characterization of the executive pardon as the criminal justice system's fail-safe can only be realized if the executive is willing to revisit the substance of habeas claims denied under established judicial standards. Properly employed, clemency "fulfills a function that is different from simply another layer of judicial review. Clemency is the only mechanism that allows the condemned to tell his or her story fully. It provides an opportunity for the decision maker to consider all of the evidence and circum-

was likely to seek.

The former welfare mom-turned-banker is doing well and followed advice to do one more thing: drop the governor a letter a year or so down the road to let him know. Although they are primo politicians, governors are also human and hearing a success story may make it more likely that other worthy applicants are given favorable consideration.

This seemingly mundane example is nonetheless an example of the type of applicant an authority wants to see: little or no risk of reoffending, the pardon was needed for a legitimate reason, and favorable action was in the public's interest. While more challenging cases are frequently presented, pardon authorities are less likely to be comfortable with risky applicants. Counsel's role in such situations will necessarily be focused on how to persuade the authority that the applicant isn't such a bad risk. (Good luck!)

Another tip: Don't overload the authority with a stack of "me too" support letters. If the application has merit, they'll know. What you want to present are the "right" letters from the "right" people, such as the prosecutor and sentencing judge and employers. Support from a mayor, sheriff, or police chief may also be helpful as would a kind word from the victim, if possible. Substantive letters from coworkers, teachers, and neighbors should be considered with the key word being "substantive" as the authority wants to gets relevant information from people in a position to know, not a basket of fluff. Cull the letters to present an accurate picture of the applicant showing that he or she is a good risk with appropriate support.

In any given community there are likely to be many examples of good citizens whose youthful indiscretions are keeping them from full participation in society. With appropriate documentation and support, they may well be ideal candidates for clemency. While assisting pardon applicants may not be a lucrative part of your practice, there is likely to be some satisfaction in helping a person become a success story. We need more of them.

stances without the constraint of the legal technicalities that characterize judicial proceedings." (Daniel T. Kobil, *Forgiveness and the Law: Executive Clemency and the American System of Justice: How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 238 (2003).)

Overview of State Procedures

Article II of the U.S. Constitution provides that "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States except in Cases of Impeachment." The presidential pardoning power is limited to crimes against the United States. In other words, the president has no authority to grant clemency to a person convicted under state law. Although states are not required to do so under the federal Constitution, each of the 50 states provides, through its own constitution, for some form of clemency. Although each state's clemency structure and procedures vary widely, some generalizations can be made.

The first generalization concerns the power structures in each state, which fall loosely into three categories: (1) the state's constitution grants exclusive authority to the governor; (2) the state's constitution grants exclusive authority to an executive board; or (3) the state's constitution provides that the governor and an executive body shall share the clemency power. Following the federal model, 29 states place the clemency power in the governor alone, "although most of those states have established an advisory body that makes nonbinding recommendations to the chief executive." (Kobil, *Quality of Mercy, supra,* at 604. (AK, AR, CA, CO, HI, IL, IA, KS, KY, ME, MD, MI, MS, MO, NJ, NM, NY, NC, ND, OH, OR, SD, TN, VT, VA, WA, WV, WI, and WY).) In most of these states the constitution provides that the legislature shall have the power to regulate the manner of applying for clemency, but this in no way derogates from the governor's authority.

In nine states the clemency power is vested exclusively in an executive board. (AL, CT, GA, ID, MN, NE, NV, SC, UT.) Although vesting the clemency power in a board rather than the governor alone may at first glance seem more democratic, in every one of these nine states the governor either appoints the board or sits on the board. For instance, in Nevada, the Board of Pardons is comprised of the governor, justices of the state supreme court, and the attorney general.

In the remaining 12 states, the governor shares the power to make clemency decisions with an administrative board or panel. (AZ, DE, FL, IN, LA, MA, MT NH, OK, PA, RI, TX). For instance, in Delaware, the governor cannot grant a pardon or commutation in the absence of an affirmative recommendation of a majority of the Board of Pardons. The Delaware Constitution provides that the Board of Pardons shall consist of the chancellor, lieutenant governor, secretary of state, state treasurer, and auditor of accounts. (Del. Const. art. VII, § 2.)

The second generalization is that the law in each state governing clemency can be seen as two-tiered. The first tier is obviously the state constitution, which delegates the clemency power to some executive authority, whether that be the governor alone, an executive board, or some combination of the two. The second tier is legislative. In conducting the research for this article, we found that currently each state has a legislative scheme governing a wide variety of clemency issues, ranging from the procedural rules governing a board's handling of clemency hearings, to notice provisions requiring the clemency applicant to notify the prosecuting attorney, sentencing judge, victim, or any combination of the three. Over half of the states require that the clemency applicant's sentencing judge and prosecuting attorney be given notice of the application and an opportunity to comment, and 27 states require that the governor report his or her clemency actions to the state legislature. Given that all 50 states have both constitutional provisions *and legislative provisions* governing clemency authority and procedures, in identifying

the procedures in a given state, one must look to both the state constitution and the particular code section. As an example, the California structure is set forth below.

The starting point in any state is the state's constitution. Article V, § 8 of the California Constitution provides "subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in cases of impeachment. . . . The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring."

Deconstructing the above provision, Article V grants the governor sole authority to grant reprieves, pardons, and commutations "on conditions [he or she] deems proper." Article V limits the governor's authority in three ways. First, he or she cannot grant clemency until after conviction. Second, he or she cannot grant clemency in cases of impeachment. And finally, the governor cannot grant clemency to a person who has been convicted of a felony more than once without the consent of four judges of the California Supreme Court. According to the governor's office, traditional pardons may be based on the applicant's innocence or rehabilitation. (California Governor's Office, How to Apply for a Pardon (2008), *available at* http://gov.ca.gov/pdf/interact/how_to_apply _for_a_pardon.pdf (last visited August 14, 2009).) Although Article V does not limit the governor's authority to specific crimes, misdemeanor convictions are generally not considered serious enough to warrant clemency, with the exception of certain sex offenses. (*Id.*) Furthermore, it is the policy of the governor's office that applicants eligible to apply for a certificate of rehabilitation under Penal Code section 4852 do so before a pardon will be granted. (*Id.*) The practical effect of this policy is that persons who have served their sentences and have been out of custody for a minimum of seven years must apply for, and receive, a certificate of rehabilitation through the court system before applying for a gubernatorial pardon. This policy reflects the emphasis that California governors have placed on the "mercy" rationale and discounts the fact that in many cases exculpatory evidence does not surface until long after conviction.

Article V also provides that the governor's authority is "subject to application procedures provided by statute." Such provisions appear in many state constitutions, which grant the legislature authority to create these procedures, although this authority in no way limits the substantive reasons a governor may exercise his or her power.

In California, the legislative provisions governing clemency appear in Title 6 of the Penal Code. Title 6 contains five chapters, and the first three set out the various procedures for seeking clemency depending on the status of the convict. Chapter 1 sets out the powers and duties of the governor, the role of the Board of Prison Terms, and governs the procedures for those applicants who are currently incarcerated (§§ 4800-4813). The second chapter, Chapter 3, sets forth the duties of the California Supreme Court regarding twice-convicted prisoners seeking clemency (§§ 4850-4852), and Chapter 3.5 sets forth the procedures for those convicts who have served their terms and are seeking a certificate of rehabilitation (§§ 4852.01-4852.21).

Applicants who are currently incarcerated have two avenues to pursue clemency—they can be referred to the governor by the Board of Prison Terms (§ 4801), or they can apply directly to the governor without the recommendation of the board. The California Board of Prison Terms is composed of nine commissioners appointed by the governor with the advice and consent of the state senate. (Cal. Pen. Code, § 5075.) Under section 4802, twice-convicted felons must apply for pardon or commutation directly to the governor, who is then required to transmit all papers and documents relied upon in support of and in opposition to the application to the Board of Prison Terms. Section 4803 allows the governor to request the convicting judge or district attorney to furnish a summary of the case and recommendation for or against granting clemency. Section 4804 requires notice be sent to the district attorney of the convicting county, and section 4807 requires a statement by the applicant identifying any compensation paid to anyone assisting in procuring the pardon or commutation. According to Governor Schwarzenegger's Web site, he has issued three pardons since taking office. Governor Davis granted no pardons; Governor Wilson granted 13; Governor Deukmejian granted 328; Governor Brown granted 403; and Governor Reagan granted 575. (*See* The Sentencing Project: Research and Advocacy for Reform, *at* http://www.sentencingproject.org (last visited June 9, 2009).)

The Political Reality

One of the purposes of this article is to show that the clemency power, constitutionally vested in each state to the chief executive or an executive board, is broad and essential to a just system. The unfortunate reality is that over the last three decades, the clemency power has been significantly underutilized. (For a comprehensive look at the frequency in which the clemency power has been exercised in each state see The Sentencing Project, *supra.*) As one author has noted, "there is little doubt that in recent decades, there has been an atrophy of the clemency power at the state and federal levels." (Daniel T. Kobil, *Forgiveness and the Law, supra,* at 223.) In our opinion, the number one reason for this underuse is a perception on the part of state governors that the exercise of their constitutionally granted authority will be viewed as taking a "soft" stance on the "crime issue." If mercy once was used as a political device to endear British monarchs to their subjects, the pendulum has swung to the opposite end of the spectrum with modern politicians now taking a "tough on crime" stance.

Unlike eighteenth-century England, where executive mercy was necessary in order to mitigate the harshness of a system that imposed mandatory death sentences for more than 200 criminal acts, in the United States the political trend is to call for increased law enforcement and harsher sentences. The trend is embodied in policies such as the "war on drugs," mandatory minimum sentencing, three-strikes laws, limits on habeas corpus petitions and appeals made by inmates, the abolition of parole in some states, and the victims' rights movement. These policies have not only dramatically increased the nation's prison population, leaving politicians scrambling to deal with the twin problems of overcrowding and too few financial resources, but also create the atmosphere in which governors and executive boards are unwilling to exercise their clemency power even in appropriate cases.

One of the most troubling manifestations of the "tough of crime" movement came with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA places severe limitations on an inmate's ability to file a federal petition for habeas corpus, and for the first time introduced a one-year statute of limitations that first-time petitioners in federal court must meet to have their claims heard. There is no exception for innocence, an issue currently being litigated by innocence projects; however, the government argues that the omission was intentional on the part of Congress. Although some federal courts have resisted this unfair and arguably unconstitutional interpretation of the law, AEDPA has had the practical effect in case after case of killing valid constitutional claims before they can be heard in federal court. For those prisoners who have failed to comply with AEDPA's draconian procedural requirements—even prisoners who were convicted through a constitutionally deficient process or those with evidence of actual innocence—clemency is not only the last but the only avenue for relief.

In the current political atmosphere, too often the merits of the case take a subsidiary role to political concerns. As Edward Hammock, former chairman of the New York State Board of Parole, put it, "To get your application looked at, you need a groundswell of support. You need mail, petitions to the governor, rallies. If you're John Inmate sitting in Auburn state prison cooling your heels, and the only friend you've got is a correctional officer who writes the nicest letter in the world for you . . . well, what kind of chance have you got? . . . I agree it's unfair. . . . But it'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." (Kevin Krajick, *The Quality of Mercy*, 5 CORRECTIONS MAG., June 1979, at 50 (quoting Edward Hammock).)

Maintaining a tough-on-crime political stance while overtly declining to utilize the gubernatorial clemency power simply fails to add up. The unwillingness to acknowledge the critical nature of clemency and its essential role in the justice system—in light of the prevalence of wrongful convictions and their underlying causes—is also problematic for public safety reasons. Put simply, if the wrong person is convicted, then the actual criminal remains at large. Some innocence cases have had the dual effect of exonerating the wrongly convicted and identifying the actual perpetrator through the FBI's Combined DNA Index System known as CODIS. Of course, not all innocence claims are based on DNA evidence and in many cases the wrongly convicted person has no idea who the actual perpetrator is. However, even in cases where the perpetrator cannot be identified, correcting the wrongful conviction would at least result in police officials reinstituting an investigation that would not otherwise occur.

To maintain that the sole purpose of executive clemency is to lessen the consequences of a just conviction in circumstances that cry out for mercy only makes sense in a perfect world where there are no legislative or judicial deficiencies. A power to pardon, as explicitly articulated by drafters of the federal and state constitutions, "is indispensable under the most correct administration of the law by human tribunals." With the application of DNA testing in criminal cases, the prescience of these early drafters could not be clearer. Moreover, to deny the extent of the problem of wrongful convictions and their underlying causes poses a serious threat to public safety. Refusing to acknowledge that sometimes innocent people are convicted allows the actual perpetrators to continue to victimize an unsuspecting public.

In the gubernatorial cost-benefit analysis, exercise of the clemency power has generally been viewed as too politically costly, and some politicians see grants of clemency as political suicide. Former governor of Louisiana, Mike Foster, took the "tough on crime" attitude to the extreme when he publicly announced plans to stack the pardon and parole boards with crime victims in an effort to keep those convicted in jail. (Douglas Dennis, *The Politics of Mercy*, 22, No. 4 ANGOLITE: THE PRISON NEWS MAG. (1997) at 26-45.) And former California Governor Pat Brown openly admitted that political pressure directly affected his clemency decisions. "Governors are so afraid of signing their own political death warrant that clemency is just not exercised at anywhere near the rate it was 20 years ago. The only governors commuting death sentences are lame-duck governors who are on their way out." (Amy Chance, *Brown Targeted Over Opposition to Death Penalty*, SACRAMENTO BEE, March 6, 1994, at A21 (quoting Gerald Uelmen, former dean of Santa Clara University Law School).) Based, however, on the increasing public unease over wrongful convictions and the ever-growing cost to the states of incarcerating a burgeoning prison population, there should be no reason why the use of the clemency power cannot itself be seen as a positive political tool. With state penitentiaries busting at the seams, broader use of the clemency power becomes less risky. The cost-benefit analysis may finally be shifting. ■

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
Alabama	Ala. Const. art. V, § 124 Ala. Code § 15-22-37	• Governor has the authority to grant reprieves and commutations to persons subject to death penalty. • Board of Pardons and Paroles has authority to grant pardons.	Persons still under sentence and not having completed 3 years of successful parole may apply for a pardon, but it must be based on innocence and requires the approval of the sentencing court or prosecuting DA.	An applicant may apply for a pardon by one of the following methods: 1) Contacting the local State Probation and Parole Office in the area the applicant lives; 2) Contacting the Board of Pardons by telephone at (334) 242-8700; 3) Contacting the Board of Pardons by mail at P.O. Box 302405, Montgomery, AL 36130. (www.pardons.state.al.us/)
Alaska	Alaska Const. art. III, § 21 Alaska Stat. § 33.20.070	Governor has authority to grant pardons, commutations, and reprieves and to suspend and remit fines and forfeitures.	No application for clemency will be considered while application is being made for any form of post-conviction relief, including a sentence reduction motion or federal habeas corpus action. Clemency will not be considered until after convicted person has served some portion of sentence except in cases of innocence or exceptional circumstance.	An applicant begins the process by first completing and submitting an "Eligibility Determination" form to the Alaska Board of Parole Office (ATTN: Clemency Determination). Once eligibility is positively determined, an Application Form will then be provided to the potential applicant. Requests for Eligibility Determination forms should be submitted to: Alaska Board of Parole, Attn: Clemency Determination, 550 West 7th Ave., Suite # 601, Anchorage, AK 99501. (www.correct.state.ak.us/corrections/Parole/pdf/clemencyhandbook.pdf)
Arizona	Ariz. Const. art. V, § 5 Ariz. Rev. Stat. § 31-401	Governor has the authority to grant commutations, reprieves, and pardons, but only upon recommendation of the Board of Executive Clemency.	Has to have recommendation from the board.	Individuals must complete and sign the application for commutation form adopted by the Board of Executive Clemency. All applications made to the Governor for a commutation of sentence are transmitted to the Chairperson of the Board of Executive Clemency for review. (www.azboec.gov/documents/400.13.D.pdf)
Arkansas	Ark. Const. art. VI, § 18 Ark. Code Ann. § 16-93-204	Governor has the authority to grant reprieves, commutations, and pardons except in cases of impeachment and treason.		Application sent directly to Governor's office. Application available at http://governor.arkansas.gov/pdf/clemency/0808_executive_clemency_app.pdf.
California	Cal.Const. art. V, § 8 Pen. Code, § 4800 et seq.	Governor has the authority to grant reprieves, pardons, and commutations after sentence.	Governor may not grant clemency to persons twice convicted of a felony w/o consent of 4 justices of the Cal. Supreme Court.	2 methods: (1) if eligible, an applicant may seek a certificate of rehabilitation under Pen. Code § 4852 and, if granted, seek a pardon from the Governor's office, or (2) the applicant can apply for a pardon directly to the Governor's office.
Colorado	Colo. Const. art. IV, § 7 Colo. Rev. Stat. § 16-17-101	Governor has full and absolute discretion in clemency matters. He may grant unconditional pardons, commutations, and reprieves.	Inmates serving a single life sentence must have served 1/3 of their sentence to parole eligibility or ten full years, whichever is less. Inmates serving a life sentence with consecutive sentences must serve ten full years. All other sentences must serve 1/3 of their actual sentence or ten years, whichever is less.	An application is initiated by the inmate with the assistance of the Department of Corrections' Case Managers. Applicants must complete Executive Clemency Advisory Board (ECAB) Application Eligibility Criteria for Commutation of Sentence & Character Certificate. Copies of the completed application are sent to the sentencing judge and district attorney in the district where the conviction took place. The Governor has final discretion to grant, refuse or table all clemency applications. (www.cjpf.org/clemency/Colorado.html)
Connecticut	Conn. Const. art. IV, §13 Conn. Gen. Stat. § 54-124a	• Governor has the authority to grant reprieves. • Board of Pardons (appointed by Governor) has the authority to grant pardons and commute sentences.	Sentence of 8 years or more: eligible after 4 years. Sentence of less than 8 years: eligible after serving 50% of the sentence. The eligibility requirements may be waived by the Board upon application and for compelling reasons.	Application sent to Board of Pardons and Paroles by mail at: Pardon Unit Board of Pardons and Paroles 55 West Main Street, Suite 520 Waterbury, CT 06702. The Board holds two hearings per year (May and Nov.). The deadline for the May docket is March 15. The deadline for the Nov. docket is Sept. 15. (www.ct.gov/doc/lib/doc/PDF/form/PardonClemencyInstructions.pdf)

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
Delaware	Del. Const. art. VII, § 1 Del. Code Ann. tit. 11 § 4301 et seq.	Governor has the authority to grant pardons, reprieves, and commutations but only upon recommendation in writing of Board of Pardons after a full hearing.	Pardons or reprieves in excess of six months and all commutations must receive the affirmative written recommendation of the majority of the Board of Pardons.	• Applicant must obtain a copy of certified copy of the court docket and sentencing order for each guilty charge. Applicant must then complete the Board of Pardons cover sheet, including reasons for applying, a history of the case, and a statement of all pending proceedings. • The presiding Judge, Attorney General, and Chief of Police must all be notified at least 37 days before hearing date. (http://pardons.delaware.gov/services/pardinst.shtml).
Florida	Fla. Const. art. IV, § 8 Fla. Stat. § 940	Governor has the authority to grant reprieves not exceeding 60 days, and, with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines.	Approval of two members of the cabinet required to grant pardons, restore civil rights, commute punishment and remit fines and forfeitures for offenses.	Applicant must complete and submit an application to the coordinator of the Office of Executive Clemency. (https://fpc.state.fl.us/Clemency.htm)
Georgia	Ga. Const. art. IV, § II Ga. Code Ann. § 42-9-42	• Board of Pardons and Paroles (appointed by Gov.) has the authority to grant pardons, reprieves and commutations after conviction and to remove all civil and political disabilities. • Governor has the authority to temporarily suspend sentences in cases of capital punishment and treason.	Majority vote of the Board is required for action in all clemency cases.	• There is no standardized application; an inmate or someone representing an inmate may write to the Board to request clemency. The only information that needs to be submitted is the inmate's name, prisoner number, and reason(s) why clemency should be granted. (http://rules.sos.state.ga.us/cgi-bin/page.cgi?g=STATE_BOARD_OF_PARDONS_AND_PAROLES_%2FRULES%2Findex.html&d=1)
Hawaii	Haw. Const. art. V, § 5	Governor has the authority to grant reprieves, commutations, and pardons after conviction.		Application to Hawaii Paroling Authority, including 2 character affidavits. (http://hawaii.gov/psd/attached-agencies/hpa)
Idaho	Idaho Const. art. IV, § 7 Idaho Code Ann. § 20-210	Board of Pardons (appointed by Governor) has authority, as provided by statute, to grant commutations and pardons.	Commission has full and final authority to grant pardons, except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor, and manufacture or delivery of controlled substances. In the cases listed above, the Commission's decision to grant a pardon shall constitute a recommendation only to the governor.	Application to Idaho Commission of Pardons and Parole. The only acceptable form is the one provided by the Commission. Application available at http://www2.state.id.us/parole/pardons.htm.
Illinois	Ill. Const. art. V, § 12 730 Ill. Comp. Stat. 5/3-3-1	Governor has the authority to grant pardons, commutations and reprieves.	No petition will be accepted for review within one year of the date of the denial of a prior petition.	Send application to the Illinois Prisoner Review Board and serve copy on the convicting judge and State's Attorney of the county of conviction. (http://www.state.il.us/prb/)
Indiana	Ind. Const. art. 5, § 17 Ind. Code § 11-9-2-1	Governor has the authority to grant commutations, pardons, and reprieves, but may not grant pardons without consent of the parole board.	Five -year waiting period and evidence of rehabilitation.	Applications filed with Parole Board. Instructions and application available at http://www.in.gov/idoc/2324.htm.
Iowa	Iowa Const. art. IV, § 16 Iowa Code §§ 914.1-914.7	Governor has the authority to grant pardons, commutations, and reprieves, remit fines and forfeitures, and grant certificates restoring citizenship rights.	Before granting pardon or commutations the governor must first obtain the advice of the Board of Parole.	Application may be sent to Board of Parole or to the Governor directly. Applications to the Board must be on the form provided by the board, which may be obtained by contacting the board's business office. (http://www.bop.state.ia.us/pdf/07-01-2009.205.pdf)

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
Kansas	Kan. Const. art. I, § 7 Kan. Stat. Ann. § 22-3701 et seq.	• Governor has the authority to grant pardons, commutations, reprieves in capital cases, and impose restrictions on clemency grants. • The Governor is required to seek the advice of the Parole Board before acting but is not bound to follow it.		Applicant must complete and forward Notice of Clemency Application-Sentencing Form to the Judge, Prosecuting Attorney, Sheriff and Police Chief located in the county of conviction. Two copies of a Request for Publication Form must be sent to the official county newspaper in the county of conviction. Two copies of the Application for Clemency must be sent to the Parole Board. All forms available at www.doc.ks.gov/kpb/clemency.
Kentucky	Ky. Const. § 77, § 150 Ky. Rev. Stat. Ann. § 439.450	Governor has the authority to grant pardons (full and conditional), commutations, and reprieves and to remit fines and forfeitures.		Applications for commutation of sentences and pardons must be made directly to the Governor. Applications for restorations of civil rights must be obtained by contacting the Department of Corrections, Division of Probation and Parole. These applications are processed by the Department of Corrections and then submitted to the Governor's Office. (http://sos.ky.gov/executive/journal/)
Louisiana	La. Const. art. IV § 5 La. Rev. Stat. Ann. § 15:572.1	• Governor has complete authority to grant reprieves. • Governor must have recommendation of the Board of Pardons (appointed by Gov.) to grant pardons or commute sentences.	Applicants serving life sentence must serve 15 years from the date of sentence, unless sufficient evidence exists which would have caused him to have been found not guilty.	Every application must be submitted to the Board of Pardons on the form approved by the Board. Applications must be received by the 15th of the month to be placed on the docket for consideration the following month. Application available at http://www.doc.la.gov/view.php?cat=13.
Maine	Me. Const. art. V, pt. 1, § 11 Me. Rev. Stat. Ann. tit. 15, § 2129 & tit. 34-A, § 5210(4)	• Governor has authority to pardon except in cases of impeachment, subject to regulation relative to manner of applying. • Pardons Advisory Board appointed by Gov. • Parole Board authorized, at request of Gov., to investigate and hold hearings.	For commutation of sentence, must have served at least ½ of original sentence. For pardon 5 year waiting period after completion of sentence and the following grounds are ineligible to apply: To rectify alleged errors in the judicial system; for operating under the influence; for seeking to have one's name removed from a sex offender registry; where the petitioner has more than one serious criminal conviction. These conditions can be waived by the Governor's Board on Executive Clemency.	Secretary of State receives application and forwards to Dept. of Corrections. Board on Executive Clemency reviews applications and information gathered by the Dept. of Corrections to determine whether a hearing will be granted. Application available at http://www.maine.gov/sos/cec/boards/pardons.pdf.
Maryland	Md. Const. art. II, § 20 Md. Code Ann. § 7-202, & Md. Regs. Code tit. 12, § 08.01.16	• Governor has the authority to grant reprieves, pardons, remit fines and forfeitures and to commute sentences. • Parole Commission investigates and advises on pardon applications on request of Gov.	No petition for pardon will be considered while the petitioner is incarcerated.	Individuals must write to the Maryland Parole Commission requesting an application. Commission directs the Division of Parole and Probation to conduct an Executive Clemency investigation. Recommendations then sent to Gov.
Massachusetts	Mass. Const. pt. 2, ch. II, sec. I, art. VIII Mass. Gen. Laws ch. 127, § 152	• Governor may not grant pardon w/o advice and consent of the Governor's Council. • General Court has authority to prescribe terms and conditions upon which pardons may be granted in felony cases.	15-year waiting period for felonies and 10-year period for misdemeanors.	Pardon and Commutation applications available at the Mass. Executive Office of Public Safety and Security website. Completed applications should be mailed to the Governor's Council in Boston.

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
Michigan	Mich. Const. art. 5, § 14 Mich. Comp. Laws § 791.243	• Governor has the authority to grant pardons, commutations, and reprieves. • Gov. required to obtain recommendation of Parole Board prior to grant, but is not bound by its decision.	Board will accept an application only one time every two years.	Clemency application needs to be filed with the Office of the Parole & Commutation Board. Board must conduct investigation and make determination on whether to hold hearing within 270 days of application. Application available at Michigan Department of Corrections website.
Minnesota	Minn. Const. art. V, § 7 Minn. Stat. § 638	• The Board of Pardons, made up of the governor, the attorney general, and the chief justice of the supreme court, has power to grant reprieves and pardons. • Director of Correction conducts investigations and makes recommendations to the Board.	• Unanimous vote of the Board is required for pardons and commutations. • Consent of two Board members is required for a rehearing of a clemency action that was earlier denied.	Applications sent to Secretary of Board of Pardons, who makes recommendations to the Board. Board of Pardons 1450 Energy Park Dr. Suite 200 St. Paul , MN 55108 (651) 642-0284
Mississippi	Miss. Const. art. 5, § 124 Miss. Code Ann. § 47-7-5	Governor has authority to grant pardons, reprieves, remit fines and stay forfeitures and to commute sentences.		Applicant must complete an Application for Clemency and submit it to the Governor's office. Applications are available by contacting the Governor's Legal Division.
Missouri	Mo. Const. art. IV, § 7 Mo. Rev. Stat. § 217.800	• Governor has full authority to grant pardons, commutations, and reprieves. • Board of Probation and Parole (appointed by Gov.) required to review applications and make non-binding recommendations.	Inmates are eligible. Individuals not confined must wait three years from incarceration.	All applications for pardon, commutation of sentence or reprieve should be referred to the Board of Probation and Parole for investigation. (www.doc.mo.gov/division/prob/ExecClem.htm)
Montana	Mont. Const. art. VI, § 12 Mont. Code Ann. § 46-23-104	Governor may grant pardon only upon recommendation of Board of Pardons and Parole (appointed by Gov.), except in capital cases.	Recommendation for clemency will be made only upon exceptional and compelling circumstances.	Application to Board of Pardons and Parole, which may hold a hearing in meritorious cases and is required to hold hearings in capital cases. Favorable recommendations are forwarded to Governor.
Nebraska	Neb. Const. art. IV, § 13 Neb. Rev. Stat. §§ 83-1,126 et seq.	Board of Pardons (comprised of Governor, Secretary of State, and Attorney General) has the authority to grant respites, reprieves, pardons and commutations and to remit fines and forfeitures, except in cases of treason and impeachment.	According to the Board of Pardons "the usual practice ... is to hear only those felony cases where approximately ten years has elapsed and those misdemeanor cases where three years has elapsed."	Applications may be submitted to the Board of Pardons' administrative office or to the Secretary of State. Applications must be submitted on the form prescribed by the Board. Application available at www.pardons.state.ne.us/pardons.html.
Nevada	Nev. Const. art. 5, §§ 13, 14 Nev. Rev. Stat. § 213.010	State Board of Pardons (comprised of the governor, justices of the supreme court, and the attorney general) has the authority to remit fines and forfeitures, commute punishment, grant pardons, and restore citizenship rights.	A majority of the Board can grant a pardon, but the Governor must be among the majority.	Send notarized application to the Board of Pardons Commissioners. Application available at http://www.pardons.nv.gov/.
New Hampshire	N.H. Const. pt. 2, art. 52 N.H. Rev. Stat. Ann. §§ 4:21 to 4:28	Pardon power is vested in the governor, "by and with the advice of the [Executive] Council," an elected body that advises the governor generally in carrying out his duties.		On all petitions to the governor and council for pardon or commutation, written notice must be given to the State's counsel, and such notice to others as the governor may direct. (N.H. Rev. Stat. 4:21)

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
New Jersey	N.J. Const. art 5, § 2 N.J. Stat. Ann. § 2A:167-5	Governor has the authority to remit or suspend fines and forfeitures, to commute capital punishment, and to grant pardons and reprieves.	The N.J. Const. provides for the creation of a commission to assist and advise the governor on pardons, but no such panel has been created.	Individuals must make written request for application by writing to the Clemency Investigator at the New Jersey State Parole Board.
New Mexico	N.M. Const. art. V, § 6 N.M. Stat. Ann. § 31-13-1(c)	Governor has complete authority to grant pardons and reprieves, and to commute sentences.	If an applicant is denied executive clemency, the applicant is not eligible to reapply until 4 years following the application.	Applications to governor's office identifying type of clemency sought and reasons for consideration. The governor may, in his discretion, refer requests for executive clemency to the Parole Board for investigation and recommendation.
New York	N.Y. Const. art. 4, § 4 N.Y. Exec. Law § 259	Governor has the authority to grant commutations, reprieves, and pardons.	Absent exceptional circumstances a pardons will not be considered if there are other legal remedies available.	The Executive Clemency Bureau within the Division of Parole screens clemency applications and responds to letters from applicants.
North Carolina	N.C. Const. art. III, § 5 N.C. Gen. Stat. § 143B-266	• Governor has unlimited authority to grant pardons, commutations, and reprieves. • Post Release Supervision and Parole Commission has authority to assist governor in investigating applications.	Governor's Clemency Office will not consider applications that are currently being appealed or seeking habeas corpus relief.	Send completed clemency request to the Governor's Clemency Office. Application should include all certified court documents, including indictments, judgment and commitment orders, plea agreement (if applicable), and all other court documents that are needed to fully understand the case.
North Dakota	N.D. Const. art. 5, § 7 N.D. Cent. Code § 12-55.1-02	Pardon power vested in Governor. Gov. may appoint a pardon advisory board (comprised of attorney general, two members of parole board, and two citizens).		Application for commutation, reprieve, pardon, or remission of fine must be made with the clerk of the Pardon Advisory Board on a form prescribed by the clerk. (N.D. Cent. Code 12-55/1-06)
Ohio	Ohio Const. art. III, § 11 Ohio Rev. Code Ann. § 2967.07	Governor has the authority to grant pardons, reprieves, and commutations		All applications must be made in writing to the Adult Parole Authority. Application and instructions available at www.drc.state.oh.us/web/ExecClemency.htm).
Oklahoma	Okla. Const. art. VI, § 10 Okla. Stat. tit. 57, § 332	Governor, upon recommendation of the Board, has the authority to grant pardons, paroles, and commutations. In the absence of Board approval, he may grant reprieves or leaves of absence under 60 days.	Must have recommendation of the Board before granting pardons, paroles or commutations.	Applicant must submit completed application form and documents relating to conviction to the Pardon and Parole Board. Application available at www.ppb.state.ok.us/.
Oregon	Or. Const. art. V, § 14 Or. Rev. Stat. § 144.649	Governor has the authority to grant pardons, reprieves, and commutations. He also has power to remit all forfeitures and penalties.	If a prospective applicant qualifies to have his or her conviction eliminated under ORS 137.225, he or she must seek relief through the courts and is ineligible for clemency.	Applications filed with Governor's Office, with a copy served on prosecuting attorney, State Board of Parole and Post-Prison Supervision, and Dept. of Corrections. Pardon information packet can be obtained by contacting the governor's legal counsel. The Governor's legal counsel recommends that before sending application to governor, the applicant should first serve copies on the above listed entities.
Pennsylvania	Pa. Const. art. 4, § 9 37 Pa. Code § 81.221	Governor has the authority to remit fines and forfeitures, grant pardons, reprieves and commutations, but only with the affirmative recommendation of majority of the Board of Pardons.	Unanimous recommendation in writing of the Board is required in death penalty cases or life imprisonment.	According to the Board of Pardons' website, the only means of obtaining a pardon application is through the mail directly from the Board. To obtain an application send payment in the amount of $8.00, made payable to the Commonwealth of Pennsylvania. Personal checks are not accepted. Enclose a self-addressed business size envelope with $.61 postage. (http://sites.state.pa.us/PA_Exec/BOP/)
Rhode Island	R.I. Const. art. 9, § 13 R.I. Gen. Laws § 13-10-1	Governor, with the advice and consent of the senate, has the authority to grant pardons and to exercise all other state clemency powers.	Extremely rare. No pardon has been issued in more than a decade.	Contact Special Counsel to Governor

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
South Carolina	S.C. Const. art. IV, § 14 S.C. Code Ann. § 24-21-920	Governor has authority to grant reprieves and commute death sentences, but all other clemency authority vested by statute in Probation, Parole, and Pardon Board, which is comprised of 7 members appointed by the Gov.	Inmates may be considered any time prior to becoming parole-eligible upon proof of the most extraordinary circumstances. The Board decides, based upon the application and findings, whether the evidence demonstrates such circumstances.	Applicant must submit application to the Dept. of Probation, Parole and Pardon Services. Application available on the agency's website at www.dppps.sc.gov/pardon_download_application.html. The application consists of a written application, letters of reference and a fee of $100.
South Dakota	S.D. Const. art. 4, § 3 S.D. Codified Laws § 24-14-1	The Governor has independent constitutional authority, or alternatively, may delegate authority to the Board of Pardons and Parole for recommendation.		Send application to Board of Pardons and Parole. Application and instructions available on the South Dakota Dept. of Corrections website at http://doc.sd.gov/forms/clemency/.
Tennessee	Tenn. Const. art. III, § 6 Tenn. Code Ann. § 40-27-101 Tenn. Comp. R. & Regs. § 1100-1-1-15	• Governor has the authority to grant pardons, reprieves, and commutations. • Gov. may also issue exonerations, signifying innocence.		Send application to the Board of Probation and Parole Executive Clemency Unit. Pardon and commutation application available on the Board's website at www.tn.gov/bopp/bopp_bo_contents.htm?#ExecutiveClemency.
Texas	Tex. Const. art. IV, § 11 Tex. Gov't Code Ann. § 508.047 37 Tex. Admin. Code § 141.111	Governor, upon the recommendation of the Texas Board of Pardons and Paroles (appointed by Gov.), has the authority to remit fines and forfeitures, grant reprieves, commutations and pardons.	Gov may not issue pardon except upon recommendation from majority of Board.	Applicant files petition with Board Executive Clemency Section, which conducts an investigation. Individual board members review each case and cast their vote w/o consulting each other.
Utah	Utah Const. art. VII, § 12 Utah Code Ann. § 77-27-5 Utah Admin. Code § 671-315	• Board of Pardons and Paroles (appointed by Gov.) has the authority to remit fines and forfeitures, commute sentences, and grant pardons. • Governor has the power to grant reprieves and respites	Five-year waiting period and exhaustion of legal remedy requirement, including expungement.	Application sent to Board of Pardons and Parole. (http://bop.utah.gov/)
Vermont	Vt. Const. chap. II, § 20 Vt. Stat. Ann. tit. 28, § 453	Governor has the authority to grant pardons and to remit fines.	Policy of Governor's office to grant clemency only for "compelling reasons," including inability to get job.	Applicant should send application directly to governor, which may then be forwarded to Parole Board for investigation and recommendation.
Virginia	Va. Const. art. V, § 12 Va. Stat. Ann. § 53.1-136	Governor has exclusive authority to grant pardons, commutations, and reprieves, to remit fines, and to restore civil rights.	Three-year waiting period for nonviolent applicants, five years for violent and drug offenses.	All petitions for pardon require applicant to send the Governor a letter clearly stating your request for pardon and what type of pardon requested. (www.commonwealth.virginia.gov/JudicialSystem/Clemency/pardons.cfm)
Washington	Wash. Const. art. III, § 9 Wash. Rev. Code § 9.94A.880	Governor has authority to commute death sentences to imprisonment for life at hard labor and to grant pardons and reprieves.	Since 1965, no Washington governor has intervened to overturn a death sentence, and in only one instance was an execution postponed by a Governor's action. (www.atg.wa.gov/page.aspx?id=2342).	Application filed with Clemency and Pardons Board, which cannot recommend clemency until a public hearing has been held and prosecuting attorney is notified, who shall also notify victims, survivors of victims, witnesses, and law enforcement.

STATE	SOURCE	STRUCTURE	LIMITATIONS	PROCEDURES
West Virginia	W.Va. Const. art. 7, § 11 W.Va. Code § 5-1-16	Governor has authority to remit fines and penalties, to commute capital punishment and to grant reprieves and pardons.	Pardons rarely granted – only 121 in 36 years	Petitioner must request application materials from Governor's office.
Wisconsin	Wis. Const. art. V, § 6 Wis. Stat. § 304.09	• Governor has absolute discretion in the granting of clemency. • Governor appoints a non-statutory Pardon Advisory Board, including members from Dept. of Justice, Dept. of Corrections, four public members, and Governor's Legal Counsel.	Five-year waiting period from completion of sentence, including probation. Not available to misdemeanants.	Send application to the Governor's Pardon Advisory Board. Information and application can be requested from the governor's office. Information available at the Wisconsin Dept. of Corrections website. (www.wi-doc.com/index_management.htm)
Wyoming	Wyo. Const. art. 4, § 5 Wyo. Stat. Ann. § 7-13-803 et seq.	Governor has authority to remit fines and forfeitures, and to grant reprieves, commutations, and pardons.	Policy of Governor usually excludes persons convicted of sex crimes.	Application directly to governor. Request application from governor's office.

CHAIR'S COUNSEL *(CONTINUED FROM PAGE 1)*

truly transcending the walls of the courtroom, collaborating with social service agencies, acting as problem solvers, and exploring innovative strategies at a community level.

By the early 1990s, the view of prosecutors as simple case processors was evolving. Prosecutors began to look beyond their essentially reactive approach to crime and to recognize that, with contacts both inside and outside the courtroom, they were uniquely positioned to forge partnerships and linkages, act as agents of change in the criminal justice system, and promote a paradigm shift in how to address crime. They adopted crime prevention as a key component of their mission.

The new strategy has taken root over the last two decades in district attorney offices across the country. Different jurisdictions have tweaked the paradigm in distinct ways, emphasizing certain aspects over others (for example, targeting quality of life crime in a definite geographic area or focusing on treatment alternatives to incarceration), but commitment to community engagement and to crime prevention remains constant (*see* ROBERT V. WOLF and JOHN L. WORRALL, CENTER FOR COURT INNOVATION AND APRI, LESSONS FROM THE FIELD: TEN COMMUNITY PROSECUTION LEADERSHIP PROFILES (November 2004)). No single term truly encompasses all these different programs, but "community prosecution" is the most commonly used umbrella label. According to the National District Attorneys Association's National Center for Community Prosecution, the proactive, collaborative, problem-solving approach is distinguished by certain key principles: (1) recognizing the community's role in public safety; (2) engaging in problem solving; (3) establishing and maintaining partnerships; and (4) evaluating outcomes of activities. The American Prosecutors Research Institute has issued several reports exploring the varied dimensions of community prosecution and the redefinition of prosecutors' roles (*see, e.g.*, M. ELAINE NUGENT, PATRICIA FANFLIK, and DELENE BROMIRSKI, APRI, THE CHANGING NATURE OF PROSECUTION, COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES (February 2004)).

State and local prosecutors have increasingly teamed up with entities outside the criminal justice system and built partnerships to curb criminal behavior by addressing its root causes, and this is especially true in jurisdictions serving large urban populations. For example, in response to a 2005 nationwide survey of state prosecutor offices, 66 percent answered that they used tools other than criminal prosecution to address community problems; the number was 95 percent for full-time offices serving populations of one million or more. Seventy percent of prosecutor offices reported a formal or informal relationship with community associations; 92 percent in large offices. And although only 24 percent assigned prosecutors to community-related activities, that number jumped to 84 percent for large offices. (Steven W. Perry, *Prosecutors in State Courts, 2005,* BUREAU OF JUST. STAT. (U.S. Dep't of Justice), July 2006 at 9).) Space here does not permit a description of the efforts of these prosecutor offices, but the National Center for Community Prosecution publishes a newsletter that reports on several of the programs reflected in these statistics (*available at* www.ndaa.org/publications/newsletters/building_bridges_contents.html).

Additionally, prosecutors have become more willing to di-

vert both juvenile and adult offenders, even felony offenders, into alternatives to incarceration, as can be seen in the proliferation of problem-solving courts, most notably drug courts (which, from one court in Florida in 1989, now number over 2,100 across the United States). Prosecutors are often key players in these courts, heavily involved in their establishment and operation. Prosecutors have also created their own diversion programs, targeted at different groups, such as youthful offenders, chronic drug addicts, and mentally ill offenders.

Although federal prosecutors have in general been slower than their state counterparts to embrace this new proactive, holistic approach to crime reduction, especially the use of alternatives to incarceration, change may be on the horizon. Fifteen years ago, when he was the U.S. attorney for Washington, D.C., Attorney General Eric Holder broke new ground by starting a community prosecution program in that office, a program still in place today. This year, in his remarks at the ABA Annula Meeting in Chicago, Attorney General Holder, still clearly committed to innovative solutions, declared that,

> getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government's ability to enhance public safety before the crime is committed and after the former offender is returned to society.

The attorney general, among other things, specifically endorsed greater use of drug treatment alternatives to incarceration for nonviolent addicted offenders. Perhaps, federal prosecutors nationwide will now increasingly shift from functioning as case processors to becoming problem solvers.

Some question the wisdom of this broadened vision of a prosecutor's role, and certainly, further research and evaluation of the myriad prosecutor programs would provide useful insights into their most effective aspects. But, experience already tells us that we cannot prison-build ourselves to a safer society. Almost all inmates eventually leave jail and prison, and a large number reoffend. A prosecutor's office that, in blinkered fashion, focuses on just convicting and locking up offenders is ignoring the reality of criminal recidivism. The proactive, collaborative approach does not entail an abandonment of the district attorney's traditional tools for crime reduction: investigation, prosecution, and conviction. Rather, it means complementing those tools with new ones: diversion, collaboration, community participation, and research-based innovation. By enlisting the aid of entities outside the criminal justice sphere and by exploring fresh methods to reduce recidivism, prosecutors can increase public safety and help foster mutual respect between law enforcement and the citizenry.

The ABA *Criminal Justice Standards on the Prosecution Function*, approved in 1992, essentially focus on a prosecutor's professional conduct as an investigator and case processor. However, the Standards do note that the prosecutor is "an administrator of justice," has "[t]he duty . . . to seek justice, not merely convict," and has, as an important function, "to seek to reform and improve the administration of criminal justice." (Standard 3-1.2.) That commitment to justice, which in its broadest sense undergirds a fair and safe society, informs the new vision of the prosecutor's expanded role.

It is unclear whether Congress and the president will decide that the time has come for a new National Criminal Justice Commission. However, it *is* clear (even without the insights of a commission) that there will always be room for improvement in our criminal justice system. We should never be satisfied with the status quo as long as people perpetrate crimes against others and violence threatens the public weal. All those in the criminal justice system, including prosecutors, should take these words of the 1967 commission to heart:

> The Commission finds . . . that the officials of the criminal justice system itself must stop operating, as all too many do, by tradition or by rote. They must reexamine what they do. They must be honest about the system's shortcomings with the public and with themselves. They must be willing to take risks in order to make advances. They must be bold. ■

CRIMINAL JUSTICE EDITORIAL POLICY STATEMENT

Criminal Justice is a magazine for everyone who cares about the quality of our justice system. Its focus is on practice and policy. Our readers are private and public defense attorneys, prosecutors, judges, law professors, and others who recognize that society is itself ultimately judged by its system for judging others. The magazine is published by the Section of Criminal Justice of the American Bar Association with the assistance of ABA Publishing.

The membership of the Section is diverse. Some members preside over or practice in state courts, others primarily in federal courts. Some specialize in white collar crimes, others prosecute or defend street crimes, and still others specialize in juvenile cases. Articles in *Criminal Justice* thus cover a wide variety of subjects, addressing areas of importance to all segments of the Section.

Those who prosecute and defend, regardless of their level of experience, constantly seek information on how to enhance their practice skills. *Criminal Justice* is also a forum for airing significant issues of interest to everyone concerned with the administration of justice. Accordingly, critical policy questions and recent trends are routinely covered. In doing so, *Criminal Justice* does not avoid controversy or unpopular viewpoints. Although a serious journal, *Criminal Justice* aims to be lively, provocative, and always highly readable.

Readers are cordially invited to submit manuscripts and letters for publication. Final decisions concerning publication are made by the Editorial Board of *Criminal Justice*, but are not to be taken as expressions of official policy of the Section or the ABA unless so stated.