IS THERE JUSTICE IN MERCY? THE RETRIBUTIVE PHILOSOPHIES OF EXECUTIVE CLEMENCY

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Executive clemency is assumed to be a mechanism to correct miscarriages of justice brought about by the criminal justice system, yet little empirical research exists to confirm this assumption. This research study examined the types of rationales cited in 799 cases of executive clemency from six states from 2005 to 2012. Rationales based upon retributive philosophies, in which a miscarriage of justice was cited, were further analyzed.

This analysis revealed that only seven percent of all clemency decisions from the examined states cited retributive rationales. Of the fifty-six grants of clemency that cited retributive rationales, most were granted in the forms of pardons. The analysis indicated that executive clemency is utilized as a mechanism to correct injustices, specifically in cases of innocence. This study concludes with a discussion of policy implications and the reliance on executive clemency as a fail-safe to the criminal justice system.
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CHAPTER 1
INTRODUCTION

Statement of the Problem

In 2012, Mississippi Governor Hailey Barbour pardoned over 200 people in his last days of office, including several mansion prison employees serving life sentences for violent crimes.\(^1\)

Long known for controversial post-conviction release conditions,\(^2\) Governor Barbour received significant criticism for his “eleventh hour” pardons. The news media reported overwhelming public outrage for the brazen clemency actions. After an initial press release from the Governor’s office, the State Attorney General threatened to block the remaining clemency orders of those still in prison and sought a judicial injunction.\(^3\) At the end of the day, the clemency actions withstood court scrutiny because the Governor had acted well within the scope of his executive privilege granted by the Mississippi State Constitution.\(^4\)

This controversy highlighted the volatile reactions politicians and administrative boards face after exercising clemency and the widespread misunderstanding of clemency procedures.

Though a longstanding part of the United States criminal justice system, clemency is often


\(^2\) In 2011, then Governor Barbour paroled Jamie and Gladys Scott, sisters serving life sentences for armed robbery on the condition that Gladys donate a kidney to Jamie. Doubts of their guilt permeated their conviction and it was expected that Barbour would fully pardon the sisters as one of his final official acts. Surprisingly, the sisters were not included among his final 215 pardons. *See generally* Nina Mandell, *Sisters Devastated to Miss Pardons*, NvDAILYNEWS (Jan. 13, 2012), http://articles.nydailynews.com/2012-01-13/news/30626114_1_pardons-gladys-scott-parole-board.


mistrusted by both the public and those with the authority to exercise clemency. The
reasons for this confusion are as complex as the clemency process itself.

In its most basic form, clemency is a legal procedure that absolves, forgives or lessens
the punishment of a defendant for the actions of his conviction. The four most common types
of clemency are: pardons, amnesties, commutations, and reprieves. Each form supplies a
unique remedy to a given situation. Pardons absolve a conviction for an individual and
amnesties absolve the convictions of groups, while commutations substitute new punishments
and reprieves temporarily suspend punishments.

Pardons are the most frequently granted form of clemency. In a technical sense, a
pardon is “an act or an instance of officially nullifying punishment or other legal consequences
of a crime.” However, many state statutes incorporate English Common Law in the pardoning
process and further cloak clemency definitions in religious terminology. These statutes
specifically regard clemency actions as an act of grace, bestowed on an individual at the mercy
of the official with the authority to do so.

In addition to complex definitions, pardons may be absolute and unconditional or
conditional. An absolute pardon totally exempts the grantee from the punishment received
with a conviction. A conditional pardon requires the grantee to adhere to specified terms. If
such terms are not satisfied, the pardon is revoked. Several states have particular types or

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6 NATIONAL GOVERNORS’ ASSOCIATION CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN
STATES 4-7 (1988).
7 Id. at 4.
8 BLACKS LAW DICTIONARY 1144 (8th ed. 2004).
9 For example, the Montana Annotated Code defines clemency as “kindness, mercy or leniency.” MONT. CODE ANN.
§ 46-23-301 (LEXISNEXIS 2012).
levels of pardons that reinstate different rights and privileges, such as voting rights. These processes are often referred to as “restoration of civil rights.”  

Amnesties are pardons granted to an entire class or population. Often granted after war to the losing side, amnesties are much rarer today. In the United States, amnesty is most often discussed in relation to illegal immigration.  

Commutations and reprieves do not nullify an entire punishment in the way that pardons and amnesties do. A commutation substitutes a lesser punishment for the original sentence. The most common form of a commutation is a life sentence granted in place of a death sentence. Reprieves or respites postpone portions of the original punishment. Medical reprieves, in which inmates are allowed to die at home, are often granted in the United States to prisoners serving life sentences who are terminally ill. Reprieves are also granted to inmates facing the death sentence in the wake of new evidence.  

Every state authorizes clemency procedures in either the state constitution or state code. There are three main structural models for state clemency administration: governor only models, administrative board only models, or some combination of the two. Traditionally, many states utilize the governor only approach, granting all clemency authority solely to the governor. This model is closely aligned with the federal model in which the president acts as

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10 NATIONAL GOVERNORS’ ASSOCIATION CENTER FOR POLICY RESEARCH, supra note 6, at 4.

11 Id.


13 NATIONAL GOVERNORS’ ASSOCIATION CENTER FOR POLICY RESEARCH, supra note 6, at 4.

14 Thirty-one states grant exclusive clemency authority to the governor. Alaska, Arkansas, California, Colorado, Hawaii, Illinois, Iowa, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota,
sole authority for executive clemency. However, as many clemency decisions have proven unpopular, several states have implemented laws that share clemency authority between the governor and a state pardon board.\(^\text{15}\) These states have varying regulations for the shared authority.

A few states appoint the governor to the board of pardons. More often, state regulations require a governor to seek a recommendation from the board of pardons. In some states, a governor may not grant clemency without prior approval from the board. A few states avoid all executive authority and administer clemency solely through a pardon board.\(^\text{16}\)

It is difficult to determine the likelihood of a successful clemency plea for each type of administration due to the differences between conviction and population rates, and the lack of a definitive source of state clemency statistics. Despite limited empirical evidence, there is a consensus among legal scholars that clemency is severely underutilized in the United States,


despite its status as the “fail-safe”\textsuperscript{17} to the criminal justice system.\textsuperscript{18} The lack of clemency grants stems largely from the continued misunderstanding of the clemency process and the fear of volatile reactions such as those Haley Barbour faced in 2012.

**Competing Views of Clemency**

There is a debate among legal scholars as to the best way to move past these misunderstandings and misapprehensions of the clemency process. Clemency is alternately understood as an act of mercy or as an act of justice. Clemency actions, reasoned as an act of mercy, follow rehabilitative philosophies. This perspective closely resembles the traditional model of clemency. According to the rehabilitative philosophy, the goal of the criminal justice system is to rehabilitate the criminal, so that he may be successfully placed back into society only once he has fully overcome his criminal disposition. The rehabilitative approach espouses that clemency should be earned, and it is only by the mercy of the appropriate administration that one is pardoned. An act of clemency is not meant to absolve a person of his transgressions, but rather to forgive his transgressions. For example, governors commonly cite the completion and fulfillment of punishment as a reason for granting clemency.\textsuperscript{19} Acting in an official capacity, a governor forgives the condemned so that he may move forward with life.\textsuperscript{20}

\textsuperscript{17} See infra notes 99-106 and accompanying text.


On the other hand, clemency is seen as an act of justice when retributive principles are followed. In these instances, a pardon is a necessary condition to correct an injustice, rather than a formality of forgiveness. For example, in 2010, Texas Governor Rick Perry granted a posthumous pardon to Tim Cole after a DNA test proved his innocence. Governor Perry agreed to the pardon only after the DNA test conclusively proved Cole’s innocence and the Texas Board of Pardons and Paroles unanimously voted to recommend a posthumous pardon. In an official statement, Governor Perry cited that the State of Texas had cleared Cole’s name, indicating there was no transgression to forgive.21

Research Questions

This thesis explores the impact of retributive philosophy on clemency decisions by reviewing the official rationales cited for grants of pardons, commutations, and reprieves to convicted offenders in six states from 2005-2012. In doing so, this thesis attempts to answer the following research questions:

1) Are rehabilitative or retributive philosophies cited more frequently in clemency decisions?

2) Which type of retributive rationales is cited most often?

3) Which form of clemency are retributive philosophies most often associated with and what is the relationship between type of clemency and type of retributive rationale?

4) Which crimes of conviction are most often cited among retributive philosophies?

Specifically, this analysis focuses on four types of retributive rationales representing the different approaches advocated by Kathleen Moore and Daniel Kobil identified below:

innocence/diminished capacity, excuses/justifications, sentence adjustments/disparate sentencing, and general unfairness.

To examine if there is justice in mercy, this study focuses on retributive rationales as opposed to rehabilitative rationales because retributive rationales deal specifically with cases attempting to correct an injustice. Whereas rehabilitative rationales are likely quite common, they do not denote a miscarriage of justice, and instead rely upon the mercy of those with clemency granting authority. If clemency is assumed to be a fail-safe which judges, attorneys, and governors can rely upon to correct injustices, then it is imperative to understand the extent of clemency’s effectiveness upon correcting such injustices. The most efficient way to do so is by focusing on those clemency decisions that cite retributive rationales, denoting an injustice created by the criminal justice system.

Retributive Rationales

The rise of exonerations and disparate sentencing has led many scholars to argue that clemency should be reserved solely for acts of justice reflective of retributive rationales. Most scholars envision a philosophical approach in which all clemency decisions are cloaked in retributive principles.\(^\text{22}\) That is not to say that merciful factors should be entirely prohibited in clemency matters, but there is much discrepancy among retributive philosophers as to what role mercy plays in clemency.\(^\text{23}\)

\(^{22}\) See Kathleen Moore, *Pardons: Justice, Mercy, and the Public Interest* 95-8 (1989); Kobil, *supra* note 18, at 567.

\(^{23}\) Ridolfi & Gordon, *supra* note 20, at 1.
A purely retributive view has no room for considerations of mercy. This perspective is most clearly defined by Moore in her seminal work *Pardons: Justice, Mercy, and the Public Interest.* Moore takes a decisively Kantian approach to retributivism, arguing that clemency decisions should always be predicated on what a person deserves. The exercising official or board must only consider what the offender deserves. Subjective calculations based upon feelings are an inadequate rationale for pardoning.

Moore argues that a truly retributive approach to clemency must combine both legalistic and moralistic philosophies. Legalistic retributivism is the philosophy that punishment is only necessary to correct the unfair advantages gained from an illegal act; whereas, moralistic retributivism is only concerned with the moral failings of the offending behavior. First and foremost, the state must ask whether the offender is liable. If not, then punishment is not an option, and if a person is previously convicted but not liable, then a pardon should be granted. If yes, the state must then ask whether the offender is deserving of punishment. Only if there is reason to believe that the offender is not morally blameworthy and therefore undeserving of punishment should clemency be offered. Moore sums up her argument as: “First, pardons are necessary for people who face punishment even though they are not liable to punishment; and second, pardons are permissible for people who face punishment when they are liable to punishment without morally deserving it.”

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24 Moore, supra note 22, at 227.
25 Id.
26 Id. at 129.
considerations for clemency. Any other factors would be unjust and outside the scope of retributivism.27

Specifically, Moore defines four instances where clemency is mandatory under retributive philosophies: innocence, justification, excuse, and sentence adjustment. Innocence rationales include grants of clemency for false confessions or wrongly implied guilt, and for reduced-ability offenders such as the mentally ill and youth.28 Justice rationales include grants of clemency for conscientious crimes, which Moore defines as an offender engaging in a morally wrong act for a conscientious reason, such as a husband assisting his fatally ill wife commit suicide.29 Excuse rationales include cases where there is no tangible gain, such as an incomplete crime, or no intangible gain, such as a strict-liability offense.30 Sentence adjustments include grants of clemency for disproportionate punishment as compared to similar offenders and overly severe punishments.31

This philosophy is largely seen as too rigid and impractical for existing clemency schemes. Kobil, a leading clemency scholar, argues that a hybrid retributive philosophy should be utilized in clemency decisions. He contends that Moore’s retributive stance should be the starting point for all clemency decisions, but that further utilitarian and societal concerns must be considered in individual cases. Kobil divides clemency decisions into two types: “justice-

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27 Id. at 99-120.
28 Id. at 135-40.
29 Id. at 155-66.
30 Id. at 142-55.
31 Id. at 166-78.
enhancing” and “justice-neutral.” Justice-enhancing acts of clemency follow Moore’s retributive approach and ensure that each offender receives his due. Justice-neutral acts of clemency are those acts made for any other reason, such as successful completion of sentence or recompense for the original offense.

In Kobil’s perspective, the clemency process should be bifurcated with executives only overseeing justice-neutral clemency decisions. Justice-enhancing clemency decisions should be made only by a clemency commission, a professional board, independent of political pressure. These boards would be composed of professionals in the field, who examined each case from a variety of perspectives.

Kobil further envisions certain standards set forth that the clemency commission would be required to follow. Using these standards, such a commission would only be able to grant clemency if there is: substantial doubt of guilt; diminished mental capacity, retardation, intoxication, or minority; disparate sentencing-proportionality; disparate sentencing-special circumstances; sentencing that is unrelated to deserts; crimes committed out of necessity, coercion, or adherence to moral principles; or crimes in which the offender has suffered enough. Only after the clemency commission had neglected to provide clemency citing one

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33 Id. at 623.
34 Specifically, Kobil’s perfect board would be made of “a psychiatrist, a jurist, a physician, a sociologist, an educator, perhaps a barrister, and a criminologist.” Id.
35 Id. at 624-33.
of the above reasons, could the executive then decide to grant clemency using a justice-neutral rationale.36

Both Moore’s pure retributive and Kobil’s hybrid retributive approaches share a common theme: clemency begins as an objective act of justice. In an age of uncontrollable political persuasion, this approach is potentially extremely appealing to executive administrations and those with clemency granting powers. By its very nature, matters of clemency are prone to political disapproval. This disapproval can be limited by removing the discretionary nature of the decision and implementing guidelines based upon the retributive philosophies espoused by Moore and Kobil.

It is theorized that standardizing clemency procedures according to the retributive philosophies advanced by Moore and Kobil would lead to greater use of the pardoning power by removing political pressure from those rendering the decisions. No states have codified such rigid guidelines. Therefore, no current empirical evidence exists to confirm such a proposal. However, the current rationales governors cite for clemency decisions can be examined for retributive bases to support the advancement of standardizing clemency procedures.

Summary

The need for clemency will exist as long as there is a mechanism for punishment. The significance of clemency expands as more courts rely on the process as the fail-safe37 to the criminal justice system. Clemency procedures designed without a proper understanding of

36 Id. at 637.
37 See infra notes 99-106 and accompanying text.
what motivates grants of clemency are bound to fail, yet little research exists as to why clemency granting authorities act on some petitions and deny others. If retributivism is to be used as a philosophical basis for future clemency procedures, then it is imperative that we understand the frequency, form, and function of its use. The examination of clemency decisions performed in this study is designed to advance this goal.
CHAPTER 2

LITERATURE REVIEW

The Origins of Clemency

Groups have practiced forms of clemency since the dawn of time. In the early days of man, tribal leaders had the authority to enforce requisite behaviors among their followers. If a tribal member failed to follow expected behavior, the leader could choose between inflicting punishment and sparing the disobedient. Seemingly inherent in the leadership position, this authority was followed without a written code.\(^{38}\)

The ancient Babylonians established the earliest known written body of law. Written between 1795-1750 B.C., the Code of Hammurabi was publically displayed so that all men were aware of what was required of citizens.\(^{39}\) The Code explicitly addresses clemency: “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.”\(^{40}\) Thus, the king had limitless authority to pardon his slaves for any reason. Husbands had authority over their families, and could pardon their wives for adultery. At a time when women were without power, only men were bestowed with the authority to grant clemency.\(^{41}\)

The clemency process progressed along with society. In the democratic society of ancient Greece, the clemency power rested with the people. Tedious rules were in place to

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\(^{40}\) *Code of Hammurabi 129* (L. W. King, trans.), http://avalon.law.yale.edu/ancient/hamframe.asp.

\(^{41}\) Kobil, *supra* note 32, at 583-84.
prevent misuse. However, these rules often prevented average citizens from obtaining clemency. At least 6,000 citizens had to provide support for a clemency request through a secret ballot, allowing only the most popular and famous to meet the necessary requirements. Amnesties were granted much more frequently than pardons because they were seen as necessary to further the interests of the state. Large populations afflicted by war, such as the citizens who participated in the Athenian Civil War in 403 B.C., were the usual recipients.\textsuperscript{42}

In contrast, the Romans divided the power to pardon among the people and the state leaders. The power to pardon could be used for private matters and public matters. For private matters that involved women, children, and slaves, the male head of the household held the authority to pardon. For example, a husband could pardon his wife for an act of disobedience. Public matters occurred outside of the family and most clemency actions for public matters were granted in the context of war. Roman commanders who conquered enemy territory had the right to enslave the entire population. However, this was rarely enforced because Roman leaders recognized the strategic benefits of granting clemency. The newly pardoned citizens would now live in the debt of the Roman Empire.\textsuperscript{43} The Romans also allowed certain women to grant clemency, a practice rarely seen in the ancient world. Vestal virgins could free a condemned man on his way to his execution simply by encountering him accidentally during his death march.\textsuperscript{44} A “pure virgin” could also demand to marry a condemned man, thus sparing him from punishment.\textsuperscript{45}

\textsuperscript{42} Id.
\textsuperscript{43} Melissa Barden Dowling, Clemency and Cruelty in the Roman World 17 (2006).
\textsuperscript{44} Id. at 14.
\textsuperscript{45} Kobil, supra note 32, at 585.
Julius Caesar, himself a student of law, was known to grant clemency regularly. Caesar saw the strategic value of clemency and often wrote of his acts to remind the people of his generosity. Whether he truly believed in exhibiting mercy toward his enemies or simply used clemency as a political tool, the people obviously approved of the frequent use. Shortly before his death, he was honored with a temple for his pardoning of civil war opponents. The temple, Clementia Caesaris, was built as a shrine to his acts of clemency.

While clemency was frequently endorsed and exercised among the Roman Empire’s leaders, it was not a guarantee. Much like politicians of today, the ancient leaders were often swayed by public opinion. In perhaps the most infamous denial of clemency in Roman history, Pontius Pilate, emboldened by a rioting crowd, chose to pardon Barnabas while sending Jesus Christ to his death. In addition, grants of clemency sometimes required conditions. For example, those granted clemency were often on the losing side of a war. While a Roman general may have let the people keep their lives and land, it was expected that they would join the Roman army.

English Common Law

Many of the clemency mechanisms in use today in the United States developed from English common law. For years, English royalty, clergy, great earls, feudal courts, and Parliament competed for clemency authority. This changed in 1535 when King Henry VIII

46 DOWLING, supra note 43, at 20.
47 Cornelia Catlin Coulter, Caesar’s Clemency, 2 CLASSIC J. 513 (1931).
convinced Parliament to pass an act granting pardoning privileges solely to the Crown.\textsuperscript{50} Thus, the concept of clemency as an exclusively royal (or executive) prerogative derived from Henry VIII’s seizure of the pardoning power.

English common law also developed the types of pardons and conditions later implemented in many state laws. A pardon was defined as “a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forfeited any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.”\textsuperscript{51} Further, the king had the power to grant general or special pardons that were “absolute, or under condition, exception, or qualification.”\textsuperscript{52} The pardon was essentially an act of grace from the king. A man need not face trial or conviction before being granted a pardon. Moreover, the king did not need to provide a legitimate reason for granting a pardon.\textsuperscript{53}

The lack of limitations on pardoning powers made clemency actions rife with corruption. The British monarchy regularly granted pardons during royal births, weddings, and coronations as gestures of goodwill.\textsuperscript{54} For example, Edward III granted a general pardon for all criminal matters to celebrate his fiftieth year of rule.\textsuperscript{55} The royal coffers were often filled by the selling of pardons to the highest bidders.\textsuperscript{56} Of course, only those with powerful connections and vast amounts of money could receive such a deal.

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\textsuperscript{51} Edward Coke, \textit{Institutes of the Laws of England} 233 (8\textsuperscript{th} ed. 1680).
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\textsuperscript{52} \textit{Id}.
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\textsuperscript{53} \textit{Id}.
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\textsuperscript{54} National Governors' Association Center for Policy Research, \textit{supra} note 6, at 7.
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\textsuperscript{55} Ruckman, \textit{supra} note 50, at 251.
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\textsuperscript{56} Kobil, \textit{supra} note 32, at 585.
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Pardons were often viewed as a mechanism for escaping punishment.\textsuperscript{57} The king’s approvers, men under indictment for treason or felony who confessed to their crimes and named all their accomplices, often sought royal pardons as a means of escaping execution. Approvers were allowed to leave the realm safely so long as convictions were successful against all the accomplices. If such convictions failed, the approvers faced certain death unless a pardon could be obtained.\textsuperscript{58}

The monarchy routinely found creative ways to further the interests of the empire through clemency. General pardons were common during war time to those joining the king’s army at their own cost.\textsuperscript{59} Conditionally pardoned convicts manned much of the British navy in the eighteenth century.\textsuperscript{60} In a 1615 royal decree, King James introduced transportation as a penalty that supposedly exercised mercy. While not a traditional form of clemency, transportation worked much like commutation. Convicts were spared the death penalty so long as they relocated to the New World and performed “profitable service to the Commonwealth.” If a convict failed to abide by the conditions set, his original punishment would be enforced.\textsuperscript{61} Due to the uprooting and lifetime of labor involved, transportation was likely seen as a more severe punishment to most convicts.

Despite numerous examples of monarchial abuse, it was the ability to grant a pardon prior to a trial or conviction that ultimately led parliament to place limits on the use of

\textsuperscript{57} Frederick C. Hamil, The King’s Approvers: A Chapter in the History of English Common Law, 11 \textit{Speculum} 238 (1936).
\textsuperscript{58} Id. at 252.
\textsuperscript{59} Id.
\textsuperscript{61} Id.
clemency. In 1678, Thomas Osborne, the Earl of Danby, had, under the King’s orders, acted in his official capacity as Lord High Treasurer, offering a bribe of neutrality to France directly after Parliament passed an act to raise funds to go to war. Knowing the King had immunity from criminal charges, Parliament arrested Osborne and initiated impeachment procedures. In 1678, King Charles II pardoned Osborne before Parliament could finish the impeachment procedures. The Habeas Corpus Act of 1679 ultimately resolved the conflict and prohibited the king from interfering with cases where persons were convicted of causing others to be imprisoned outside of England. The Act also restricted clemency authority regarding impeachment proceedings. Through the years, parliament continued to whittle away at the crown’s clemency authority. In 1721, parliament once again obtained the power to pardon by legislative act.

Clemency in the New World

Prior to America’s break from England, the crown authorized the governors of the colonies to exercise clemency. After the American Revolution, a new mechanism for granting clemency needed to be established. There was little question that the concept of clemency would be included in the constitution of the new world. It was not uncommon for minor offenses to carry the punishment of death, and, thus, a mechanism to avoid such punishment was necessary. Weary from decades of imperial abuse, the early American colonists were

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62 Kobil, supra note 32, at 587.
63 Id.
64 There was some opposition to the inclusion of a clemency mechanism in the Constitution. These concerns stemmed from the philosophy of Cesare Beccaria who believed that clemency was unnecessary so long as punishments were mild and proceedings were regular and expeditious. See U.S. Dep’t of Justice, Attorney General’s Survey of Release Procedures: Pardon (1939).
understandably concerned with placing total clemency authority in the hands of a single individual. The concept was reminiscent of monarchial privilege.66

During the Federal Constitutional Convention of 1787, the delegates fiercely debated who should hold the authority to exercise clemency. Roger Sherman of Connecticut argued that the responsibility of pardoning should be shared by the president and senate. Sherman envisioned a pardoning process that allowed the president to only grant pardons with the consent of the senate. When the senate was not in session, the president would have the authority to grant to reprieves until consent could be sought.67 Luther Martin of Maryland argued that reprieves and pardons should be limited to only cases in which a conviction had been sustained.68 Ultimately, the convention chose a mechanism similar to that of England’s. The final draft read that the executive “shall have the power to grant pardons and reprieves, except in impeachments.”69

Critics immediately objected to the breadth of the presidential power. George Mason of Virginia voiced grave concern over the likelihood of abuse of such power.70 Alexander Hamilton, a leading defender of the clemency power, addressed these concerns in The Federalist No. 74. Clemency was necessary, according to Hamilton, to combat the severity of laws, claiming that “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”71 Further, this “easy access to

67 Id.
68 Ruckman, supra note 50, at 255.
69 Id. at 251.
70 Kobil, supra note 32, at 591.
71 THE FEDERALIST No. 74 (Alexander Hamilton).
exceptions” would be best served in the hands of the executive. Hamilton argued that by granting the authority to pardon to one individual, said person would act with greater responsibility and thus be unlikely to be influenced by outside forces:

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, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.  

The federal clemency power has suffered criticism from time to time, particularly when a president grants sweeping pardons in the last days of office. Despite such criticisms, the actual authority has remained unchanged since the original writing of the Constitution. The state constitutions, on the other hand, have experimented with numerous clemency procedures. The original thirteen colonies differed greatly in their approach to executive clemency. Only five: New York, Delaware, Maryland, North Carolina, and South Carolina, vested full pardoning authority solely in the governor. New Hampshire, Massachusetts, New Jersey, Pennsylvania, and Virginia originally limited the governor’s pardoning power by requiring the consent of an executive council. Rhode Island and Connecticut maintained the clemency procedures of the royal charter. Georgia, the most cautious of the original colonies,

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\[Id.\]
only allowed the governor grant reprieves until the general assembly could meet to discuss clemency matters.\textsuperscript{73}

Clemency has been debated extensively at the 230 state constitutional conventions.\textsuperscript{74} Throughout the years, delegates at state constitutional conventions have voiced similar concerns as those that were debated at the 1787 Federal Convention. In a strongly retributive argument, Thomas Hood of Kentucky claimed, in 1849, that the clemency power had been “shamefully imposed upon and abused” and was no longer a shield to protect “the innocent or unfortunate...from unmerited suffering.”\textsuperscript{75} Hood went on to explain that clemency was now being used to rescue the “guilty murderer from that punishment which the malignity of his crime so richly deserved” but acknowledged that clemency was necessary to mitigate the rigidness of the law.\textsuperscript{76}

In a cursory review of the state constitutional conventions, researcher John Dinan found that while many delegates continually expressed concern over the abuses of the clemency power, few actually felt the problem stemmed from the executive having the authority to grant pardons.\textsuperscript{77} Delegates across the nation reasoned that the abuses could not be a product of the executive, because abuses were so widespread. Therefore, the problems originated with the

\textsuperscript{73} Christen Jensen, The Pardoning Power in the American States 5-8 (1922).
\textsuperscript{74} Dinan, \textit{supra} note 66, at 389.
\textsuperscript{76} \textit{Id}.
\textsuperscript{77} Dinan, \textit{supra} note 66, at 389.
To combat these abuses, states began experimenting with new clemency mechanisms in which clemency granting power was shared with varying authorities.

The most common shared authority clemency mechanism is the pardon board. Pardon boards are composed of other state officials and/or citizens either elected alongside of, or appointed by, a governor. These boards have the authority to advise on clemency matters and insulate the executive from inappropriate requests of friends and family. Dinan’s research of the state constitutional conventions found that the delegates were quite willing to split the pardoning power with other branches of the government. Many of the suggestions the delegates expressed are used in some form today. For example, Dinan noted that at the 1837-38 Pennsylvania Constitutional Convention, it was suggested that pardons could only be granted with the concurrence of court of conviction. Nearly half of the states require some sort of notice to the court of conviction once a clemency application is filed or once a decision is reached. Many states require the lead prosecutor to provide an opinion to the merits of a

For example, Kentucky Delegate Thomas Hood spoke of the swiftness that clemency applications appeared before the governor, with numerous testimonies to the convicted plight. According to Hood, only a monster of a man could “refuse the prayers and importunity of a woman in tears, whose heart is rung with the deepest anguish. Sutton, supra note 75, at 722.

The states that implement pardon boards vary in their approach. Utah statutes require the governor to appoint five full-time members to the Board of Pardons and Paroles, and not more than five pro tempore members. Members of the board serve for five years. Utah Code Ann. § 77-27-2(1) (LEXISNEXIS 2012). In perhaps the most controversial approach, Nevada’s State Board of Pardons Commissioners consists of the governor, the justices of the State Supreme Court, and the attorney general. Nev. Rev. Stat. Ann. § 213.010(1) (LEXISNEXIS 2012).

Dinan, supra note 66, at 398.

Id. at 398-400.

clemency application.\textsuperscript{83} Statements may be gathered to use for or against the application from the courts.

Another product of the debates of the state constitutional conventions was the removal of secrecy surrounding clemency decisions. Many delegates expressed reluctance to place such unfettered power in the governor’s hands if there was no requirement to tell the people the reasons for his actions.\textsuperscript{84} Today, several states have some form of reporting statutes in place regarding clemency records. Nineteen states further require the governor to report the reasons for clemency approval. While state legislatures have experimented with the nuances of clemency regulations and procedures, the courts have expressed great reluctance to interfere with such regulations and procedures.

Clemency in the Courts

Though long considered a function of the executive branch, numerous cases questioning the usage and function of clemency have been brought before the United States Supreme Court ("Supreme Court"). The most contested issues within clemency concern the life and liberty interests of inmates serving life or death sentences, clemency within the criminal justice system, definitions of clemency, and legislative and judicial limitations.

\begin{footnotesize}
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\item \textsuperscript{83} For example, California requires the governor to provide notice of an application to the district attorney of the county in which the conviction occurred. Within the notice the governor may request a recommendation for or against clemency. CAL. PEN. CODE § 4805 (LEXISNEXIS 2012).
\item \textsuperscript{84} Dinan, supra note 66, at 406-07.
\end{itemize}
\end{footnotesize}
The most controversial clemency cases have considered whether death row inmates have a life or liberty interest in clemency proceedings. These interests derive from the Due Process Clause of the United States Constitution and are applied to the states through the Fourteenth Amendment. Proponents of inmates seeking clemency argue that no life or liberty interest is extinguished until death, therefore, constitutionally speaking, inmates must be afforded due process throughout the clemency application process regardless of an impending death sentence. Opponents claim that such interests are inapplicable once a death sentence or life sentence is legally imposed.

For years the Supreme Court refused to acknowledge life or liberty interests of life-imprisoned and death row inmates. This view was exemplified in *Connecticut Board of Pardons v. Dumschat*.

Dumschat, a Connecticut inmate serving a life sentence, had applied for a commutation on several occasions. Each time his application was denied with no explanation. He sued under 42 U.S.C. 1983, claiming that the board’s failure to provide a written statement of reasons for denial violated his due process rights under the Fourteenth Amendment.

The district court and court of appeals agreed, citing the Connecticut clemency process and the large percentage of approved clemency applications. Upon hearing the case, the

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86 “There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: ‘[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.’” *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979)(quoting Meachum v. Fano, 427 U. S. 215, 224 (1976)).

87 452 U.S. at 458.

88 *Id*. at 461.

89 *Id*. The court of appeals relied heavily on the statistics, finding that over seventy-five percent of inmates serving a life sentence received some form of pardon after serving the minimum amount of the sentence. *See* Dumschat v. Connecticut Board of Pardons, 432 F. Supp. 1310, 1314 (1977).
Supreme Court remanded back to the court of appeals to reconsider the issue in light of *Greenholtz v. Nebraska Penal Inmates*. On remand, the court of appeals affirmed its decision and found that *Greenholtz* required a statement of reasons for denial of a clemency appeal. Frustrated by the results, the Supreme Court intervened and overturned the court of appeals ruling. Reinterpreting *Greenholtz*, the Supreme Court held that a constitutional entitlement to release an inmate from a valid prison sentence does not exist independently of a right explicitly conferred by the state. While *Greenholtz* concerned the due process rights regarding parole, a process similar to clemency, the case was distinct in that Nebraska had created a law requiring inmates be given a reason why they were denied parole. Connecticut had no such law in place. Therefore, Dumschat’s rights had not been violated.

The Supreme Court would not find a protectable life or liberty interest in relation to clemency until 1998 in *Ohio Parole Authority v. Woodward*. Woodward, a convicted murderer, challenged Ohio’s clemency procedures which called for an investigation that included an interview. Counsel was not allowed to participate in the interview. Woodward claimed these procedures violated his due process rights since anything he said could be used in another proceeding against him and his silence could be used against him in his quest for clemency.

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90 *Greenholtz* concerned whether the parole procedures under Nebraska law afforded the appropriate level of due process. A Nebraska state law entitled inmates to a list of reasons why they were denied parole. The Court noted the distinction between parole and commutation proceedings, such as the lack of judicial review over commutation decisions, but did note that there were very similar characteristics between the two, such as inmate evaluations and predictions of future behavior. *Dumschat*, 452 U.S. at 465.

91 *Dumschat*, 452 U.S. at 465.

92 *Id.* at 465.


94 *Id.* at 277.
The United States Court of Appeals for the Sixth Circuit concluded that minimal due process was required for clemency mechanisms by finding two separate strands of due process. The first strand looked at the clemency procedure itself and found no direct life or liberty interest within clemency procedures. In line with previous rulings, the court concluded that since no inmate had an inherent right to clemency, there was no liberty interest at stake and thus no procedural due process violation. However, the court looked deeper into clemency and found that a second strand of due process analysis was required. Clemency, despite providing no inherent due process right to inmates, was a step in the adjudication process and as such, implicated life interests.

The Supreme Court dismissed the two-strand analysis of the Sixth Circuit, but did conclude that minimal procedural due process was protected by the Constitution. Despite such newly acknowledged protection, proponents of life and liberty interests within clemency procedures are not certain a victory was secured. By providing for only minimal standards of due process, the Supreme Court set the standard for future violations so low that nearly any clemency procedure short of arbitrary measures is likely to be considered constitutional.

The Supreme Court has also addressed the role of clemency in the judicial process. In this connection, clemency is often understood as an extension of the judicial process. Indictment procedures prevent cases with little evidence from going to trial. Trials determine guilt or innocence. Sentencing phases look at issues not considered in the trial. The appeals

95 Woodward v. Ohio Parole Authority, 107 F.3d 1178 (6th Cir. 1997).
96 Id. at 1184-86.
97 In her concurring opinion, Justice O’Connor opined that only those procedures that are entirely arbitrary, such as the toss of a coin, would be subject to court intervention. Woodward, 523 U.S. at 289 (O’Connor, J., concurring).
and appellate review processes review each of these steps to determine that there were no constitutional errors so that the conviction may stand. After all this, there is only one option for the defendant left to pursue: clemency. Legally though, the Supreme Court has ruled that clemency is not an extension of the judicial process, but an entirely distinct process that occurs only after all other judicial processes have been exhausted.\textsuperscript{98}

The 1993 decision of \textit{Herrera v. Collins}\textsuperscript{99} sent shock waves through the legal community and clemency advocates. \textit{Herrera} was not originally a case that came before the Supreme Court concerning a clemency matter. Rather, \textit{Herrera} concerned whether by a showing of innocence a defendant was entitled to federal habeas relief in the absence of an independent constitutional violation.\textsuperscript{100} Ten years after a conviction for murder, Herrera wished to present new evidence that showed he was “actually innocent”\textsuperscript{101} of the crime that led to his death sentence. Such evidence would prohibit his execution under the Eighth Amendment’s cruel and unusual punishment prohibition. He further argued that the Fourteenth Amendment’s due process guarantee required the court to hear the new evidence or vacate his death sentence. The Supreme Court disagreed and deferred to clemency as the proper remedy for the situation.\textsuperscript{102}

\begin{footnotes}
\item \textsuperscript{98} Herrera v. Collins, 506 U.S. 390 (1993).
\item \textsuperscript{99} \textit{Id}.
\item \textsuperscript{100} \textit{Id.} at 393-96.
\item \textsuperscript{101} “Actual Innocence” is a legal term that refers to a specific type of claim by the defendant. Unlike traditional defenses in which an excuse is used to mitigate the consequences of an offense, an “actual innocence” claim acts indicates that the defendant is not actually guilty of the crime for which he was convicted. \textit{See} Legal Information Institute, \textit{Actual Innocence}, Cornell University Law School (last visited Nov. 26, 2012), http://www.law.cornell.edu/wex/actual_innocence.
\item \textsuperscript{102} Herrera, 506 U.S. at 411.
\end{footnotes}
Absent an independent constitutional violation, claims of actual innocence based on newly discovered evidence did not qualify for federal habeas relief. Rather, the traditional remedy for “preventing miscarriages of justice where the judicial process has been exhausted”\textsuperscript{103} is clemency. In the Supreme Court’s view, Herrera had been legally convicted and exhausted all of his appeals. Since there were no longer any constitutional claims to pursue, his only avenue to profess his innocence was a clemency plea to the state. In his opinion, Chief Justice Rehnquist went to great pains to convince others that clemency is a successful solution for wrongly convicted persons. Relying heavily on the assumption that states will entertain clemency applications based upon innocence, Rehnquist contended that clemency acted as a fail-safe to the criminal justice system.\textsuperscript{104}

Not only has the Supreme Court ruled that clemency procedures are outside of the adjudication process, it has also consistently held that clemency decisions are beyond judicial review,\textsuperscript{105} even going so far as to shield those post-conviction procedures bearing a striking resemblance to clemency.\textsuperscript{106} For example, in 1950, the Supreme Court held that Georgia’s procedure to determine insanity after sentence was constitutional. The defendant, a convicted murderer sentenced to die, had requested that the governor postpone his execution alleging that he had become insane after his conviction. The governor, in accordance with state law,

\textsuperscript{103} Id. at 411.
\textsuperscript{104} Id. at 415. Chief Justice Rehnquist conceded that the judicial system is fallible and that innocent men are at times wrongly convicted. He stopped short of admitting that the United States had executed an innocent man, instead claiming that clemency is frequently exercised in capital cases concerning claims of “actual innocence”. Ironically, a few short years later, Chief Justice Rehnquist would contend that clemency procedures “do not determine the guilt or innocence of the defendant.” Ohio Parole Authority v. Woodward, 523 U.S. 272, 284 (1998).
appointed three physicians to examine the man. They concluded he was sane. The defendant filed a habeas corpus motion asserting that the Georgia procedure violated his due process rights. He contended that the Constitution required that his sanity be determined by judicial proceedings or an administrative tribunal after notice and hearings. The Supreme Court disagreed and reasoned that the post-conviction sanity determination procedures were very similar to clemency procedures. Both clemency decisions and post-conviction sanity determinations occurred after the initial trial, both are appeals to the conscience, and both are not subject to judicial review. Further, the Supreme Court found that judges routinely made such decisions and there was little reason to deny the governor the same right since, traditionally, it was the governor who decided whether to spare a man from execution.

The Supreme Court has also found it must often define specific acts of clemency while considering procedural issues. The manner in which such acts are defined leads directly to the ruling, regardless of whether a definitional issue was presented before the Supreme Court. Depending upon the term of the Supreme Court, the definitions vary from an extremely traditional, rehabilitative standard to a more modern, retributive standard. The earliest cases almost always viewed clemency as a merciful prerogative of the executive, but as time went on and clemency issues grew more complex, the Supreme Court began to find other explanations for certain procedures.

107 Id. at 13.
108 Id.
109 See United States v. Wilson, 32 U.S. 150 (1833).
The first case concerning clemency reached the Supreme Court in 1833. *United States v. Wilson* interpreted how to legally plead a pardon when in court. In an indictment for mail robbery, Wilson had pleaded not guilty, but later amended his plea to guilty. Previously convicted under another indictment for what was likely the same crime, Wilson received a presidential pardon. Upon sentencing for the current indictment, the trial court debated the effect of the previous pardon on the new charge. The Attorney General argued that the pardon was not applicable to the present case because it was restricted to another conviction not currently before the court. He further argued that it was absolutely necessary for Wilson to accept the benefit of the pardon by plea or motion. No counsel appeared for Wilson during the debate.

In delivering the opinion of the Supreme Court, Chief Justice John Marshall considered whether a pardon had to be accepted and pleaded by a defendant in order to receive judicial notice. The Supreme Court looked to English common law for guidance. Deferring to the traditional definition espoused by Blackstone, the Supreme Court found that:

> A pardon is 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. It is a private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.

110 *Id.*

111 *Id.* at 158.

112 *Id.* at 159.

113 *Id.* at 155. The Attorney General acknowledged that Wilson could claim the benefit of the pardon at any time during the trial, but that it was Wilson who must bring the pardon before the court. “It is admitted that he may avail himself of it at any time by plea, before or after the verdict or confession. But it is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence.” *Id.*

114 *Id.*
The pardon was deemed inapplicable because it was not brought judicially before the court by a plea or motion and therefore could not be judicially noticed at trial. Marshall opined that “a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance.” In effect, Wilson lost the benefit of the pardon when he failed to bring it before the Supreme Court and plead its protection as a defense. The Supreme Court was powerless to enforce the pardon upon him.

The Supreme Court returned to the process of pleading and accepting pardons in the 1927 case of *Biddle v. Perovich*. Perovich had been convicted of murder and sentenced to die. President Taft eventually commuted the sentence to life in prison. Perovich was moved from a local jail to an Alaskan penitentiary. Several years later Perovich filed a writ of habeas corpus claiming that the order of the president to remove him from jail and place him in a penitentiary was without his consent and therefore the commutation had no legal authority. Perovich cited *United States v. Wilson* as controlling authority that a pardon must be accepted to be effective. The solicitor general argued that Wilson was not controlling authority, but merely an acceptance of the English common law rule that a pardon had to first be pleaded and proved before a court could take notice.

The Supreme Court agreed with the solicitor general and held that the pardoning power gave the president the authority to commute a death sentence without the consent of the convicted. The Supreme Court adopted a retributive standard for clemency. “A pardon in our
days is not a private act of grace from an individual happening to possess that power.”\textsuperscript{118} Rather, a pardon was viewed as a determination on the part of those with authority that the public welfare would be better served by lessening the fixed judgment.\textsuperscript{119} The Supreme Court specified that the judicial process was not without flaws, and it was necessary that relief be afforded to correct these mistakes through a mechanism other than the courts.\textsuperscript{120}

On numerous occasions, the Supreme Court has examined the ability of an executive to set conditions for pardons. The Supreme Court first acknowledged the ability of the president to set conditional pardons in 1856 in \textit{Ex Parte Wells}.\textsuperscript{121} Wells had been convicted of murder and sentenced to death, but had been granted a presidential conditional pardon that reduced the sentence to life in prison. Wells accepted the pardon and then filed a writ of habeas corpus arguing that the president did not have constitutional authority to grant a conditional pardon, therefore the condition was void. Moreover, if the condition was void, the pardon in effect had granted him freedom.\textsuperscript{122}

In determining whether the president had the authority to grant conditional pardons, the Supreme Court reviewed English common law and state constitutions to find how “pardon” was defined. In the dictum of the opinion, Justice Wayne discussed the necessity of the pardon to correct injustices. He gave the specific example of mitigating a punishment “without lessening the obligation of vindicatory justice.”\textsuperscript{123}

\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 535.
\textsuperscript{121} 59 U.S. 307 (1856).
\textsuperscript{122} \textit{Id.} at 308.
\textsuperscript{123} \textit{Id.} at 310.
numerous English authorities citing the king’s ability to grant conditional pardons. In addition, it was found that states whose governor exercised executive clemency routinely granted conditional pardons.\textsuperscript{124}

In upholding the constitutional authority of the president to grant conditional pardons, the Supreme Court reasoned that the language of the Constitution not be taken literally, but rather reviewed more generally. The Article II power to “grant reprieves and pardons for offenses against the United States”\textsuperscript{125} referred to all pardons, whether general or special, full or conditional.\textsuperscript{126} Essentially, the Supreme Court found that the Constitution held it necessary to provide the president with the authority to conditionally mitigate the punishment for a conviction.\textsuperscript{127}

The Supreme Court did however proffer some limitations on the pardoning power. Malum in se conditions, those which were unlawful in themselves, were prohibited.\textsuperscript{128} The president also could not force the condition and pardon upon someone. For example, if a man sentenced to die were granted a pardon on the condition that he be transported to a penal colony to work for the remainder of his days, he may reject the pardon and choose to carry on with the original sentence. Further, if a man failed to follow through with the condition, the pardon would be null and void and the original sentence would be enforced.\textsuperscript{129}

\textsuperscript{124} Id.
\textsuperscript{125} U.S. CONST. art. II, § 2.
\textsuperscript{126} Wells, 59 U.S. at 314.
\textsuperscript{127} Id.
\textsuperscript{128} For example, a president would not be allowed to pardon a convicted murderer if he conditioned the pardon that the murderer kills one of his political enemies.
\textsuperscript{129} Wells, 59 U.S. at 312.
In 1925, the Supreme Court yet again refused to interpret limitations on the pardoning power in *Ex parte Grossman*.\(^{130}\) Grossman had received a pardon for a conviction of criminal contempt of court. He was committed to a house of correction, despite the pardon. A writ of error was filed. The superintendent of the house of correction argued that the pardoning power did not extend to common law offenses, such as contempt of court. Therefore Grossman was legally imprisoned. The Supreme Court disagreed.\(^{131}\)

The Supreme Court reasoned that the language of the Constitution had to be examined in light of the English common law. The framers were of English descent and their experience and vernacular were used to create the Constitution. A cursory review by the Supreme Court Justices found numerous examples of the king enjoying the right to pardon those in contempt of court, despite no explicit language granting such a privilege. Further, the several states whose governors exercised pardon privileges had also applied such clemency to contempt cases. The justices took this as evidence that the language of the Constitution was general and therefore the pardoning power did extend to common law offenses such as contempt of court.\(^{132}\) The justices did note a distinction between criminal contempt of court and civil contempt of court. The English cases had shown the king had the authority to pardon a man for “interfering with the dignity of the court, [but] a pardon was ineffective against the remedial part of a court order necessary to secure the rights of the injured suitor.”\(^{133}\)

\(^{130}\) 267 U.S. 87 (1925).
\(^{131}\) *Id.* at 111.
\(^{132}\) *Id.*
\(^{133}\) *Id.*
The Supreme Court also addressed concerns over the abuse of the pardoning power if it extended to contempt cases. Foreseeing no danger of the president paralyzing the courts by pardoning all criminal contempt cases, the Supreme Court took a decidedly retributive stance on clemency.

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of the circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.\textsuperscript{134}

Essentially, the Supreme Court felt that there was little chance of an abuse of pardoning power because such abuse would destroy the deterrent effect of the judicial punishment. If such happened, the proper remedy would be to seek an impeachment of the President and not a limitation on the pardoning power.\textsuperscript{135}

Congress attempted on numerous occasions to limit the pardoning power despite the sole authority conferred upon the president by the Constitution. In 1866, the Supreme Court considered whether such a congressionally mandated limitation was constitutional.\textsuperscript{136} Still reeling from the Civil War, Congress enacted a law that required all attorneys to take an oath prior to entering the legal profession.\textsuperscript{137} While not a direct limitation on the pardoning power,

\begin{footnotesize}
\begin{enumerate}
\item The oath prescribed by the act is as follows:
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the effect of the oath was to punish those who had participated in the southern secession during the Civil War. The requirements of the oath essentially excluded ex-Confederates from joining the profession.

Plaintiff, a southern lawyer, had obtained a full presidential pardon for his activities during the Civil War. He argued that the oath was a form of punishment for his war time activities and therefore the full pardon absolved him from taking the oath. The Supreme Court agreed and deemed the entire oath unconstitutional. In the opinion written by Justice Field, the pardoning power was defined as “the benign prerogative of mercy.”

Further, a pardon absolved the petitioner from both the prescribed punishment and guilt of his offenses.

There have been several cases in which clemency is not the issue presented before the Supreme Court, but the ruling greatly affects the future application of the clemency power. The seminal cases of Furman v. Georgia and Gregg v. Georgia, in which the death penalty was found to be unconstitutional and then reinstated, greatly affected the trajectory of

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1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;
2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;
3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;
4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,
5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same. Id at 376.

138 Id. at 370.
139 Id.
140 See infra notes 100-05 and accompanying text.
141 408 U.S. 238 (1972).
clemency applications. In 1972, in *Furman*, the Supreme Court held that the death penalty as applied was unconstitutional. There was an informal moratorium on executions until the Supreme Court upheld capital punishment and certain death penalty procedures in the 1976 decision of *Gregg v. Georgia*.  

Statistics gathered during the moratorium period show grants of clemency dropped significantly. It is estimated that prior to *Furman* for every ten executions, eight clemency grants were given. Post-*Gregg* clemency grants are estimated at one for every five executions. It is difficult to determine the exact reason for this, but most scholars point to the dwindling rationales for clemency grants post-*Gregg*. Michael Korengold, Todd Noteboom, and Sara Gurwitch found six main rationales for grants of clemency prior to *Furman*: doubt of the guilt of a death row inmate based on newly discovered evidence, sentencing disparities, changes in the perceived rehabilitation of death row inmates, lack of unanimity in the sentence among jurors, lack of perceived fairness in the investigative and trial stages, and mitigating factors. The same researchers noted that post-*Gregg* clemency decisions most commonly point to one of three rationales: “actual proof of innocence, violation of prevailing standards of decency, and an express request for clemency by the prosecution.” The *Furman* and *Gregg* decisions illustrate how the Supreme Court can impact the trajectory of clemency without actually ruling on a substantive clemency issue.

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143 *Gregg*, 428 U.S. at 153; *Furman*, 408 U.S. at 238.
145 *Id.* at 357-59.
146 *Id.* at 360.
Through the years, the Supreme Court has expressed a deep reluctance to rule on matters of clemency, except in cases of a constitutional violation. From the debate of life and liberty interests of death row inmates to limitations of the pardoning power, the Supreme Court has consistently exercised minimal influence with each decision reflecting the ideology of the time. Clemency has been defined as “an act of grace”, 147 a “unilateral hope”, and “the fail-safe to the criminal justice system.” 148 The varied perceptions of clemency have impacted not only the usage of clemency, but also the ongoing philosophical debates regarding clemency usage.

Clemency Perspectives

Clemency decisions typically follow one of two lines of philosophical reasoning. The first, and most traditional rationale, is the clemency as mercy perspective. This perspective follows the reasoning espoused by Chief Justice John Marshall, who defined the scope of the presidential pardon power as “an act of grace, proceeding from the power entrusted with the execution of laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.” 149 Accordingly, all clemency decisions are discretionary, and may be based on any extrajudicial factors. Under the clemency as mercy perspective, the most typical rationale for granting clemency is the rehabilitation of the

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147 United States v. Wilson, 32 U.S. 150, 160 (1833).
149 Wilson, 32 U.S. at 160.
offender. Such a perspective presupposes that the conviction and sentence was correct and just. \textsuperscript{150}

Clemency understood as an act of mercy follows the rehabilitative philosophies developed from the utilitarian principles of Jeremy Bentham. Bentham believed in the principle of utility: “the greatest happiness for the greatest number.”\textsuperscript{151} According to Bentham, all people engage in a hedonistic calculus when weighing the advantages and disadvantages to participate in a certain act. For example, a thief will consider the benefit of his theft (i.e. the stolen item) against the consequences of his actions (i.e. getting caught and going to jail). Bentham argued that punishments were necessary to deter an individual from engaging in a criminal act and that all punishments should function as deterrence, rather than vengeance. Such deterrence would benefit the entire society, thereby producing the greatest happiness for the greatest number.\textsuperscript{152}

In the early twentieth century, sociologists built upon the work of Bentham, arguing that punishment should also reform. This led to numerous reforms throughout the American criminal justice system. Juvenile courts were established to keep children out of the adult system. Indeterminate sentences were implemented so that an offender’s rehabilitation progress could be monitored and he would be released only upon full reformation.\textsuperscript{153} Reformation was viewed as an act of utility according to Bentham principles. The greatest good

\textsuperscript{150} Ridolfi & Gordon, \textit{supra} note 20, at 2.
\textsuperscript{152} \textit{Id.} at 165.
for society was to reform an offender so that the offender could be reintegrated into society and society would be safe from future criminal actions.  

For decades, the American criminal justice system has adhered to the principles of rehabilitative philosophies, particularly in relation to clemency. Most published clemency decisions include standard language about the completion of sentences and evidence of good moral character. Many executive orders granting clemency explicitly state that the pardoned offender has fully paid his debt to society, and therefore earned a pardon further evidencing the presupposition that the conviction was fully just.

The second, more modern perspective of clemency is the clemency as justice perspective. This perspective treats clemency as a constitutional mandate in which only cases concerning actual innocence or deprivation of due process should be considered. Further, the justice perspective does not presuppose the judiciary always provides the proper results. Proponents of the clemency as justice perspective seek to remove most discretion from such decisions, instead favoring a retributive approach in which the sole consideration is the justification of a pardon. Retributivism in relationship to clemency is somewhat of a misnomer. Whereas retributivism typically refers to punishments, it is essentially a theory of justification, and these same principles may be applied to clemency.

\[154\] \textit{id.} at 3.

\[155\] \textit{See}, \textbf{GOVERNOR EDMUND G. BROWN, EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE AND REPRIEVES} (2011). Of the twenty-one pardons Governor Edmund Brown granted in 2011, each contained the following language “[the pardoned] has lived an honest and upright life, exhibited good moral character, and conducted [himself] as a law-abiding citizen.” Further each pardon referred to the debt paid to society. \textit{id.}

\[156\] \textit{id.}

\[157\] \textit{MOORE, supra} note 22, at 92.
The retributive principles of clemency as justice are generally correlated to the ancient principle of *lex taliones*, an eye for an eye. In reality, retributivism is much more complicated. The basic supposition of retributivism is that all rationales must be grounded in justice. This supposition is based the principles of equality and consistency. According to retributivists, all people are equal and should be treated similarly and just punishments will be rendered consistently.\(^{158}\)

While typically associated with punishment philosophies, retributivism is ultimately a theory of justification and therefore can be applied to clemency. Critics of the clemency as justice perspective argue that pardons do not need justification; therefore, the theory of retributivism is misplaced.\(^{159}\) However, as Moore has offered, punishments and pardons are quite similar. Both determine how long a person will remain in prison, or pay fines, or remain under the stigma of a conviction. Arguably, punishment should be concerned with justification of sentences; therefore, it follows that clemency should also be concerned with the justification for the remission of a sentence.\(^{160}\)

This approach is not without criticism. Critics further contend that a retributive approach is entirely at odds with the traditional structure of clemency in which an executive has broad discretion to grant a remission of punishment.\(^{161}\) Historically, it would appear the critics are correct. As previously explained, clemency has been used for a plethora of reasons, ranging from compassion to miscarriages of justice to rationales bearing no connection to

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\(^{158}\) Id. at 93.

\(^{159}\) Harris & Redmond, *supra* note 38, at 2.

\(^{160}\) Moore, *supra* note 22, at 91.

\(^{161}\) Harris & Redmond, *supra* note 38, at 2.
justice or mercy. Critics additionally proffer that a retributive theory of clemency, in which executive discretion would be severely limited, would essentially remove all meaning from the clemency process. 162

One of the strongest rationales retributivists cite for incorporating a retributive theory of clemency is for cases of the wrongly convicted. Critics have pointed out that the Supreme Court has found that release is mandatory in cases of the wrongly convicted. Clemency is discretionary, exoneration is mandatory. 163 Opponents counter that there is no guarantee that any clemency authority will correct such a judicial error. 164 Further, the states vary extensively in clemency procedures. Few include mandatory hearings indicating governors may not investigate clemency cases as rigorously as Herrera seems to indicate. 165 Retributivists, such as Kobil, proffer that procedures should be put in place to inhere due process protections in the clemency process. Without such, merely relying on clemency granting authorities to expeditiously handle claims of wrongful conviction are likely to fail. 166

Nationwide Reports

The United States Department of Justice keeps detailed statistics on all federal clemency activity. The numbers reveal that certain presidents are much more benevolent with their pardoning power. For example, Dwight D. Eisenhower and Ronald Reagan both served a total

162 Id.
163 Id.
164 Stephen Silverman, Note: There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates’ Last Appeals, 37 ARIZ. L. REV. 375 (1995).
165 Id. at 392. Only two states, Arizona and Pennsylvania provide clemency hearings as a matter of law. Id. at 396.
166 Kobil, supra note 32, at 633-34.
of ninety-six months as president, yet President Eisenhower granted nearly three times the number of pardons as President Reagan. President Eisenhower granted a total of 1,110 pardons and 47 commutations, whereas President Reagan only granted 393 pardons and 12 commutations.  

Such statistics for state clemency actions are much more difficult to obtain. There is no national database of record for state clemency actions. Recording laws vary from state to state, depending on the clemency mechanisms in place. Most states in which the governor enjoys sole authority on clemency actions require some type of report to the legislature. The laws fluctuate as to what the record must contain. For example, in Oregon, the governor is solely responsible for the exercise of clemency. The Oregon State Constitution requires that the governor report each case of clemency to the legislative assembly at the next regular session after such an action. The report must include the name of the person granted clemency, the crime for which the person was convicted, the sentence and its date, and the reasons for exercising clemency.  

In Washington, the governor must report each case of clemency and the reasons for such clemency.  

Not all states require written reports. Wisconsin merely requires that the governor “communicate to the legislature” all clemency actions.  

The recording statutes for states implementing pardon boards vary even more greatly. For example, South Carolina only requires a written record in cases in which the governor does 

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169 WASH. CONST. art. III, § 11.  
170 WIS. CONST. art. 5, § 6.
not follow the recommendation of the pardon board.\footnote{171} Connecticut requires the secretary of the board to provide written notification of any absolute pardon to the clerk or chief court administrator of the court of conviction.\footnote{172} Georgia requires an annual written report of all the board’s activities. The report submitted to the general assembly must include details of each case of reprieve or suspension of sentence.\footnote{173} Idaho also requires a complete report of all the board’s activities that may also include any information requested by the governor.\footnote{174}

The varied recording statutes have led to a dearth of available clemency statistics for the individual states. Most national clemency reports focus on clemency procedures, rather than clemency statistics. Numerous reports have surveyed the state clemency procedures. One of the first national surveys on clemency procedures is the 1922 Jensen dissertation. Jensen traced the development of clemency from Teutonic people to the 1920s in order to critique the administrative discretion. While Jensen did not obtain quantitative data for each state regarding grants of clemency, he did review thousands of clemency grants and found a myriad of reasons cited. At the time the dissertation was written, several states had not codified clemency procedures, leaving little standardization. These states had the widest variation of reasons. For example, Jensen found no consistency in the reasons for the 1,257 clemency grants in Oregon from February 2, 1911 to July 15, 1919. While some referred to retributive reasons such as “the ends of justice have been met,” several were predicated purely on the

\footnote{171} S.C. CODE ANN. REGS. § 24-21-910 (LEXISNEXIS 2011).
\footnote{172} CONN. CODE ANN. § 18-26(c) (LEXISNEXIS 2011).
\footnote{173} GA. CODE ANN. § 42-9-19 (LEXISNEXIS 2012).
\footnote{174} IDAHO CODE ANN. § 20-210 (LEXISNEXIS 2012).
governor’s prerogative. Jensen found one example of a governor issuing a pardon “because the prisoner is about to be married.”

In 1939, the United States Attorney General published the Attorney General’s Survey of Release Procedures (“Survey”). The subject of the federal pardons was included in Volume III. The report traced the history and development of the pardon, while also providing commentary on the clemency mechanisms in use at the time. The Survey explicitly explained pardoning procedures, from application to delivery and acceptance to pleading and proof.

While the Survey provided no quantitative data on pardons, an entire chapter was dedicated to the effect of the pardon, a concept largely unexplored up to this point. A paradox existed between court decisions in which a pardon would wipe the slate clean for the offender by “absolving from guilt,” essentially so that in the eyes of the law the offender would be innocent of the original crime and those court decisions in which it was explicitly held that a pardon does not imply innocence but guilt on the basis of acceptance of the pardon. The Survey noted that rationales for pardons could be separated into two groups: those granted for innocence and those granted for reasons implying guilt. The Survey went on to claim that those pardons granted for innocence should have different effects than those granted for other reasons, but did not elaborate on these different effects.

The 1977 Center for State Courts Report (“State Courts Report”) examined a national survey of state clemency procedures, but no quantitative data were compiled. The State Courts Report cited a myriad of reasons for extending clemency, but provided no actual examples of

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175 Jensen, supra note 74, at 99.
176 U.S. DEPT. OF JUSTICE, supra note 64, at 268.
177 Id. at 267, 293.
clemency. Some of the most common rationales, according to the State Courts Report, are: to correct miscarriages of justice (hard cases, unduly severe sentences, innocence or dubious guilt), mitigating circumstances, to avoid the death penalty, to prevent deportation, and for turning state’s evidence.\textsuperscript{178} 

The first and only published attempt to gather nationwide clemency statistics is the 1988 report by the National Governors Association. A three part survey was sent out to every state. The survey examined the clemency procedures in place, clemency use and application, including reasons for granting clemency, and the monetary costs associated with clemency activity, such as staffing and budgetary issues. Only thirty-six states responded and of those, many failed to provide the information clearly.\textsuperscript{179} The report found many difficulties in interpreting the survey results such as varying recording procedures and the usage of different terms for similar clemency procedures. Using the data collected, the report found that each state granted an average of twenty-one pardons and thirteen commutations in 1986. However, this average is greatly skewed due to the strong variance of clemency grants in each state. Georgia and South Carolina both reported over 650 grants of clemency, whereas Rhode Island issued none.\textsuperscript{180} Therefore, the average cited in the report is of little use for statistical interpretation.

\textsuperscript{178} NATIONAL CENTER FOR STATE COURTS, supra note 5, at xvi.

\textsuperscript{179} The following states participated in the survey: Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. NATIONAL GOVERNORS’ ASSOCIATION CENTER FOR POLICY RESEARCH, supra note 6, at 164.

\textsuperscript{180} Id. at 163.
The report did provide some illumination on the reasons why clemency is granted. The states report the most common reasons for granting clemency were illness of applicant, evidence of rehabilitation, or some combination of factors; however, these factors were not discussed. Unfortunately, it is not clear that the reasons reported in the survey were the official reasons for granting clemency, particularly in states that do not require publication of reasons.  

Clemency Rationale Research

Despite existing as long as punishment, little research of rationales for clemency exists. The few published studies that do examine reasons for extending clemency focus on defendant characteristics, death penalty cases, or a particular state and time period. Rarely are clemency mechanisms and political factors included as variables.

In 2003, Michael Heise examined defendant characteristics, political factors, and structural models as predictors for clemency success in death row cases. Heise’s research of defendant characteristics revealed little new information in the clemency debate. However, the addition of political factors and structural models in relation to defendant characteristics is unique in clemency research. Defendant characteristics included gender, race and ethnicity, age, educational status and marital status, and prior felony conviction. Political factors included presidential election year, governor election year, and governor background. Heise

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181 Id. at 168.

defined three structural models: governor only, administrative board only, and a combination of governor and an administrative board.\textsuperscript{183}

Gender was found to be the defining defendant characteristic. Women were overwhelmingly more likely to receive clemency than their male counterparts.\textsuperscript{184} Heise was unable to derive any significant link between clemency decisions and a defendant’s race or ethnicity. Younger, uneducated death row inmates were more likely to be successful in clemency proceedings. In addition, Heise found marriage had no impact on clemency proceedings, while prior felony convictions drastically reduced an inmate’s chances of a successful clemency appeal.\textsuperscript{185}

Heise was unable to find any significant link between presidential election years or governor election years and clemency decisions. Further, Heise was unable to find any evidence that clemency decisions made at the end of an administration differed from those made in the middle of an administration. Likewise, Heise found no significant political background variables that affected clemency decisions.\textsuperscript{186}

Structurally, administrative boards were found to exercise clemency on a greater basis than the other two structural models. Additionally, Heise found that inmates in Southern states and those applying after 1984 were less likely to receive clemency.\textsuperscript{187} Heise’s work is greatly illuminating as to the extra-legal factors that affect clemency decisions. In addition, the findings indicating that administrative boards were found to exercise clemency at a greater pace than

\textsuperscript{183}Id. at 289.
\textsuperscript{184}Id. at 277.
\textsuperscript{185}Id. at 281-88.
\textsuperscript{186}Id. at 295-96.
\textsuperscript{187}Id. at 303.
other structural models further evidences that governors are extremely aware of the political risks involved with granting clemency.

In 2008, John Kraemer examined the factors associated with the commutation of state death row prisoners sentenced between 1986 and 2005. Kraemer found 102 instances of clemency.\(^{188}\) The results showed that gender and race significantly impacted the likelihood of commutation.\(^{189}\) Women were much more likely to be granted clemency, and African Americans, Hispanics, and other racial groups had a higher chance of obtaining clemency than Caucasians. Kraemer found no association between prior felonies and commutation. Interestingly, Kraemer identified both higher education and the place of sentencing as statistically significant in decisions of clemency. Those prisoners who had some college education and/or were sentenced in a southern state were less likely to receive a favorable clemency decision. Kraemer’s work produced findings consistent with previous research, further verifying that many factors play a role in clemency decisions.\(^{190}\)

Only a handful of research studies have highlighted the philosophical rationales for grants of clemency. Of these studies, most report rationales as a byproduct of the original research. For example, researchers James R. Acker and Charles S. Lanier compared commutation rates pre-\textit{Furman} and post-\textit{Furman}. They uncovered that executive clemency substantially slowed post-\textit{Furman}. Between 1973 and 1999, Acker and Lanier found a 13.8 to one ratio where only 40 offenders had capital sentences commuted, while 553 executions were


\(^{190}\) Kraemer, \textit{supra} note 188, at 1413-14.
carried out. State statistics gathered indicated this ratio to be three to nine times greater in favor of execution pre-Furman. Additionally, Acker and Lanier noted that many of these commutations were granted by two governors: New Mexico governor Toney Anaya and Ohio Governor Richard Celeste. The most commonly cited reasons for grants of commutation, doubts of guilt, diminished capacity, and disparate sentencing, followed retributive philosophies.

While Acker and Lanier’s research points to retributive philosophies dominating commutation decisions, the original research goal was to compare the pace of clemency activity pre-Furman to post-Furman thereby limiting the information collected in relation to clemency rationales. Further, it is unclear if Acker and Lanier collected the clemency rationales from the official reasons stated in the commutation or general statements released to the media.

In 2003, Professor of Law Linda Ammons examined the reasons governors grant clemency to women incarcerated for attacking or killing their purported abuser. Citing official reasons reported to the legislature and press release quotes, Ammons found that most often governors indicated a belief that women remained trapped in abusive relationships due to a “syndrome.” Further, of the nine governors she examined, two cited merciful rationales, whereas three specifically cited disagreement with the inflicted punishment. Ammons found only one instance of a governor seemingly indicating that battered woman’s syndrome might not only excuse, but justify a woman protecting herself from imminent danger or bodily harm.

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192 Id.
by attacking or killing her abuser. Ammons research is laudable and provides new insight
into the decision making of governors, but the reliance on newspaper articles and press
releases limits her findings. Without viewing official reasons for each grant of clemency, there
is a risk of misreported information.

A relatively new trend in clemency is the use of posthumous pardons. Though still rare,
American governors are slowly embracing this legal procedure. These pardons provide great
insight into the clemency decision making process in that executives generally hold press
conferences and issue executive orders explicitly stating reasons for the pardon. The most
famous of the posthumous pardons is that of John Arridy. The Arridy pardon was granted by
Colorado Governor Bill Ritter, Jr. in 2011. After confessing to the 1936 sexual assault and
murder of Dorothy Drain, Arridy was sentenced to death. Arridy was extremely intellectually
disabled. He functioned on a child level and had an I.Q. of 46. Decades later, overwhelming
evidence indicates his innocence, including the admission of guilt by another person. Governor
Ritter cited Arridy’s mental handicaps as well as his likely innocence as the driving factors of his
decision to grant the posthumous pardon. Specifically he stated, “It is in the interests of justice
and simply decency, however, to restore his good name.”

Advances in technology and improvements to pretrial procedures have led to the review
of numerous criminal cases, such as the Arridy case. If such an investigation reveals a

196 Id.
miscarriage of justice, a posthumous pardon is the only legal remedy. Stephen Greenspan, a
psychologist who worked on the Arridy pardon, recently created a historical compilation of all
the posthumous pardons granted in America. Greenspan found that 107 individuals had
received such a pardon, twelve of whom had been executed. Greenspan’s work sheds great light on the clemency decision process among governors,
but it cannot be ascertained that governors entertain applications of clemency from living
applicants the same as posthumous applicants. There is no further risk that the posthumously
pardoned will commit a crime, whereas living applicants can pose great political risk.

Summary

Despite its long history and inclusion in every state constitution or legislative code,
clemency still evokes significant controversy. Supreme Court decisions have left clemency
largely in the hands of the executive branch, subject to little judicial review. More recently,
clemency has been informally named the “fail-safe” to the criminal justice system, yet little
evidence exists to prove its effectiveness in correcting injustices.

Clemency is often misunderstood and underutilized in comparison to conviction and
punishment rates. Though a traditional part of the justice system, it remains largely
unexamined, specifically when exploring rationales for decisions. The small amount of research

\[^{197}\] Greenspan, supra note 194, at 13.

\[^{198}\] Id.
that does exist indicates that retributivism plays a growing role in decisions to grant clemency. This study focuses largely on retributive rationales to confirm if such a relationship exists. Further, this study builds upon the current research by including the type of retributive rationale cited and the type of crime committed. It is imperative that such research focus on officially cited reasons found in executive orders, proclamations, and reports to legislatures in order to provide accurate and reliable information. Therefore, this present study improves upon the current research by utilizing only executive orders, proclamations, and legislative reports.

This study's goal is to illuminate the clemency decision making process and establish which forms of retributivism are most often associated with clemency. Further, this study identifies whether clemency is successfully being used to correct miscarriages of justice. It is only through the identification and analysis of current clemency rationales that clemency can truly be considered the fail-safe of the criminal justice system.
CHAPTER 3

METHODOLOGY

Introduction

As previously discussed in Chapter 2, little research exists as to why clemency is granted. This is largely due to the inherent secretiveness of clemency proceedings and the lack of cohesive standards for each clemency granting authority. This research examines the clemency decision process by reviewing official reasons cited in executive orders and legislative reports. To examine the rationales behind clemency decisions, a total of four research questions are asked. The first question looks at the frequency of rehabilitative and retributive rationales within clemency decisions:

1) Are rehabilitative or retributive philosophies cited more frequently in clemency decisions?

The second question identifies which type of retributivism is most commonly cited within clemency decisions. Specifically, whether innocence, sentence disparity, excuses and justifications, or other forms of retributivism are cited more frequently:

2) Which type of retributive rationales is cited most often?

The third question examines whether pardons, commutations, or reprieves are most often associated with retributive rationales:

3) Which form of clemency are retributive philosophies most often associated with and what is the relationship between type of clemency and type of retributive rationale?

The final question explores which crimes are most associated with retributive philosophies:

4) Which crimes of conviction are most often cited among retributive philosophies?
State Selection Methods

State laws and regulations were first reviewed to determine which states incorporated recording statutes. Only those states that included specific recording statutes requiring the clemency granting authority to provide stated reasons for exercising clemency were considered. Of the fifty states, thirty have some form of recording statute related to clemency decisions:

Table 1. State Statutes with Recording Requirements

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Code of Ala. § 12-22-24(b)</td>
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<tr>
<td>Arizona</td>
<td>Ariz. Rev. Stat. § 31-446</td>
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<td>Arkansas</td>
<td>Ark. Const. art. 6, § 18</td>
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<td>Colorado</td>
<td>Colo. Const. art. IV, § 7</td>
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<td>Delaware</td>
<td>Del. Const. Ann. art. VII, § 1</td>
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<td>O.C.G.A. § 42-9-19</td>
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<td>Iowa</td>
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<td>Kentucky</td>
<td>Ky. Const. § 77</td>
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<td>Maine</td>
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<td>Mississippi</td>
<td>Miss. Code Ann. § 47-7-15</td>
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<td>Montana</td>
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<td>Nevada</td>
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<td>Wyoming</td>
<td>Wyo. Const. art. 4, § 5</td>
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Nineteen of those thirty states further require the specific reasons for granting
clemency to be included in the record:

Table 2. State Statutes with Rational Requirements

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</tr>
<tr>
<td>Oregon</td>
<td>Or. Const. art. V, § 14</td>
</tr>
<tr>
<td>Virginia</td>
<td>Va. Const. art. V, § 12</td>
</tr>
<tr>
<td>Washington</td>
<td>Wash. Const. art. III, § 11</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W. Va. Const. art. VII, § 11</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Wis. Const. art. V, § 6</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Wyo. Const. art. 4, § 5</td>
</tr>
</tbody>
</table>

Of these nineteen states, only those with readily available data of clemency activity
from 2005 to 2012 were considered for this thesis. Some of the nineteen states were
eliminated from consideration because they did not have complete, available data for the
studied period from 2005 to 2012. For example, only the 2011 Clemency Report from Governor
Jerry Brown in California was readily available. Arkansas only provides press releases with a
stated intent to grant clemency and thus, no official records were readily available in that state.
Additionally, some states were removed from consideration due to the absence of meaningful
and verifiable clemency activity. For example, during the study period, Arizona had only one
reported case of clemency from Governor Jan Brewer during the reviewed time period and the
official reasons have not been released. As opposed to those states without readily available
data regarding clemency activity, the states of Kentucky, Maryland, Michigan, Virginia,
Washington, and Wisconsin did have complete data and were selected for review in this thesis.

Data Collection

The Kentucky State Constitution grants pardoning power to the governor and requires a
statement of reasons for each decision, “which application and statement shall always be open
to public inspection.” 199 The secretary of state keeps a register of all official acts of the
governor, including all clemency decisions in the Executive Journal. The Executive Journal is
available online at the secretary of state website.200 A keyword search was used for “pardon,”
“commutation,” and “reprieve” for the time period of 2005 to 2012. Additionally, the
governor’s website was reviewed for any recent executive orders.201

The Maryland State Constitution grants the governor the power to “grant reprieves and
pardons, except in cases of impeachment.”202 Further, notice is required “in one or more
newspapers, of the application made for it, and of the day on, or after which, his decision will
be given.” Additionally, “he shall report to either branch of the Legislature, whenever required,
the petitions, recommendations and reasons, which influenced his decision.” Additionally,
governors are required to execute a written executive order.203 Executive orders are
maintained by the Maryland General Assembly and Department of Legislative Services for prior

199 KY. CONST. § 77.
201 The governor’s website is available at: http://governor.ky.gov/Pages/default.aspx.
202 MD. CONST. art. 2, § 20.
203 MD. CODE ANN. § 7-601 (LEXISNEXIS 2012).
The executive orders for the current governor are located on the governor’s website. These orders were examined for the years 2005 to 2012.

The Michigan State Constitution grants the governor the “power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law.” It further directs that “he shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefore.” Grants of clemency are recorded in the state legislative journals, available on the Michigan legislative website. The journals are organized by legislative branch and year. Journals from 2003 to 2012 were available for review. Each year includes a searchable index. A keyword search of “clemency,” “pardon,” “commutation,” and “reprieve” was used for each index to verify all officially recorded clemency actions were located for the years 2005 to 2012.

The Virginia State Constitution requires that the governor shall “communicate to the general assembly, at each regular session, particulars of every case or fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.” A guide to Virginia clemency records published by the
Library of Virginia provided the appropriate title of the annual clemency reports.\textsuperscript{210} The annual “List of Pardons, Commutations, Reprieves, and Other Forms of Clemency” was obtained via Virginia’s Legislative Information System using a keyword search of “clemency.” Clemency records dating to 1974 are readily available and were examined for the years 2005 to 2012.\textsuperscript{211}

The governor has clemency granting authority under the Washington State Constitution. Accordingly, the governor must provide a report of each grant of clemency that includes the reasons for such a grant.\textsuperscript{212} These reports are recorded in the Washington State Senate Daily Journals. The Senate Daily Journals are available online from 2005 to present day.\textsuperscript{213} The index was examined for each daily journal for a record of pardons, commutations, and reprieves for the years 2005 to 2012.

According to the Wisconsin State Constitution the governor “shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses, except treason and cases of impeachment.” The Wisconsin State Constitution further stipulates that the governor shall “annually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date and the date of commutation, pardon or reprieve, with his reasons for granting the same.”\textsuperscript{214} The annual reports are recorded in the Senate and Assembly Journals, which are

\begin{itemize}
  \item \textsuperscript{211} Reports to the legislature are available at: http://leg2.state.va.us/dls/h&sdocs.nsf/Search%20options?OpenForm.
  \item \textsuperscript{212} \textsc{WA. Const.} art. III, § 11.
  \item \textsuperscript{213} The Senate Daily Journals are available at: http://www.leg.wa.gov/Senate/SDJ/Pages/2013.aspx.
  \item \textsuperscript{214} \textsc{Wis. Const.} art. V, § 6.
\end{itemize}
available online through the Wisconsin legislative documents website. The records were obtained through a keyword search of “pardon,” “commutation,” and “reprieve” for each legislative year from 2005 to 2012.

Variables

Four categories of variables were examined: type of rationale, type of clemency, type of retributive rationale, and type of crime of conviction. Once the clemency records from Kentucky, Maryland, Michigan, Virginia, Washington, and Wisconsin were obtained, the records were first examined for rehabilitative rationales or retributive rationales. The rationale for each grant of clemency was further divided into two categories: rehabilitative rationales and retributive rationales. Rehabilitative rationales include successful completion of required conditions, recompense for victim or society, remorse for convicting activity, and successful reintegration into society or lack of rule violations while in custody. The rehabilitative rationales were not divided into separate categories as governors typically cite numerous rehabilitative ideals in grants of clemency.

The retributive rationales were divided into four separate categories, combining the numerous examples cited by Moore and Kobil. The four categories are:

- Grants of clemency that cite innocence, lack of implied guilt, or diminished capacity.
- Grants of clemency that cite excuses or justifications; such as self-defense or battered woman’s syndrome.

---

215 Wisconsin Legislative Documents are available at: http://docs.legis.wisconsin.gov/.
216 See supra notes 18-20 and accompanying text.
217 See supra notes 24-36 and accompanying text.
Grants of clemency that cite overly harsh original sentences or sentence disparity among similar offenders.

Grants of clemency citing general unfairness such as deportation proceedings or inability to find employment.

Clemency activity was divided into four categories: pardons, commutations, reprieves, and other forms of clemency. All forms of pardonning, including simple and conditional, were examined and documented. Other forms of clemency include amnesties, restoration of rights, and other various forms of clemency relief offered by the states. Due to the various forms of clemency in the six states, only pardons, commutations, and reprieves were examined for analysis purposes. For example, Virginia includes all “Restoration of Rights” as a separate clemency action within the governor’s annual clemency report, whereas Michigan does not. Thus, not only are the pardon, commutation, and reprieve categories most relevant to this study, but they were also consistently utilized in all of the states studied.

**Coding**

All data was input into SPSS. Each individual act of clemency was assigned an ID number. The data collected included: type of clemency action, type of rationale, type of retributive rationale, affirmative recommendation from pardon board, the year the crime of conviction was committed, the year clemency was granted, and the type of crime committed. Clemency actions were divided as follows: pardons,\textsuperscript{218} commutations,\textsuperscript{219} reprieves,\textsuperscript{220} and all

\textsuperscript{218} All forms of pardons, conditional or conditional, full or partial were labeled “pardon” for analysis purposes.

\textsuperscript{219} All forms of commutations, including medical commutations were labeled “commutation” for analysis purposes.

\textsuperscript{220} All forms of reprieves, including medical reprieves were labeled “reprieve” for analysis purposes.
other forms of clemency. The clemency actions were then examined for rehabilitative or retributive principles. Only those citing a clear rehabilitative or retributive principle were included in the analysis.

Finally, the type of crime was examined and divided into one of eight categories: 1) drug offenses, including possession and manufacturing; 2) property offenses including theft, robbery, and burglary; 3) homicide offenses including murder and manslaughter; 4) sexual offenses including rape and sexual assault; 5) assaults and batteries; 6) fraud offenses including failure to report a change in income and credit card fraud; 7) an “other” category for crimes such as forgery, uttering, or crimes no longer illegal such as abortion; and 8) those grants of clemency that did not specify the crime. All variables were assigned a code as follows:

<table>
<thead>
<tr>
<th>Variable Category</th>
<th>Variable</th>
<th>Coding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rationale</td>
<td>Rehabilitative</td>
<td>1 = yes; 0 = no</td>
</tr>
<tr>
<td></td>
<td>Retributive</td>
<td>1 = yes; 0 = no</td>
</tr>
<tr>
<td>Type of Retributivism</td>
<td>Innocence</td>
<td>1 = yes; 0 = no</td>
</tr>
<tr>
<td></td>
<td>Sentence Disparity</td>
<td>1 = yes; 0 = no</td>
</tr>
<tr>
<td></td>
<td>Excuses and Justification</td>
<td>1 = yes; 0 = no</td>
</tr>
<tr>
<td></td>
<td>General Unfairness (Other)</td>
<td>1 = yes; 0 = no</td>
</tr>
<tr>
<td>Types of Clemency</td>
<td>Pardon</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Commutation</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Reprieve</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>4</td>
</tr>
<tr>
<td>Type of Crime</td>
<td>Drug Offenses</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Property Offenses</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Homicide Offenses</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Sexual Assault Offenses</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Assault/Battery</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Fraud</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>None Listed</td>
<td>0</td>
</tr>
</tbody>
</table>
Limitations- Reliability and Validity

Limitations exist in this study, including the method in which the data have been gathered. Ideally, all fifty states would require official reasons for clemency decisions and publish these rationales. Unfortunately, less than half of the states have such a requirement. Complicating matters, of the nineteen states that require a rationale within the record of clemency grants, many did not have readily available data that could be obtained from official websites. The greatest limitation of this study is the use of only six states for analytical purposes. Thus we do not know how these states clemency activity compares to the rest of the United States, which can affect the generalizability of this thesis. Despite the small amount of states, over 800 cases of clemency were found over a span of seven years. From 2005 to 2012, the states had numerous governors of varying political parties.

Another limitation in this study is the identification of a “rationale.” The states and governors vary widely in what constitutes a “reason” for recording purposes. For example, each grant of clemency in Michigan provided the same reasons of “best interest of justice” and an “affirmative recommendation from the pardon board.” However, grants of clemency in Washington included a narrative about the convicted, including descriptions of successful completion of school, deportation proceedings, or possible job prospects. This variation made the classification of rationales difficult and subjective. To overcome the subjective nature of defining rationales, only those rationales with clear rehabilitative or retributive citations were analyzed. Thus, twenty-one cases were eliminated from this study.

Additionally, one limitation to this study is the possibility of missed clemency decisions. While every effort was undertaken to find all clemency records, it is possible that the keyword
searches did not return all the clemency decisions. However, this is largely the only method to collect the data in those states that do not publish an annual report containing every grant of clemency.

Finally, only officially cited reasons were analyzed. Though a part of the official record, one can never be completely certain why a governor chooses to grant or deny clemency. It is necessary to rely solely on the officially cited reasons to provide structure to the research. Many governors provide interviews after granting clemency, expanding on their decision making process. However, this information may be misinterpreted by the press or paraphrased, and thus not reflect the governor’s intentions. Further, not all clemency decisions are discussed by governors and those that are face significant scrutiny from the press and the public, leading some governors to focus more on political pressures rather than true decision rationales.

The very nature of clemency decisions makes studying rationales extremely difficult. Few states require any record of the clemency process, even less require an official reason for such a grant. Most previous clemency rationale research focuses solely on death row commutations and pardons, since these cases are more likely to have records or press reports. By focusing solely on those cases with a potential execution, clemency researchers are ignoring a large portion of clemency grants. The finality of an execution may play more into the clemency decision process than realized. Therefore all types of clemency cases should be examined. While the limitations pose potential threats to the validity of this study’s findings, the methods utilized in this study are the best procedures for this research. Clemency rationale research is vital to our understanding of the clemency process, and the most
meaningful way to do it is to utilize official, published decisions of all clemency grants for all types of convictions.

Conclusion

The methods described in this chapter identify the frequency of certain clemency rationales in relation to types of clemency grants and types of crimes committed. Additionally, these methods clarify which forms of retributivism are used most often in relation to clemency. Chapter four examines the results, including the frequency of retributive rationales compared to rehabilitative rationales and the relationship between types of clemency grants and types of rationales. Additionally, the relationship between type of crime and type of retributive rationale is examined.
CHAPTER 4

ANALYSIS

Introduction

Previous clemency research has largely ignored rationales, instead focusing on extra-legal factors, such as defendant characteristics, or overall frequency of clemency activity. This research has focused mainly on death row inmates, thereby ignoring the majority of clemency activity. This study fills the gap in previous research by focusing on grants of pardons, commutations, and reprieves for all types of crimes over a period of seven years (2005-2012) in six states that require a rationale cited in an official, published record.

This chapter addresses each of the four research questions, beginning with the frequency of rehabilitative and retributive rationales. Specifically, the percentage of rehabilitative rationales is compared to retributive rationales. Next, this analysis further explores the retributive rationales, focusing on which form of retributivism is most frequently cited. The types of retributivism are based upon the categories espoused by Moore and Kobil: innocence, sentence disparity, excuses and justifications, and general unfairness. This study then identifies which form of clemency- pardon, commutation, or reprieve- is most often associated with a retributive rationale. Additionally, the analysis focuses on the relationship between type of clemency and type of retributive rationale. Finally, this study also examines which types of crimes are most associated with retributive philosophies. As with question 3, this part of the analysis explores the relationship between form of clemency, and form of retributive rationale, but expands upon the analysis by also looking at the type of crime.
The following research questions help identify the effectiveness of clemency utilized as a fail-safe to the criminal justice system by focusing largely on retributive rationales. Such grants of clemency, by the very nature of retributivism, indicate an injustice occurred during the administration of criminal justice. By focusing on the retributive philosophies, this research identifies how clemency is used to correct injustices, the frequency of such use, and the types of convictions most commonly amended. Upon analyzing each research question, this study further discusses the implications of retributivism philosophy as a basis for clemency policies.

**Frequency of Retributive Rationales**

The first research question investigates the frequency of each type of clemency rationale:

1) Are rehabilitative or retributive philosophies cited more frequently in clemency decisions?

Eight hundred twenty (820) cases of clemency were found in the six states from 2005-2012. For analytical purposes, only those clemency decisions that cited either a rehabilitative rationale or retributive rationale were used \( (n = 799) \). In twenty-one cases, both rationales were cited. Thus, those cases were removed from the analysis, leaving a total of 799 cases for this analysis. Of the 799 clemency decisions reviewed, the vast majority follow the traditional philosophy that clemency is to be earned through rehabilitation \( (n = 743) \). As seen by Table 4, rehabilitative rationales comprised ninety-three percent of all clemency rationales, while retributive rationales accounted for only seven percent \( (n = 56) \) of all clemency rationales.

The overwhelming reliance on rehabilitative philosophies suggests that clemency granting authorities utilize clemency as an act of mercy, rather than a correction of injustice.
Despite the political pressures associated with clemency granting, governors continue to frequently cite rehabilitative philosophies. For example, Kentucky Governor Ernie Fletcher routinely referred to those gaining clemency as “useful member[s] of society...worthy of a full pardon”\(^{221}\) signifying that clemency was to be earned.

The benevolence of retributive rationales largely depended upon which state granted the act of clemency. Table 4 reflects the overall spread of clemency rationales across the states (percentages denote percent of total (799) clemency rationales). Of the six states, only Virginia, Kentucky, and Michigan utilized retributive rationales. Virginia appears to utilize retributive philosophies most often, accounting for over half of all the retributive rationales found. Kentucky followed with seventeen grants of clemency citing retributive philosophies, while Michigan had only one.

Table 4. Frequency of Rehabilitative and Retributive Rationales

<table>
<thead>
<tr>
<th>State</th>
<th>Rehabilitative Frequency</th>
<th>Rehabilitative %</th>
<th>Retributive Frequency</th>
<th>Retributive %</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky</td>
<td>83</td>
<td>10.4%</td>
<td>17</td>
<td>2.1%</td>
<td>100</td>
</tr>
<tr>
<td>Maryland</td>
<td>27</td>
<td>3.4%</td>
<td>0</td>
<td>0.0%</td>
<td>27</td>
</tr>
<tr>
<td>Michigan</td>
<td>199</td>
<td>24.9%</td>
<td>1</td>
<td>0.1%</td>
<td>200</td>
</tr>
<tr>
<td>Virginia</td>
<td>149</td>
<td>18.6%</td>
<td>38</td>
<td>4.8%</td>
<td>187</td>
</tr>
<tr>
<td>Washington</td>
<td>22</td>
<td>2.8%</td>
<td>0</td>
<td>0%</td>
<td>22</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>263</td>
<td>32.9%</td>
<td>0</td>
<td>0%</td>
<td>263</td>
</tr>
<tr>
<td>Total</td>
<td>743</td>
<td>93%</td>
<td>56</td>
<td>7.0%</td>
<td>799</td>
</tr>
</tbody>
</table>

Further analysis reveals that grants of clemency are typically bestowed years after the initial conviction and completion of sentence. Seven hundred thirty-five (735) clemency cases citing rehabilitative philosophies provided the time frame from the initial conviction to the year clemency was granted. Among these cases, the average time to clemency was 20.52 years, perhaps indicating clemency granting authorities want greater certainty that the convicted will not reoffend. This time frame also provides those with clemency authority a longer period to examine for signs of rehabilitation, such as the completion of education. Several grants of clemency referred specifically to the successful completion of varying levels of education or reliable employment history. Interestingly, the average time span from initial conviction to grant of clemency splits in half when retributive rationales are cited. Of the fifty-one cases that provided the date of conviction and the date of clemency grant, the average time span in retributive rationale cases was 10.02 years.

Types of Retributive Rationales

The second question explores the frequency of the types of retributivism espoused by Moore and Kobil. Specifically,

2) Which type of retributive rationales is cited most often?

Table 5 categorizes the retributive rationales. Retributive rationales were organized into four categories: innocence, sentence disparity, excuses and justifications, and general unfairness labeled as “other” for analysis purposes. The general unfairness category includes those grants of clemency citing the need to stop deportation procedures, the inability of the convicted to
find gainful employment or the likely loss of current employment, or the inability to proceed in adoption/family matters.

Most retributive rationales fell within the “other” category. Nearly half of the fifty-six retributive based grants of clemency cited miscellaneous reasons indicating a general unfairness to the convicted. Guilt was not at issue in these cases, rather the prior conviction prevented the person from successfully moving forward in life, thereby overly extending the original punishment. What distinguishes this category from rehabilitative philosophies is that, general unfairness dictates that the punishment inflicted is no longer fair and that it exceeds justification, whereas a pure rehabilitative philosophy denotes the punishment was entirely fair, but the convicted has earned some form of relief. Despite the difference, the general unfairness category greatly resembles rehabilitative philosophies, which might explain the frequency of its use.

The second largest category of retributive rationales was excuses and justifications. Over a quarter of the grants of clemency were found to cite either an excuse or justification. While excuses may range from influence of alcohol and/or drugs to coercion, the most frequently cited excuse or justification is long term abuse, such as battered woman’s syndrome. For example, five of the eight commutations granted by Kentucky Governor Ernie Fletcher in 2007 were for women convicted of murdering their abuser.222

Innocence was the third largest category of retributive rationales with twelve grants of clemency. Not every grant of clemency expressly cleared the convicted of the crime. Many expressed extreme doubt of guilt, but fell short of claiming actual innocence. This was found most often in reprieves granted prior to executions to allow for DNA testing or other investigatory methods. For example, in 2009, Virginia Governor Tim Kaine, offered a reprieve to a man sentenced to death for two murders. After petition for clemency based upon innocence, Governor Kaine expressed a need for more time to fully review the case due to “the irreversible nature of an execution.”223 In the same year, Governor Kaine granted an absolute pardon to a man convicted of rape after DNA testing proved the man could not have committed the crime.224

Sentence disparity was rarely cited as a retributive rationale. Only six grants of clemency were found citing a sentence disparity. Those citing sentence disparities did so for numerous reasons, including receiving more time than other participating members of a crime or falling under a three-strike situation in which the punishment was greatly enhanced. For example, in 2008, Governor Kaine granted a conditional pardon to a woman convicted of multiple robberies. Due to the nature of the robberies, she was subsequently classified under Virginia’s “Three-time loser” law, making her ineligible for parole until 35 years after the initial


224 Id. at 22.
conviction, a consequence with which both the trial judge and prosecuting attorney disagreed.\textsuperscript{225}

Table 5. Frequency of Retributive Rationale Type

<table>
<thead>
<tr>
<th>Type</th>
<th>Frequency</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Innocence</td>
<td>12</td>
<td>21.4%</td>
</tr>
<tr>
<td>Sentence Disparity</td>
<td>6</td>
<td>10.7%</td>
</tr>
<tr>
<td>Excuse/Justification</td>
<td>16</td>
<td>28.6%</td>
</tr>
<tr>
<td>Other</td>
<td>22</td>
<td>39.3%</td>
</tr>
<tr>
<td>Total</td>
<td>56</td>
<td>100%</td>
</tr>
</tbody>
</table>

Though many of the retributive rationales fell within the “other” category, it appears those governors willing to cite to such rationales make use of all forms of retributivism. The type of retributive rationale is likely tied to the type of clemency grant, a hypothesis explored in the third research question of this study.

Types of Clemency and Types of Retributive Rationales

Not all grants of clemency provide the same relief, nor do all grants of clemency attract the same controversy. When citing retributive rationales, a governor is essentially expressing the convicted did not deserve the full punishment inflicted under the law. The type of retributivism cited is likely to impact the form of clemency granted. For example, if innocence was proven, it would be unlikely for a governor to offer a commutation, in which a lesser

punishment is replaced for the original punishment, rather than an absolute pardon in which the guilt of the convicted offender is absolved.

The third research question compares the type of clemency in relation to retributive rationales:

3) Which form of clemency are retributive philosophies most often associated with and what is the relationship between type of clemency and type of retributive rationale?

Table 6 identifies the type of clemency grants in which retributive rationales were found. Retributive rationales were cited most frequently in pardons, followed by commutations, and reprieves. Of the 602 pardons found, only 41 cited retributive rationales. Of the 193 commutations founds, only 12 cited retributive rationales. Only three reprieves were found citing retributive rationales. No other form of clemency citing retributive rationales was found.

Table 6. Frequency of Type of Clemency Grant

<table>
<thead>
<tr>
<th></th>
<th>Pardon</th>
<th>Commutation</th>
<th>Reprieve</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>41</td>
<td>12</td>
<td>3</td>
<td>56</td>
</tr>
<tr>
<td>Percent</td>
<td>73.2%</td>
<td>21.4%</td>
<td>5.4%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Percent of Total</td>
<td>5.1%</td>
<td>1.5%</td>
<td>0.4%</td>
<td>7.0%</td>
</tr>
</tbody>
</table>

Expanding upon this analysis, each grant of clemency was examined for type of retributive rationale. Table 7 explains the frequency of each type of clemency grant in relation to the type of retributive rationale. Pardons were the most frequently granted form of clemency to cite a retributive rationale. Of the forty-one pardons found citing retributive
rationales, seventeen of these cited the “other” category, eleven cited innocence, ten cited an excuse or justification, and three cited a sentence disparity.

Table 7. Type of Retributive Rationale in Relation to Type of Clemency Grant

<table>
<thead>
<tr>
<th>Rationale</th>
<th>Pardon</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Frequency</td>
<td>%</td>
<td>Frequency</td>
<td>%</td>
<td>Frequency</td>
<td>%</td>
<td>Frequency</td>
<td>%</td>
<td>Frequency</td>
<td>%</td>
<td></td>
</tr>
<tr>
<td>Innocence</td>
<td>11</td>
<td>19.6%</td>
<td>1</td>
<td>1.8%</td>
<td>0</td>
<td>0.0%</td>
<td>12</td>
<td>21.4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sentence Disparity</td>
<td>3</td>
<td>5.4%</td>
<td>3</td>
<td>5.4%</td>
<td>0</td>
<td>0.0%</td>
<td>6</td>
<td>10.7%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Excuse/Justification</td>
<td>10</td>
<td>17.9%</td>
<td>6</td>
<td>10.7%</td>
<td>0</td>
<td>0.0%</td>
<td>16</td>
<td>28.6%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>17</td>
<td>30.4%</td>
<td>2</td>
<td>3.6%</td>
<td>3</td>
<td>5.4%</td>
<td>22</td>
<td>39.3%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>41</td>
<td>73.2%</td>
<td>12</td>
<td>21.4%</td>
<td>3</td>
<td>5.4%</td>
<td>56</td>
<td>100%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Interestingly, nearly half of the retributive based pardons fell within the “other” category, representing a perceived general unfairness to the convicted, while excuses or justifications represented the third largest category. Together, these two categories comprise over sixty-five percent of all pardons citing retributive rationales. Both the “other” category and excuses and justification categories represent retributive rationales in which the guilt of the offender is largely unquestioned; rather the issue before the clemency granting authority is whether the original punishment inflicted is overly severe, and thus no longer justified. Again, this type of rationale is very similar to rehabilitative rationales, and might explain the frequency of such justifications.

Despite the majority of pardons citing retributive rationales falling within the “other” and excuses and justifications categories, nearly twenty-seven percent of all pardons citing
retributive rationales were for innocence. Only one commutation was found for innocence, indicating when the guilt of the convicted is no longer in question, pardons are the most preferred method for absolving criminal punishment.

Commutations were most likely to be granted based upon an excuse or justification. Six of the twelve commutations based the commutation on an excuse or justification. The reliance on commutations, as opposed to pardons might indicate that in some situations, despite having a good reason for committing the crime, the situation did not rise to the level of absolving all criminal guilt. Conversely, this might also indicate the fear of political repercussions based upon constituent disapproval. The rest of the commutations were granted based upon sentence disparity (3), other retributive rationales (2), and one for innocence.

Types of Crime and Retributive Rationales

The fourth research question explores the relationship between type of crime of conviction, type of clemency, and type of retributive rationale. Specifically,

4) Which crimes of conviction are most often cited among retributive philosophies?

Retributive rationales were most commonly cited in grants of clemency for cases involving a homicide. Table 8 breaks down how many retributive grants of clemency were found for each category of crime. Twenty-four of the fifty-six retributive grants of clemency were for homicide cases. Seven retributive based grants of clemency were for cases involving drug charges. Six retributive based grants of clemency were for sexual offenses, while five retributive based grants of clemency involved property offenses. Grants of clemency involving fraud accounted for three of the retributive grants, and grants of clemency for assaults and
batteries accounted for only two. Eight grants of retributive based clemency were for miscellaneous charges including forgery, uttering, and charges no longer considered illegal, such as procuring an abortion.

Table 8. Type of Crime in Relation to Type of Clemency Grant

<table>
<thead>
<tr>
<th>Type of Crime</th>
<th>Pardon</th>
<th>Commutation</th>
<th>Reprieve</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homicide</td>
<td>11</td>
<td>10</td>
<td>3</td>
<td>24</td>
</tr>
<tr>
<td>Drugs</td>
<td>6</td>
<td>1</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Sexual Offenses</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Property Offenses</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Fraud</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Assault &amp; Battery</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>0</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>None Listed</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>41</td>
<td>12</td>
<td>3</td>
<td>56</td>
</tr>
</tbody>
</table>

Fascinatingly, of the retributive based grants of clemency, homicide was the most frequently cited crime. It was the only category of crime to include at least one grant of clemency for each type of retributive rationale analyzed. Specifically, eleven pardons, ten commutations, and three reprieves were found, comprising nearly half of all retributive based clemency grants.

Table 9 explains the frequency of each type of retributive rationale in relation to each type of clemency grant for the crime of homicide. Over half of all grants of clemency for crimes
of homicide citing retributive rationales referred to an excuse or justification, and most of these were obtained in the form of a pardon.

Table 9. Type of Retributive Rationales for the Crime of Homicide

<table>
<thead>
<tr>
<th>Type of Rationale</th>
<th>Pardon</th>
<th>Commutation</th>
<th>Reprieve</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Innocence</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Sentence Disparity</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Excuse/Justification</td>
<td>7</td>
<td>6</td>
<td>0</td>
<td>13</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
<td>10</td>
<td>3</td>
<td>24</td>
</tr>
</tbody>
</table>

Seven pardons and six commutations were identified based upon an excuse or justification. These excuses and justifications most often relate back to abusive relationships as discussed in the analysis of question two. The split between pardons and commutations suggests that not all governors feel as benevolent about full absolution of guilt in cases of extreme abuse. By granting a commutation, rather than a pardon, a governor is merely substituting a lesser punishment while still maintaining the guilt of the convicted.

The second highest category of type of retributivism found regarding homicide, was innocence. Four pardons and one commutation were found, comprising twenty percent of all retributive grants of clemency for homicide cases. All four pardons were granted in Virginia by Governor Kaine. Of these four, only one was an absolute pardon. Granted in 2005, Governor Kaine based the absolute pardon on exculpatory evidence in which another man confessed to the crime. After several witnesses corroborated the new evidence, it was clear that the
convicted man did not commit the crime in question. All other pardons were conditionally granted in 2009. Governor Kaine acknowledged the men had not conclusively proven their innocence thereby negating the necessity for an absolute pardon.

Only two commutations citing sentence disparity were uncovered in homicide cases. One commutation and three reprieves citing other retributive rationales were found.

Conclusion

This chapter examined the role and extent of retributive philosophies in clemency decisions from a sample of six states from 2005-2012. It further examined the types of retributive philosophies that are most likely to appear in the different forms of clemency. Additionally, the crime of conviction was compared to the varied retributive rationales and forms of clemency.

While retributive philosophies account for only seven percent of all the clemency decisions sampled, the purpose of this study was to focus on those clemency decisions that act as the fail-safe to the criminal justice system and work to correct an injustice. Despite accounting for a small amount of the total sample, the results were quite robust. First and foremost, the frequency of retributive rationales greatly depends upon the state and governor authorizing grants of clemency. Those governors more prolific with retributive rationales most often cite general unfairness within the grant of clemency. Though the person obtaining the pardon, commutation, or reprieve is guilty of the crime of conviction, the circumstances

227 Office of Governor Timothy M. Kaine, supra note 225, at 28-37.
surrounding the original punishment were unfair enough to warrant relief. Pardons were most likely to contain retributive rationales, followed by commutations and reprieves.

While pardons citing general unfairness were the most common form of retributive based clemency, pardons citing innocence were quite common as well, comprising nearly 20% of all the retributive based clemency actions. This indicates that there is a need for retributive based clemency procedures. On at least twelve occasions, governors granted clemency to a convicted person due to findings of innocence or lack of implied guilt despite numerous court appeals that had failed to produce the truth. No person should ever be punished for a crime he did not commit. Further, there were sixteen instances in which a governor found the convicted person had an excuse or justification for the criminal actions. Many of these excuses centered on abusive situations. It is only in recent years that the judicial approach to battered spouses has changed significantly. Without clemency, it is unlikely those incarcerated prior to such changes would qualify for relief. Clearly, a fail-safe to the criminal justice system is necessary.

The following chapter discusses the policy implications of retributive philosophies upon clemency procedures. Additionally, the empirical findings are used to inform the philosophical debate of whether clemency itself is the appropriate method to correct miscarriages of justice brought about by the criminal justice system.
CHAPTER 5

DISCUSSION AND CONCLUSIONS

Summary of Findings

This study examined the extent of retributive philosophies among 799 clemency decisions from six states between 2005 and 2012. Of the fifty-six retributive based clemency decisions, seventy-three percent were pardons, twenty-one percent were commutations and three percent were reprieves. The most common form of retributivism cited within the grants of clemency was a general unfairness, followed by innocence. The most common crime that received a retributive based clemency grant was homicide.

In several instances, the criminal justice system failed to produce justice. At least twelve persons received clemency based on innocence rationales from 2005 to 2012 in the six states studied. It is likely governors in other states have exonerated more citizens for crimes they did not commit. Additionally, it was found that governors utilize clemency as a means to provide relief to those convicted under harsher sentencing schemes than currently acceptable. Six cases of sentence disparity were found, as well as sixteen cases in which the offender was found to have an excuse or justification. In light of these findings, it is clear that governors are willing and able to utilize clemency as a fail-safe mechanism for the criminal justice system. This research is only a starting point into retributive based clemency rationales. Therefore, it is important to consider the implications of this study so that future researchers may expand upon the findings.
Policy Implications

The implications of this study are drawn from the identification of clemency as a mechanism to correct an injustice attributed to the criminal justice system. The results of this study indicate that, while rare, governors do utilize clemency as a fail-safe. Of the fifty-six retributive based clemency grants, twelve were for innocence based reasons. Punishing a person for a crime he did not commit goes against the very purpose of the criminal justice system. Yet, when all appeals are exhausted and the courts will no longer revisit the case, the only option left is to petition for clemency. The Supreme Court has come to rely upon clemency as the fail-safe for the criminal justice system.228 This reliance assumes that all those petitioning will receive the opportunity to be heard, and that those with clemency granting authority will thoroughly review and weigh the evidence before them. The results of this study indicate that at least in some states, claims of innocence are heard and reviewed.

Not only are claims of innocence of utmost importance to clemency petitions, but also those petitions indicating a change in what is considered criminal behavior. Our perception of crime changes through the years. What was once considered illegal might no longer be, as in the case of the pardon for the procurement of an abortion. Often our acceptance of legal defenses changes based upon scientific developments. Sixteen grants of clemency were found to cite an excuse or justification. Many of these cited long term abuse. It is only in recent years that battered woman’s syndrome has become an acceptable defense, largely due to the admission of expert testimony within criminal cases as to why battered spouses do not leave abusive relationships. Not only does clemency serve as a fail-safe, it also helps keep the courts

and punishments in line with modern perceptions by providing relief in situations seen as unjust under today’s expectations, as in the cases of an abused wife killing her husband. 229

Suggestions for Future Research

This research can be built upon in several ways. For example, clemency decisions from more states could be collected. This study focuses on six states from 2005 to 2012. Ideally, clemency decisions from all fifty states since the Herrera decision would be collected to measure the frequency of retributive rationales. Future research should also focus on clemency petitions, not just executive orders or official proclamations. While the executive orders and proclamations examined in this study include the official rationales for grants of clemency, one can never be certain what additional information factored into the decision process. By reviewing actual clemency petitions, future researchers would be exposed to the actual evidence the governor or other clemency granting authority considers when rendering a decision.

Not only should future research focus on a greater number of states and actual clemency petitions, but such researchers should also strive to compare those clemency petitions that do not succeed. This study does not consider clemency petitions that were not successful due to absence of available data concerning clemency petitions. Therefore, the researcher is unable to identify which factors are more likely to lead to a successful petition. It is unclear which type of retributivism might be most cited in clemency petitions.

229 Ammons, supra note 193, at 548.
In order to increase the validity of this study, not only should more states be utilized in the analysis, but also those with clemency granting authority during the specified time period should be surveyed about individual cases. While it is impractical to issue a survey for every case of clemency, future researchers should consider gathering more information about those clemency decisions with a clear retributive base, such as the fifty-six identified in this study. Such a survey could be used in conjunction with the official rationales to increase the scope and accuracy of defining and categorizing rationales.

Due to the small available sample, resulting from limitations among the states, the results of this study are difficult to fully generalize. Of the six states examined, only Kentucky, Michigan, and Virginia contained any retributive rationales. Within these three states, two, Kentucky and Virginia, were the most prolific with retributive rationales. Michigan had only one grant of retributive based clemency. Additionally, the time frame should be expanded to ensure that multiple governors of varying political beliefs are included in the analysis.

Conclusion

Is there justice in mercy? Examining official clemency decisions for retributive rationales is the best way to answer this question. This study offers the first empirical evidence that justice can be found in mercy. While not a frequently occurring phenomenon, retributive or justice-enhancing rationales are cited by governors when correcting miscarriages of justice. Though little clemency rationale research has been conducted, this study provides a good starting point for further research. We are now closer to understanding if and how justice
appears in clemency decisions, yet far from understanding why. The fact remains that much more research is needed.

Today clemency is being utilized not only to provide relief to those offenders who have earned the mercy of their governor, but also those who were unjustly punished by the criminal justice system. Though we may never know exactly why a governor or pardoning board grants clemency for one petition, yet denies another, it is imperative that we acknowledge, that in certain circumstances, the courts have failed and the only option left for relief, under the current system, is clemency. Yet, we cannot assume that clemency will operate as a reliable fail-safe without empirical evidence to suggest otherwise.

The very nature of clemency makes rationale research extremely difficult. Petitions are kept confidential, making the comparison between those granted clemency and those denied nearly insurmountable. Many states require little to no record of clemency decisions, further frustrating the ability to gather official rationales. Moreover, those with clemency granting authority in general vary greatly in what constitutes a “reason” for such relief. Despite this, some data can be gathered from those states that do publish official reasons.

Of the 799 cases examined in this study, 56 cited a retributive rationale that worked to correct an injustice brought about by the criminal justice system. We do not know how many innocent men and women sit in prison cells, having exhausted all appeals and hoping for clemency. We do not know how many battered spouses have spent decades behind bars for crimes that would receive significantly less punishment in today’s courtrooms. Finally, we do not have an accurate measurement of how many instances a governor or pardoning board has
corrected an injustice through clemency. Only further research can begin to answer these questions, but it is certain that from the data gathered, justice plays a role in mercy.