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Gavriel B. Wolfe
wolfegb@bc.edu

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I BEG YOUR PARDON: A CALL FOR RENEWAL OF EXECUTIVE CLEMENCY AND ACCOUNTABILITY IN MASSACHUSETTS

GAVRIEL B. WOLFE*

Abstract: The pardon power, often described as a safety valve on the criminal justice system, is in a state of atrophy. Against a backdrop of “tough-on-crime” rhetoric, a systemic devaluation of rehabilitation efforts, and significant racial disparities in punishment, the disuse of clemency means no possibility of exit for those who have transformed themselves while incarcerated. This Note examines the origins, history, and philosophical underpinnings of clemency in the United States, focusing on the delicate balance between executive discretion and accountability. It then considers the structural and political factors that have contributed to the almost total failure of the clemency process in Massachusetts in recent years. The Note argues for the revitalization of executive clemency as a means of achieving optimal justice in individual criminal cases and system-wide, and it suggests changes to the administration of the clemency process in Massachusetts to achieve that end.

INTRODUCTION

Arnold L. King entered the criminal justice system young.¹ At seventeen, he dropped out of high school and became addicted to drugs.² At eighteen, he was high and in pursuit of his next supply when he shot and killed a man on Newbury Street in Boston.³ In 1972, King, a black teenager, was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.⁴

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¹ Adrian Walker, *Seeking Redemption*, *BOSTON GLOBE*, Oct. 13, 2005, at B1.

² *Id.*; Arnie King, *Reflections from Inside*, 12 *FIELD NOTES* 10, 10 (2002), available at <http://www.sabes.org/resources/publications/fieldnotes/vol12/fn123.pdf>.

³ Arnie King, *Homeward Bound*, *EDGE BOSTON*, Nov. 25, 2005, <http://www.edgeboston.com/index.php?ch=columns&sc=arnieking&id=1628>.

⁴ *Id.*; Walker, *supra* note 1.

Arnie King is now a middle-aged man.⁵ He has spent decades in prison.⁶ However, he has not merely grown in years; he has also matured.⁷ During his time in prison, he has doggedly undertaken the project of his own education, earning a GED, an associate's degree, a bachelor's degree, and a master's degree.⁸ Perhaps most importantly, King has reflected on his life's path, his incarceration, and the mistakes he has made, and he has chosen to share his experiences and insights with others.⁹ He has written extensively for publications on the outside, primarily to educate the larger community about prison life and to counsel against the path he followed.¹⁰ King has taken responsibility for having taken the life of another human being, and has communicated in word and deed that he has atoned for that crime.¹¹

Nonetheless, despite the life changes he has effected—and despite having been behind bars for nearly three and a half decades, fully twice the length of his pre-incarceration life—King has not yet fulfilled the punishment that society, in the form of the jury, saw fit to impose on him for his offense.¹² At age fifty-three, Arnie King is now beginning his thirty-fifth year of incarceration.¹³ Because he is ineligible for parole, he will spend the rest of his life in prison unless the Governor grants him clemency.¹⁴

Clemency is a broad term used to describe an official act, such as pardon or commutation, which removes some or all of the punitive consequences of criminal conviction.¹⁵ Typically, clemency is granted after an individual has been charged, tried, and convicted of a crime, and functions to reduce the amount of punishment that the offender must suffer.¹⁶ A pardon eradicates all or part of a conviction.¹⁷ It allows the offender to walk away with a clean slate, as though he or she had

⁵ See Walker, *supra* note 1.

⁶ *Id.*

⁷ See *id.*

⁸ King, *supra* note 2, at 10.

⁹ See Walker, *supra* note 1; Arnie King, *Don't Follow My Prints*, EDGE BOSTON, JUNE 19, 2005, <http://www.edgeboston.com/index.php?ch=columns&sc=arnieking&id=1521>.

¹⁰ See, e.g., King, *supra* note 9; King, *supra* note 2, at 10.

¹¹ See King, *supra* note 9.

¹² See Walker, *supra* note 1.

¹³ See *id.*; Kazi Toure: Support the Release of Arnold King, RADICALNDAR (Jan. 22, 2006), <http://www.radicalendar.org/calendar/bostonimc/all/index.php?view=day&full-date=2006-01-22> [hereinafter Support the Release of Arnold King].

¹⁴ See Walker, *supra* note 1.

¹⁵ KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 4–5 (1989).

¹⁶ *Id.* at 5.

¹⁷ *Id.*

never been tried or convicted.¹⁸ Commutation, on the other hand, merely reduces the severity of punishment by substituting a lesser sentence for a greater one.¹⁹ In Arnie King's case, commutation would mean permitting him to serve less than a life term.²⁰

King has petitioned for clemency five times, and five times he has been turned down.²¹ In 2004, the Massachusetts Advisory Board of Pardons recommended his most recent commutation petition favorably to the Governor, yet his prison sentence still was not commuted.²² Instead, Governor Mitt Romney effectively denied him clemency by failing to take the matter into consideration within the year after the recommendation was issued.²³ By not acting, Governor Romney allowed the Board's recommendation to expire.²⁴ Arnie King will have to petition for clemency yet again and hope that next time his petition does not fall on deaf ears.²⁵

King's personal story raises questions about the operation of the clemency process, especially when considered against the backdrop of contemporary trends within the American justice system. Arnie King is just one of more than two million people now living behind bars in the United States.²⁶ That number reflects exponential growth in recent decades—roughly four times more people are incarcerated today than were incarcerated in 1970.²⁷ A number of factors have led to this increase, including a shift in criminal justice policy toward longer sentences and determinate sentences without the possibility of early release.²⁸

Of course, raw numbers do not tell the whole story. Our nation's overflowing prisons are mostly filled with poor, dispossessed, racial

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See MOORE, *supra* note 15, at 5.

²¹ See *In re Arnold L. King*, Op. Advisory Bd. of Pardon 1, 2 (Nov. 9, 2004) [hereinafter *In re Arnold L. King*] (on file with the Boston College Third World Law Journal); Support the Release of Arnold King, *supra* note 13.

²² See *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold King, *supra* note 13.

²³ See 120 MASS. CODE REGS. 902.12(2) (2006); *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold L. King, *supra* note 13.

²⁴ See 120 MASS. CODE REGS. 902.12(2); *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold L. King, *supra* note 13.

²⁵ See 120 MASS. CODE REGS. 902.12(2); *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold L. King, *supra* note 13.

²⁶ See JAMES Q. WHITMAN, *HARSH JUSTICE* 3 (2003).

²⁷ *Id.*

²⁸ See *id.* at 55.

minorities.²⁹ At least forty percent—maybe even more than fifty percent—of incarcerated individuals are African American.³⁰ According to a Bureau of Justice Statistics report, one in three African American males can expect to be imprisoned during his lifetime.³¹ Today, sixty-two percent of the U.S. prison population is African American or Latino, as compared with only twenty-three percent in 1930; in contrast, seventy-seven percent of inmates in 1930 were white.³² Statistics are similarly disproportionate for youthful offenders.³³ African American and Latino youth are far more likely than their white peers to be sentenced for both drug offenses and violent crimes, and they are likely to serve longer sentences.³⁴

There is considerable disagreement about the reasons for these racial disparities.³⁵ However, it is indisputable that the disproportionate number of poor people of color in prison is not merely the result of disproportionate offending.³⁶ Discretionary decisions made by law enforcement officials also contribute to the disparity.³⁷ Former President Carter put it plainly and personally when he compared the way the system would treat his children compared with the children of his black neighbors: “All three of my boys smoked pot [growing up]. I knew it. But I also knew if one was caught he would never go to prison. But if any of my neighbors got caught . . . they would go to prison for 10, 12 years.”³⁸ Statistics bear out Carter’s assertion.³⁹ Though seventy-one percent of youth arrested throughout the United States in 1997 were

²⁹ JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 49–51 (2004) [hereinafter KENNEDY COMM’N REPORTS]; WHITMAN, *supra* note 26, at 57.

³⁰ KENNEDY COMM’N REPORTS, *supra* note 29, at 48.

³¹ *Id.*

³² *Id.* at 49.

³³ *Id.*

³⁴ *Id.*

³⁵ See KENNEDY COMM’N REPORTS, *supra* note 29, at 49.

³⁶ *Id.* at 51. Of course, some commentators *do* directly attribute the racial disparities in incarceration to racial disparities in criminal behavior, ignoring disparities in law enforcement and other factors. *Id.* This, in turn, leads to race-based solutions to crime. See Brian Faler, *Bennett Under Fire for Remark on Crime and Black Abortions*, WASH. POST, Sept. 30, 2005, at A5. In September 2005, former U.S. Secretary of Education William J. Bennett made the claim that “if you wanted to reduce crime, you could . . . abort every black baby in this country, and your crime rate would go down.” *Id.*

³⁷ KENNEDY COMM’N REPORTS, *supra* note 29, at 51.

³⁸ *Id.* at 50 (quoting former President Jimmy Carter).

³⁹ *Id.* at 49.

white, white youth represented only thirty-seven percent of detained or committed juveniles.⁴⁰

Clemency is frequently described as a safety valve on the criminal justice system that can correct inequitable flaws in the way that the system operates.⁴¹ Today, that safety valve appears to be shut tight.⁴² Executive clemency in the United States has atrophied, yet it is needed now more than ever.⁴³ The combination of the current “tough-on-crime” climate, front-end discretion, and strict sentencing regimes necessitates a closer look at executive clemency as a remedy for inequity in criminal justice.⁴⁴ Even if police and prosecutorial discretion could be eliminated, and bias removed from all criminal justice legislation, clemency would still be necessary because no set of legislative rules can work in all circumstances.⁴⁵ In light of Arnie King’s frustrated commutation petitions and the knowledge that clemency is necessary to a working justice system, it is imperative to examine the clemency process and analyze the reasons for its failure.⁴⁶

Certainly, clemency is not appropriate in all cases, and the difficulty of regulating its operation raises many questions.⁴⁷ Some questions are more theoretical and others relate to the way that the clemency power is exercised in practice. Why might a governor grant or deny someone clemency? What standards should apply? How do administrative structure and contemporary theories of punishment impact a jurisdiction’s clemency activity? What makes a clemency process “successful”? Does someone like Arnie King deserve to continue to be punished? Together, these questions form the basis of an inquiry that is both academic and practical.

This Note will consider the role of discretion within the criminal justice system and will argue that the contemporary political bias in favor of inflexible, harsh punishment requires the existence of discretion on the “back end” of the criminal justice system. It will examine declining grants of clemency in the past twenty-five years and analyze how the

⁴⁰ *Id.*

⁴¹ See, e.g., *id.* at 73; Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 *FORDHAM URB. L.J.* 1483, 1483 (2000).

⁴² KENNEDY COMM’N REPORTS, *supra* note 29, at 71.

⁴³ See Love, *supra* note 41, at 1484–85.

⁴⁴ See KENNEDY COMM’N REPORTS, *supra* note 29, at 57–58; WHITMAN, *supra* note 26, at 49; Love, *supra* note 41, at 1495.

⁴⁵ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 *TEX. L. REV.* 569, 592 (1991).

⁴⁶ See Love, *supra* note 41, at 1484–85.

⁴⁷ See MOORE, *supra* note 15, at 7–8.

administrative process and the philosophical underpinnings of clemency support an anti-clemency bias. In particular, this Note focuses on executive clemency powers in Massachusetts, including the power of the Governor to commute sentences.⁴⁸ Because the clemency process in Massachusetts is clearly defined, yet yields a negligible number of grants, Massachusetts serves as a useful context for exploring clemency's nationwide failure.⁴⁹ Finally, this Note will explore how to reactivate the clemency power, and how to balance the discretionary nature of clemency with guidelines to ensure that the power is neither hampered nor abused, in order to best enhance justice in individual cases and system-wide.

Part I provides a brief history of clemency in the United States, describes its current state of atrophy, and argues for its renewal. Part II examines the structure of the executive clemency process in Massachusetts, compares that structure with its counterparts in other U.S. jurisdictions, and identifies institutional disincentives for granting clemency in Massachusetts. Part III looks beyond the formal process to the underlying philosophical justifications for the clemency power and surveys academic scholarship in this area. Part IV traces recent changes in the Massachusetts Executive Clemency Guidelines as they relate to those justifications. Lastly, Part V synthesizes the central lessons from the foregoing study, and proposes modifications to the administration of executive clemency in Massachusetts and other jurisdictions in order to increase the exercise of the pardon power while maintaining accountability.

I. CLEMENCY IN THE UNITED STATES: OVERVIEW, HISTORY, DECLINE

A. *Background: History and Decline*

Oh, mercy mercy me
*Oh, things ain't what they used to be*⁵⁰

The power of the executive to grant clemency for criminal offenses has been an indispensable element of federal and state systems of jus-

⁴⁸ This Note will not specifically treat the subject of clemency in the context of capital punishment or commuting death sentences, so as to avoid the unique moral questions regarding the death penalty that have the potential to cloud a more general analysis.

⁴⁹ See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION 105 tbl.3 (2006).

⁵⁰ MARVIN GAYE, *Mercy Mercy Me (The Ecology)*, on WHAT'S GOING ON (Motown Records 1971).

tice since the early days of the republic.⁵¹ Indeed, the founders of the nation considered this executive function so important that they enumerated it in the Constitution among the first of the president's powers, alongside his role as Commander in Chief.⁵² The states followed suit; nearly every state constitution contains a provision granting the governor the power to issue pardons.⁵³

Although the power to grant clemency has a central, centuries-old place in the constitutional schema, that power has fallen into disuse in recent history.⁵⁴ Clemency's moon waxed and waned with the legal and political tides of the last two centuries.⁵⁵ In the nineteenth century, because the American criminal justice system remained fairly primitive, the need for clemency was acute.⁵⁶ Innovations such as parole and probation, which temper a criminal sentence, had not yet been established in most jurisdictions.⁵⁷ The vast majority of today's constitutional criminal procedure safeguards did not exist, and mitigating defenses, such as those based on mental illness, were not well developed.⁵⁸ Further, no social safety net of federal benefits programs existed, so the consequences were dire for a family with a wage-earner in prison.⁵⁹ As a result, the pardon power was exercised regularly, as a matter of course.⁶⁰ Between 1860 and 1900, for example, approximately half of all presidential pardon requests were granted.⁶¹

However, the twentieth century brought changes in legal standards, as well as a new approach to criminal justice grounded in the nascent behavioral sciences.⁶² The dawn of psychiatry offered new justi-

⁵¹ See U.S. CONST. art. II, § 2, cl. 1; LOVE, *supra* note 49, at 18. Indeed, the constitutional power was put to the test almost immediately after the Constitution was ratified when President George Washington pardoned the protagonists of the Whiskey Rebellion. MOORE, *supra* note 15, at 27.

⁵² See U.S. CONST. art. II, § 2, cl. 1.

⁵³ LOVE, *supra* note 49, at 18; see, e.g., MASS. CONST. pt. 2, ch. II, § I, art. VIII. The President has authority to grant clemency for "offenses against the United States." U.S. CONST. art. II, § 2, cl. 1. Governors have power to grant clemency in cases involving violations of state criminal law. U.S. Dep't of Justice, Office of the Pardon Attorney, Information and Instructions on Pardons, http://www.usdoj.gov/pardon/pardon_instructions.htm (last visited Apr. 12, 2007).

⁵⁴ KENNEDY COMM'N REPORTS, *supra* note 29, at 68–69; LOVE, *supra* note 41, at 1483.

⁵⁵ See generally MOORE, *supra* note 15, at 46–86.

⁵⁶ See *id.* at 53.

⁵⁷ *Id.*

⁵⁸ See *id.*

⁵⁹ *Id.*

⁶⁰ See MOORE, *supra* note 15, at 53.

⁶¹ *Id.*

⁶² See *id.* at 53, 56.

fication for criminal justice policy—the promise of treating and curing criminal behavior.⁶³ Instead of merely punishing offenders, the system aimed to turn them into law-abiding citizens.⁶⁴

As a result, rehabilitation became a dominant goal in the dispensation of criminal justice in the United States.⁶⁵ Policymakers, now thinking in terms of reform, devised new sentencing schemes to match this purpose; instead of a fixed term, a criminal offender might be sentenced to an indeterminate length of time in prison.⁶⁶ The sentence would be satisfied only when the convicted person demonstrated that he was fully reformed.⁶⁷

In this schema, clemency became an atavistic concept.⁶⁸ Presumably, “[s]ince sentences would be fitted to the rehabilitative needs of each individual, there would no longer be a need for the institution of pardon.”⁶⁹ In theory, sentences would be so individually tailored that pardoning an offender before his therapeutic punishment was completed could only poorly serve the offender and society.⁷⁰ If any further fine-tuning was necessary, parole provided a new, discretionary post-conviction option for individualizing the administration of justice.⁷¹

Despite its seeming promise, rehabilitation came under attack from both ends of the political spectrum in the early 1970s.⁷² Conservatives decried its perceived potential for excessive leniency.⁷³ Liberals, on the other hand, found that rehabilitation lost its shine when offenders ended up serving longer sentences because they were not deemed satisfactorily reformed.⁷⁴ Moreover, because rehabilitation was built on individuation of punishment-treatment, inequities abounded.⁷⁵ This, in turn, gave rise to the concern that cultural bias regarding race and class might influence the duration of a person’s incarceration and be toler-

⁶³ See *id.* at 57–58.

⁶⁴ *Id.* at 57, 59.

⁶⁵ See MOORE, *supra* note 15, at 55–60.

⁶⁶ *Id.* at 59.

⁶⁷ *Id.*

⁶⁸ See *id.* at 61.

⁶⁹ *Id.* at 55.

⁷⁰ See MOORE, *supra* note 15, at 61.

⁷¹ *Id.* It is critical to note that parole is not a form of clemency. *Id.* at 6. Rather, parole is a manifestation of punishment. *Id.* It is a judicially administered mechanism used to regulate a criminal offender’s liberty. *Id.*

⁷² Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, in 3 CRIMINAL JUSTICE: POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 109, 122 (Julie Horney ed., 2000).

⁷³ *Id.*

⁷⁴ See MOORE, *supra* note 15, at 70; Cullen & Gendreau, *supra* note 72, at 122.

⁷⁵ Cullen & Gendreau, *supra* note 72, at 122.

ated in the name of science.⁷⁶ Finally, empirical data did not appear to support the rehabilitation model.⁷⁷ Assessment of results from hundreds of studies showed that rehabilitation efforts as a whole had no appreciable effect on recidivism.⁷⁸

The 1970s brought about a reevaluation and a systemic about-face.⁷⁹ Policymakers responded to an increase in drug-related crime with a renewed emphasis on retributivism.⁸⁰ Instead of rehabilitation, the principal aim of criminal justice policy became making sure that offenders were punished according to well-defined standards and got their just deserts.⁸¹ Over the last few decades, political rhetoric has emphasized getting tough on crime.⁸² In policy terms, this has translated into aggressive policing and prosecuting, strict determinate sentencing, mandatory minimum sentences, and “three strikes” rules.⁸³

Tough-on-crime politics have had an effect on clemency as well as on legislation and sentencing.⁸⁴ Executives fear the “soft-on-crime” label that might come with letting offenders out of prison before their sentence is complete.⁸⁵ Consequently, the use of the pardon power has

⁷⁶ *Id.*

⁷⁷ MOORE, *supra* note 15, at 67.

⁷⁸ *Id.* In fact, the data may have been considerably less conclusive than it was originally made out to be. Cullen & Gendreau, *supra* note 72, at 128–29. Studies of particular programs showed positive results, but those results were obscured by broad-brush surveys of the available literature. *Id.* More recent scholarship suggests that certain rehabilitation efforts did work, and distinctions can be drawn between successful and failed efforts, particularly with regard to the setting in which treatment is delivered, the type of offender receiving the treatment, and the integrity of the therapeutic treatment. *Id.* at 138.

⁷⁹ MOORE, *supra* note 15, at 66.

⁸⁰ See KENNEDY COMM’N REPORTS, *supra* note 29, at 68.

⁸¹ MOORE, *supra* note 15, at 74–75.

⁸² See KENNEDY COMM’N REPORTS, *supra* note 29, at 68. Since the 1970s, “tough-on-crime” jargon has become nearly universal in American political parlance. *See id.* However, it is instructive to note that being tough on crime is not a universal international value. *See* WHITMAN, *supra* note 26, at 76. Professor James Q. Whitman describes a recent episode in French politics where an exposé of harsh prison conditions led to a contest among politicians to demonstrate “who had the deeper commitment to making punishment more *humane*” and cared more about “the rights and dignity of convicts.” *Id.*

⁸³ See KENNEDY COMM’N REPORTS, *supra* note 29, at 57–58; WHITMAN, *supra* note 26, at 49, 56–57; Love, *supra* note 41, at 1495.

⁸⁴ See KENNEDY COMM’N REPORTS, *supra* note 29, at 69; Love, *supra* note 41, at 1496–97.

⁸⁵ See KENNEDY COMM’N REPORTS, *supra* note 29, at 69. There is perhaps no more fear-some cautionary tale than that of Governor Michael Dukakis and Willie Horton, particularly in Massachusetts politics. *See id.* When Governor Dukakis ran for president in 1988, he was skewered with the soft-on-crime label because Willie Horton, a convicted murderer in Massachusetts, was let out of prison in 1986 and subsequently committed another brutal murder. *Id.* Ironically, Horton was not the beneficiary of clemency, but rather was out of prison as part of a weekend furlough program over which Governor Dukakis exercised no direct control. *Id.*

steadily declined in the last few decades in jurisdictions nationwide.⁸⁶ Today, the pardon power is exercised extremely rarely.⁸⁷ Even when clemency is granted, it tends to take the form of a pardon granted after a punishment is fully served—granted either for symbolic value or to restore civil rights—and fails to confer a remission of punishment.⁸⁸

The pardon power's infrequent application has tarnished its reputation.⁸⁹ Grants of clemency have dwindled to such an extent that the practice is no longer perceived as a routine part of the criminal justice system.⁹⁰ Instead, clemency's rarity makes it appear to be an aberrant, and possibly outmoded, practice.⁹¹

B. *The Contemporary Need for Clemency*

Despite its decline in practice, the need for clemency remains acute.⁹² In fact, the very factors that have led to clemency's decline necessitate its revival.⁹³ The tough-on-crime movement has been tough on

⁸⁶ See *id.* at 70.

⁸⁷ See *id.* at 70–71. On the federal level, for example, the number of pardons granted from 1980 to 1992 plummeted more than seventy-five percent from each of the preceding twelve-year periods, from more than 2000 to fewer than 500. *Id.* at 70. President George W. Bush has continued this downward trend. *Id.*

⁸⁸ See Kobil, *supra* note 45, at 602. Historically, erasing the collateral consequences of conviction has been an essential task of the clemency power. See Love, *supra* note 41, at 1491. Nonetheless, to reduce clemency to this exclusive purpose is to disregard clemency's multi-faceted utility and to incautiously dispose of commutation in a wholesale manner. See *id.* at 1490.

⁸⁹ Love, *supra* note 41, at 1484.

⁹⁰ See *id.*; KENNEDY COMM'N REPORTS, *supra* note 29, at 71. Fewer pardons also mean greater public scrutiny. Love, *supra* note 41, at 1484. Since Watergate, the body politic has become more suspicious of government in general, and discretionary powers are particularly suspect. See Cullen & Gendreau, *supra* note 72, at 122. President Gerald Ford's highly controversial preemptive pardon of Richard Nixon contributed to a sharp mistrust of the clemency power and a perception that pardons are frequently politically motivated. See MOORE, *supra* note 15, at 7; Jason B. Grosky, *Critics: Pardons Are Too Political*, EAGLE-TRIB. (Lawrence, Mass.), Oct. 13, 2002 (online version on file with the Boston College Third World Law Journal).

Other high profile pardons continue to fuel that perception. Consider, for example, President Clinton's pardons of a group of Puerto Rican nationalists in his final days in office, which was believed to be an attempt to win support from Latino voters in advance of Hillary Clinton's New York Senate race. Love, *supra* note 41, at 1484. Or, for an example of a Massachusetts pardon appearing to be politically-motivated, one can turn to the 1993 pardon by then Governor William Weld of Anthony Galluccio, an ambitious Cambridge City Councilor, for prior drunk driving and petty theft convictions. Michael Jonas, *On Galluccio, Shadow of a Doubt*, BOSTON GLOBE, Apr. 2, 2006, at 6.

⁹¹ Love, *supra* note 41, at 1483.

⁹² KENNEDY COMM'N REPORTS, *supra* note 29, at 71.

⁹³ See Kobil, *supra* note 45, at 574.

American society.⁹⁴ With two million people in jail, the United States has by far the highest incarceration rate of any Westernized democracy, and incarceration incurs heavy costs, both financial and social.⁹⁵ The contemporary insistence on combining harsh punishment and little mercy is not sustainable.⁹⁶ Moreover, this formula for justice fails to reflect the concerns that originally enshrined the clemency power in the federal and state constitutions.⁹⁷ Today, scholars with widely divergent views about criminal justice policy share a common belief that the pardon power should be exercised more actively.⁹⁸

In a dramatic address at the American Bar Association's (ABA) annual meeting in San Francisco on August 9, 2003, Supreme Court Justice Anthony Kennedy challenged the assembled lawyers to look critically at the criminal justice system.⁹⁹ He raised fundamental concerns about the fairness and success of the system, and called particular attention to the issue of clemency, decrying the fact that "the pardon process . . . seems to have been drained of its moral force."¹⁰⁰ He took the opportunity to advocate the vital importance of clemency in contemporary American criminal law.¹⁰¹ According to the ABA Commission established to study Justice Kennedy's concerns, "[t]oday, in many determinate sentencing jurisdictions the pardon process is the only way that prisoners can have their claims of exigency considered. In such jurisdictions, pardon is necessary to the just and efficient functioning of the criminal justice system."¹⁰²

Despite Justice Kennedy's adjuration, grants of clemency remain strikingly rare.¹⁰³ In order to gain insight into the situation, it is critical to first look at the relationship between the rate of clemency and the process by which the clemency power is administered.¹⁰⁴

⁹⁴ See Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1530 (2000).

⁹⁵ See WHITMAN, *supra* note 26, at 3; Rapaport, *supra* note 94, at 1530.

⁹⁶ See Rapaport, *supra* note 94, at 1530.

⁹⁷ See U.S. CONST. art. II, § 2, cl. 1; MASS. CONST. pt. 2, ch. II, § I, art. VIII.

⁹⁸ See Kobil, *supra* note 45, at 611; Love, *supra* note 41, at 1512.

⁹⁹ See Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² KENNEDY COMM'N REPORTS, *supra* note 29, at 72.

¹⁰³ *Id.* at 71.

¹⁰⁴ See *id.* at 74.

II. EXECUTIVE CLEMENCY AND ADMINISTRATIVE STRUCTURE

A. *The Relationship Between Structure and Grant Activity*

Clemency is universally an executive power, but it is administered differently by jurisdiction.¹⁰⁵ In some states, the governor alone decides whether to pardon a petitioner.¹⁰⁶ In others, the governor is aided by an independent board of appointed officials.¹⁰⁷ In some cases, the governor merely consults the board, and in others the governor's power is wholly dependent on the board's consensus.¹⁰⁸

Several scholars in the past twenty years have conducted surveys of clemency procedure by jurisdiction in an attempt to catalogue and compare the various systems.¹⁰⁹ The most recent, compiled by Margaret Colgate Love, contains both information about each jurisdiction's procedure as well as its recent pardon activity.¹¹⁰ According to Love's findings, few jurisdictions have a thriving pardon power.¹¹¹ In fact, most states have not granted more than a token number of pardons each year since 1995.¹¹² Only nine states issue a "substantial number of pardons" each year and grant a substantial percentage of the applications

¹⁰⁵ *Id.* at 70.

¹⁰⁶ *Id.*

¹⁰⁷ KENNEDY COMM'N REPORTS, *supra* note 29, at 70.

¹⁰⁸ *See id.*

¹⁰⁹ *See generally* Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413 (1999); NAT'L GOVERNORS' ASS'N CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988).

¹¹⁰ LOVE, *supra* note 49, at 18. Though Love's primary focus is on the effect that pardon can have in relieving the collateral consequences of criminal conviction, her work is a valuable mine of information about comparative pardon procedure more generally. *See id.* at ix, 20–21.

¹¹¹ *Id.* at 18. The Kennedy Commission Report similarly concluded: "preliminary research indicates that even in those jurisdictions where the pardon process appears on the surface to be working efficiently, it rarely produces any grants." KENNEDY COMM'N REPORTS, *supra* note 29, at 72.

¹¹² LOVE, *supra* note 49, at 21. The federal clemency system is as withered as any of the state systems. *See* KENNEDY COMM'N REPORTS, *supra* note 29, at 72 n.17. It provides one of the starkest examples of the failure of the clemency process to yield results. *See id.* The Justice Department has twelve officials staffing its pardon office. *Id.* During the first three years of George W. Bush's presidency, he granted a grand total of eleven pardons—not quite one pardon apiece for each of the staff. *Id.* During the same time period, he did not grant a single commutation. *Id.* Meanwhile, he denied 580 pardon appeals and 2400 petitions for commutation. *Id.*

filed.¹¹³ Other than in these states, she concludes, pardon does not seem to be “reasonably attainable.”¹¹⁴

According to Love, the states with the most active pardon power share certain characteristics of administration.¹¹⁵ The most robust exercise of the pardon power tends to occur where it is more regulated and somewhat insulated from politics.¹¹⁶ In each of the most active states, the process is regulated by law and is reasonably transparent.¹¹⁷ All but two of the nine have a public application process and hold hearings at regular intervals.¹¹⁸ In most of these states, the recommending board or the grantor is required to publish the reasons for its recommendation.¹¹⁹ Additionally, in the most active states, the pardoning authority has a degree of protection from the political process, either because the pardon power is placed in an independent board or because the governor’s power cannot be exercised without a favorable board recommendation.¹²⁰

B. *Massachusetts Administrative Structure and Grant Activity: A Closer Look*

In light of Love’s findings, one would expect the clemency power in Massachusetts to result in a relatively large number of grants.¹²¹ The Commonwealth has a clear, well-regulated administrative process, and the Governor shares responsibility for making clemency decisions with an independent board.¹²² However, an analysis of the Massachusetts process proves that while the existence of these characteristics may correlate to more frequent exercise of executive clemency, they do not ensure it.¹²³ In the past ten years, only 27 pardons have been granted, though about 100 petitions are filed annually.¹²⁴ Even more

¹¹³ LOVE, *supra* note 49, at 21. These states are Alabama, Arkansas, Connecticut, Delaware, Georgia, Nebraska, Oklahoma, Pennsylvania, and South Carolina. *Id.* In the sample years, most of these states granted over 100 pardons and more than fifty percent of all applications. *Id.* at 108 tbl.4.

¹¹⁴ *Id.* at 21.

¹¹⁵ *See id.* at 20–21.

¹¹⁶ *Id.* at 21.

¹¹⁷ *Id.*

¹¹⁸ LOVE, *supra* note 49, at 21.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* at 21, 105 tbl.3.

¹²² *Id.* at 105 tbl.3.

¹²³ *See* LOVE, *supra* note 49, at 105 tbl.3.

¹²⁴ *Id.*

striking, Governor Romney did not grant a single pardon or commutation during his entire four years in office.¹²⁵

Given the infrequent grants of clemency in Massachusetts compared to what Love's study would suggest, it is useful to look in detail at the procedure that governs executive clemency in Massachusetts to determine whether the process itself poses structural barriers to grants of clemency.

1. Massachusetts Clemency Administration in Detail

The Massachusetts Constitution vests the pardon power in the Governor and the Governor's Council.¹²⁶ The Governor's Council ("the Council"), also called the Executive Council, is an eight-member elected body with the lieutenant governor serving *ex-officio*.¹²⁷ Before a pardon application reaches the Council and the Governor's desk, an administrative body, the Advisory Board of Pardons ("the Board"), conducts an initial review based on guidelines established by the Governor.¹²⁸ The Board's seven members are full-time, salaried employees, appointed by the Governor to five-year terms.¹²⁹

When the Board receives a pardon application from a prisoner, it must give notice to specified officials within the justice system to afford

¹²⁵ Margaret Colgate Love's survey, conducted in 2005, found that Governor Romney did not use his clemency powers during his first three years in office. LOVE, *supra* note 49, at 105 tbl.3. That Governor Romney granted no pardons or commutations between then and the end of his term in office is evidenced by the fact that he submitted no pardon report to the legislature, and no act of clemency by Governor Romney was ever reported in the Boston Globe, Massachusetts's newspaper of record. Yet Governor Romney's preference not to exercise his clemency powers is no secret. In a recent interview, Governor Romney proudly stated: "People ask me to commute sentences or to pardon criminals. I haven't done that. I get a lot of recommendations, I haven't pardoned a one." *Keller @ Large: Romney Discusses Laguer Case* (WBZTV radio broadcast Oct. 22, 2006).

¹²⁶ MASS. CONST. pt. 2, ch. II, § I, art. VIII. "The power of pardoning offences, except . . . impeachment . . . , shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted . . ." *Id.*

¹²⁷ Mass.Gov, Governor's Council, <http://www.mass.gov> (follow "State Government" hyperlink; then follow "Governor's Council" hyperlink) (last visited Apr. 12, 2007) [hereinafter Governor's Council].

¹²⁸ MASS. GEN. LAWS ch. 127, § 154 (2006); see Executive Clemency Guidelines Issued by Governor Mitt Romney, Commonwealth of Mass. Executive Dep't (Apr. 22, 2003) (on file with the Boston College Third World Law Journal) [hereinafter Romney Guidelines]. This Advisory Board is actually the state Parole Board wearing a different hat. MASS. GEN. LAWS ch. 127, § 154. When petitioners apply for clemency, the Parole Board sits as the Advisory Board of Pardons. *Id.*

¹²⁹ MASS. GEN. LAWS ch. 27, § 4.

them the opportunity to comment on the petition.¹³⁰ If the application is in compliance with minimal statutory and administrative requirements, the Board conducts a preliminary investigation and prepares a case summary regarding the petitioner's criminal, social, and institutional histories, as well as any other factors relevant to the issue of pardon.¹³¹

Having conducted a preliminary investigation, the Board may submit a recommendation to the Governor and the Council, together with any comments received, or it may hold a public hearing on the merits of the petition if it determines that a hearing is necessary to be able to give the petition adequate consideration.¹³² For a pardon petition, a hearing is required if the Board determines that a petition is eligible for further review; for commutation, a hearing is optional.¹³³ When the Board issues its recommendations, it must submit specific reasons for them.¹³⁴

If the Board favorably recommends that the Governor grant a pardon, he or she may only do so with the advice and consent of the Council.¹³⁵ If the petitioner was convicted of a felony, further procedure exists; the Council must hold a public hearing of its own.¹³⁶ The Council must have a quorum to vote, its vote must be a recorded roll

¹³⁰ *Id.* ch. 127, § 154. The statutorily named officials include the attorney general, the chief of police of the municipality in which the crime was committed, the district attorney or justice of the district court, and the commissioner of correction if the prisoner is incarcerated in a Massachusetts correctional institution. *Id.*

¹³¹ 120 MASS. CODE REGS. 902.04 (2006); *see also id.* 901.04 (setting forth the same process for commutation petitions). The process for pardon and commutation is substantially the same. *See id.* 901.04; 902.04. Consistent with the use of "pardon" within the Massachusetts statutory schema, I have chosen to use the generic "pardon" to describe executive clemency generally. MASS. GEN. LAWS ch. 127, § 152. However, I will note any significant procedural distinctions in the text.

It is important to note that the clemency process does not function as an appraisal of the original adjudication. *See id.* at § 154. To the contrary, the Board is prohibited from ever reviewing the proceedings of the trial court or considering any questions about their propriety. *Id.*

¹³² MASS. GEN. LAWS ch. 127, § 154. Both the petitioner's application and the Board's written recommendation are public records. *Id.* at §§ 152, 154. However, if the facts stated in the report would cause undue hardship or injury to the petitioner or other individuals, they may be submitted separately from the recommendation itself, and may be maintained confidential. *Id.* at § 154.

¹³³ 120 MASS. CODE REGS. 901.05, 902.06.

¹³⁴ *Id.* at 901.11, 902.10.

¹³⁵ MASS. GEN. LAWS ch. 127, § 152.

¹³⁶ *Id.*

call, and the vote of a majority of the members present is required for the approval or disapproval of the petition.¹³⁷

Without the consent of the Council, the Governor may not pardon a single prisoner.¹³⁸ On the other hand, if the Council recommends that the petitioner be granted a pardon, the Governor has complete discretion regarding whether to approve or disapprove the petition, or whether to consider the petition at all.¹³⁹ If, within a year, he or she takes no action on a favorable recommendation of the Board, that recommendation is considered to have been denied and the petitioner must reapply.¹⁴⁰

Whether the Governor grants, affirmatively denies, or simply ignores a pardon petition, he or she is not required to provide an explanation.¹⁴¹ In fact, the Governor's only reporting requirement regarding his or her pardon decisions is that he or she must annually communicate to the state legislature a list of pardons granted and the action of the Board on those pardons.¹⁴² In other words, the Governor is not required to give reasons for his or her conclusion in any given case.¹⁴³

2. Structural Explanations for Grant Inactivity

The very structure of the Massachusetts clemency process contains elements of discretion, bureaucracy, and a lack of accountability that set the stage for a low number of grants.¹⁴⁴ Analyzing the administration of clemency in Massachusetts helps explain the recent inactivity, and may yield lessons for other jurisdictions as well.¹⁴⁵

Massachusetts may be described as having an independent advisory board, because the Board is appointed, not elected.¹⁴⁶ However, that does not mean that the clemency process is necessarily insulated from politics.¹⁴⁷ First of all, the Governor appoints the Board members and chairperson to salaried jobs.¹⁴⁸ Therefore, the Board members have an incentive to make decisions that are consistent with the Gover-

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See* 120 MASS. CODE REGS. 902.12(2).

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² MASS. GEN. LAWS ch. 127, § 152.

¹⁴³ *See* 120 MASS. CODE REGS. 902.12(2).

¹⁴⁴ *See* MASS. GEN. LAWS ch. 27, § 4; *id.* ch. 127, §§ 152, 154.

¹⁴⁵ *See* LOVE, *supra* note 49, at 20–21, 105 tbl.3.

¹⁴⁶ *See* MASS. GEN. LAWS ch. 27, § 4; *id.* ch. 127, § 154.

¹⁴⁷ *See* Grosky, *supra* note 90.

¹⁴⁸ MASS. GEN. LAWS ch. 27, § 4.

nor's politics.¹⁴⁹ If the Governor's preference is to consider few pardon candidates, board members have a vested interest in playing a strict gatekeeper role, so that they might be reappointed if the Governor is reelected.¹⁵⁰ The Governor will rarely, if ever, consider pardon applications that have not been recommended positively by the Board, so a negative recommendation functionally denies a petition.¹⁵¹ In fact, the Board is the end of the line for most pardon petitions.¹⁵² Of about 100 applications filed each year, most are recommended negatively.¹⁵³

The Council—which receives petitions after the Board—is also vulnerable to political pressure, because it is elected, not appointed.¹⁵⁴ Between the Council and the Governor, nine elected officials are ultimately responsible for making clemency decisions.¹⁵⁵ That means nine individuals who are accountable to voters.¹⁵⁶ In a political climate in which society rewards being tough on crime, this bevy of politicians has a strong incentive to deny clemency.¹⁵⁷

Apart from political pressures on the clemency process, the process may be hampered by its complicated structure with multiple participants and levels of review.¹⁵⁸ Love's study suggests that a governor's clemency decision-making will be aided by an independent review board that can devote its full attention to the clemency process.¹⁵⁹ However, the Massachusetts system incorporates two multi-member panels, and some clemency petitions require multiple proceedings.¹⁶⁰ Moreover, between the Board, the Council, and the Governor himself, there

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* According to a Boston Bar Association Task Force report, some members continue to sit and vote on parole and clemency petitions even after their terms have ended as a matter of law. BOSTON BAR ASS'N, TASK FORCE ON PAROLE AND CMTY. REINTEGRATION, PAROLE PRACTICES IN MASSACHUSETTS AND THEIR EFFECT ON COMMUNITY REINTEGRATION 35–36 (Aug. 2002), available at <http://www.bostonbar.org/prs/reports/final-report081402.pdf> [hereinafter PAROLE PRACTICES IN MASSACHUSETTS]. When this happens, they stay on at the governor's sufferance unless and until they are reappointed, and such members are perceived as being beholden to the governor. *Id.* at 36.

¹⁵¹ See Romney Guidelines, *supra* note 128, at 8.

¹⁵² See LOVE, *supra* note 49, at 105 tbl.3.

¹⁵³ *Id.*

¹⁵⁴ See MASS. CONST. pt. 2, ch. VI, § I, art. XI, amend. 16.

¹⁵⁵ See *id.* pt. 2, ch. II, § I, art. VIII; Governor's Council, *supra* note 127.

¹⁵⁶ See MASS. CONST. pt. 2, ch. II, § I, art. VIII; *id.* pt. 2, ch. VI, § I, art. XI, amend. 16; Governor's Council, *supra* note 127.

¹⁵⁷ See KENNEDY COMM'N REPORTS, *supra* note 29, at 69; Love, *supra* note 41, at 1496–97.

¹⁵⁸ See LOVE, *supra* note 49, at 105 tbl.3.

¹⁵⁹ See *id.* at x–xi.

¹⁶⁰ See MASS. CONST. pt. 2, ch. II, § I, art. VIII; MASS. GEN. LAWS ch. 127, §§ 152, 154.

are three opportunities for a petition to be denied.¹⁶¹ As a statistical matter, the more entities that need to align to grant clemency, the greater the probability that such an alignment will not occur.¹⁶² Practically speaking, the process may be too bureaucratic to yield many positive grants.¹⁶³

Another administrative factor impacting the health of the executive clemency power is the fact that the Governor is not required to give reasons for his actions.¹⁶⁴ Though the Board pens a report on each case, the Governor does not.¹⁶⁵ It may be assumed that when the Governor acts in accordance with the Board's recommendation, his reasoning follows the reasoning in the Board's report.¹⁶⁶ However, when the Governor acts at variance with the Board, as in the case of Arnie King, his reasoning remains unknown.¹⁶⁷

Moreover, the requirement that the Governor convey selective information to the legislature—about pardons granted, but not pardons denied—exacerbates the bias toward denying clemency.¹⁶⁸ The statutory scheme does not require the Governor to report denied clemency petitions to any entity.¹⁶⁹ The fact that the Governor can avoid scrutiny for virtually all denials, but cannot likewise escape scrutiny for grants of clemency, may itself facilitate denials.¹⁷⁰ Plainly put, it is politically safe for a governor to deny or simply ignore the Board's positive recommendations.¹⁷¹ If the Governor fails to act on a favorable recommendation from the Board, and there is no media attention on the case, it is

¹⁶¹ MASS. CONST. pt. 2, ch. II, § I, art. VIII; MASS. GEN. LAWS ch. 127, § 154.

¹⁶² See LOVE, *supra* note 49, at 105 tbl.3.

¹⁶³ See LOVE, *supra* note 41, at 1502–03; Rapaport, *supra* note 94, at 1533.

¹⁶⁴ See MASS. GEN. LAWS ch. 127, § 152; Kobil, *supra* note 45, at 637.

¹⁶⁵ See MASS. GEN. LAWS ch. 127, §§ 152, 154.

¹⁶⁶ See Romney Guidelines, *supra* note 128, at 2.

¹⁶⁷ See *id.* The governor's reasoning may reflect the Board's reasons, but without an independent explanation by the governor observers must resort to speculation. See *id.* at 8–9. Researchers at SUNY Albany recently began to archive clemency petitions from death row inmates around the country. Very little is known about what makes a petition successful. By analyzing hundreds of petitions and making them available to the public, the researchers hope to begin to figure out what “works.” See *Archive Collects Pleas from Death Row*, CNN.COM, March 1, 2006, <http://www.democracyinaction.org/dia/organizations/ncadp/news.jsp?key=2311&t=>.

¹⁶⁸ See MASS. GEN. LAWS ch. 127, § 152.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*; KENNEDY COMM'N REPORTS, *supra* note 29, at 69. There are arguments to be made for and against holding the governor accountable for clemency decisions in general. See LOVE, *supra* note 41, at 1512; Rapaport, *supra* note 94, at 1535. This section merely points out the potential negative impact of an uneven reporting requirement.

¹⁷¹ See MASS. GEN. LAWS ch. 127, § 152; KENNEDY COMM'N REPORTS, *supra* note 29, at 69.

unlikely that the Governor would ever be called to account for his decision.¹⁷²

A final factor that may influence the frequency of clemency grants in Massachusetts is the simple composition of the Board, which does double duty as both the Advisory Board of Pardons and the Parole Board.¹⁷³ A Boston Bar Association (BBA) Task Force on Parole and Community Reintegration, which convened in May of 2000, noted that, at the time, the Board was composed almost exclusively of people with backgrounds in law enforcement and other official criminal justice work.¹⁷⁴ However, the statute that sets out membership criteria for the Board requires that Board members have five years of experience in one of a *variety* of fields, including: parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology, and social work.¹⁷⁵ Though the statute does not affirmatively require diversification, the BBA report contends that “the clear intent of the statute was to include persons from diverse backgrounds as Board members.”¹⁷⁶ The report demonstrates this intent with reference to legislative history, pointing out that changes made to the statutory requirements throughout the twentieth century consistently modified the makeup of the Board, adding language about gender diversity, diversity of political affiliation, and diversity of professional background.¹⁷⁷ In addition, the Board itself adopted guidelines in 1990 that emphasize the need for “different and professional experiences and viewpoints” and “a range of perspectives” in reviewing prisoners’ cases.¹⁷⁸ Nonetheless, the Board continues to be dominated by people with law enforcement or criminal justice backgrounds.¹⁷⁹

The BBA report asserts that a lack of diversity on the Board in recent years statistically correlates to a lack of prisoners released on parole.¹⁸⁰ During the 1970s and 1980s, governors made appointments to the board that reflected the diverse backgrounds described in the stat-

¹⁷² See KENNEDY COMM’N REPORTS, *supra* note 29, at 69. The fact that the recommendations of the Board are not published contributes to the general lack of accountability. See MASS. GEN. LAWS ch. 127, § 154. The recommendations are public documents, but they are available by request rather than published. *See id.*

¹⁷³ See PAROLE PRACTICES IN MASSACHUSETTS, *supra* note 150, at 35.

¹⁷⁴ *Id.* at 27.

¹⁷⁵ See MASS. GEN. LAWS ch. 27, § 4.

¹⁷⁶ PAROLE PRACTICES IN MASSACHUSETTS, *supra* note 150, at 33.

¹⁷⁷ *See id.* at 32–33.

¹⁷⁸ *Id.* at 34.

¹⁷⁹ *See id.* at 27.

¹⁸⁰ *Id.* at 34–35.

ute.¹⁸¹ In 1990, seventy percent of inmates serving non-life sentences were released on parole.¹⁸² Since then, the majority of appointees have come from backgrounds in policing, prosecution, parole and probation.¹⁸³ By 2000, only forty-one percent of inmates were granted parole.¹⁸⁴ The clemency rate declined significantly during the 1990s as well.¹⁸⁵ Because the same board makes decisions about parole and clemency, and grant rates for both declined when the board became more homogeneous, it is reasonable to impute the BBA report's findings regarding parole board diversity and grants to the clemency context as well.¹⁸⁶

In sum, a variety of administrative factors create a structural bias against granting clemency in Massachusetts. These factors include the vulnerability of the Board and the Governor's Council to political pressures; the involvement of multiple levels of bureaucratic decision-makers; the lack of accountability when the Governor's decision is at variance with the Board's recommendation; the uneven reporting requirements regarding grants and denials of clemency; and the Board's lack of diversity. As a result, good reasons exist to modify the executive clemency administrative process in Massachusetts.¹⁸⁷

Still, the structural bias against clemency alone cannot explain the precipitous drop in clemency grants over the last twenty-five years, because the process has remained essentially unchanged throughout this period.¹⁸⁸ The same procedure—flawed though it may be—once yielded greater results.¹⁸⁹ Consequently, it is imperative to seek alternative explanations for the recent decline by turning from procedure to substance. The underlying rationales used to justify the existence of the clemency power have a powerful effect on its exercise and implementation; philosophical attitudes toward clemency color the process from

¹⁸¹ PAROLE PRACTICES IN MASSACHUSETTS, *supra* note 150, at 33.

¹⁸² *Id.* at 35.

¹⁸³ *Id.* at 34. The BBA report also considered the racial and ethnic diversity of the board, as well as its geographical representation. *Id.* More people of color were appointed to the board in the 1970s and 1980s, and more of the board members lived in urban communities to which potential parolees would likely return. *Id.* As of 2002, only one person of color served on the board, and other than one board member who lived in West Roxbury, none of the board members lived in an urban area. *Id.* at 35.

¹⁸⁴ *Id.*

¹⁸⁵ See Grosky, *supra* note 90.

¹⁸⁶ See *id.*; PAROLE PRACTICES IN MASSACHUSETTS, *supra* note 150, at 35.

¹⁸⁷ See *supra* Part I.B.

¹⁸⁸ See MASS. GEN. LAWS ch. 127, §§ 152, 154 (2006).

¹⁸⁹ See Grosky, *supra* note 90.

beginning to end.¹⁹⁰ As a result, any study of declining clemency rates must take into account the philosophical justifications that undergird the clemency power and evaluate whether they offer any insight into the decline.¹⁹¹

III. PHILOSOPHICAL APPROACHES TO CLEMENCY AND WHAT THEY SAY ABOUT ADMINISTRATIVE PROCESS

A. *Philosophical Attitudes Matter*

Philosophers and legal scholars have long argued about what principles should guide criminal punishment and punishment remission, and how those principles ought to play out in practice.¹⁹² Correspondingly, every criminal justice system reflects philosophical undercurrents and attitudes, either explicitly or embedded in its design and implementation.¹⁹³ Considering the philosophical principles at play—and sometimes in conflict—within any clemency process can provide an essential framework for evaluating the process itself.¹⁹⁴ In order to reflect on clemency's sharp decline in Massachusetts, for example, it is necessary to consider competing theoretical justifications for the clemency power and assess how those perspectives are brought to bear in its administration.¹⁹⁵

In early American history, clemency was viewed as a gift that could be bestowed by the executive as a matter of grace.¹⁹⁶ This notion of grace derived from the European tradition of the sovereign ruling by divine right and possessing the capacity for divine benevolence.¹⁹⁷ Clemency was an act of intervention from on high in cases where the law would mete out a harsh punishment but principles of equity demanded a less severe penalty.¹⁹⁸

¹⁹⁰ See *infra* Part III.

¹⁹¹ See *infra* Part III.

¹⁹² See generally MOORE, *supra* note 15.

¹⁹³ See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 101 (7th ed. 2001).

¹⁹⁴ See *infra* Part IV.

¹⁹⁵ See *infra* Part IV. Scholarly or philosophical treatises about clemency frequently use the words “clemency” and “pardon” interchangeably. MOORE, *supra* note 15, at 15. Because various forms of clemency function similarly as instruments of tempering the criminal justice system, and differ only as to degree or procedure, they are typically considered within the same theoretical framework. See *id.*

¹⁹⁶ MOORE, *supra* note 15, at 50.

¹⁹⁷ *Id.* at 51.

¹⁹⁸ See, e.g., Regina v. Dudley and Stephens, 14 Q.B.D. 273, 288 (1884). In this famous case, three men in a boat lost thousands of miles from the Cape of Good Hope murdered

Then, in the early twentieth century, Justice Holmes described the concept of pardon in entirely different terms:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.¹⁹⁹

According to this formulation, clemency exists not merely for the purpose of serving private justice, but also—or perhaps primarily—for the purpose of serving the public good.²⁰⁰

Today, these two different understandings of the clemency power—as a private instrument of grace and as a tool for the benefit of the public welfare—both inform the way that constitutional authority is implemented.²⁰¹ State public policy, as expressed in legislative, executive and judicial writings, often draws upon one or both of these explanations to justify the existence of executive clemency and to guide its exercise.²⁰² In addition, contemporary philosophical approaches to clemency reflect the tension between the two.²⁰³

B. *Contemporary Theories of Clemency: Retributivism and Redemption*

Scholars—both lawyers and philosophers—fiercely debate the theoretical justifications for clemency, and how these theories should best be applied in practice.²⁰⁴ They struggle to reconcile the history of clemency as a monarchic power with our constitutional scheme of checks and balances; to understand what role, if any, the notion of mercy may play in a modern, objective criminal justice system; to accommodate the perceived need for a safety valve on an imperfect, over-taxed criminal justice system; and to balance discretion against the liberal, democratic ideal of equity.²⁰⁵ Because clemency is fundamentally about remission of punishment, theorists tend to articulate their views

and cannibalized their ill companion in order to survive. *Id.* at 273. The law required the court to sentence the defendants to death, but the Queen afterward commuted the sentence to six months of imprisonment. KADISH ET AL., *supra* note 193, at 139 n.2.

¹⁹⁹ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927); MOORE, *supra* note 15, at 64.

²⁰⁰ *See* MOORE, *supra* note 15, at 65.

²⁰¹ *See* Romney Guidelines, *supra* note 128, at 1, 6.

²⁰² *See id.*

²⁰³ *See* MOORE, *supra* note 15, at 65.

²⁰⁴ *See generally* Kobil, *supra* note 45; Rapaport, *supra* note 94.

²⁰⁵ *See generally* Kobil, *supra* note 45; Rapaport, *supra* note 94.

of the proper exercise of the clemency power in terms of the theory of punishment to which they subscribe.²⁰⁶

1. Retributivism: Justice, Equity, Process, and Standards

Retributivist theorists argue that executive clemency must be made to operate in accordance with retributivist principles of punishment—that is, based on each offender getting his or her just deserts.²⁰⁷ According to this model, clemency is only justified as an extrajudicial corrective, compensating for any failure of the system that might be occasioned by the necessarily broad brush strokes of legislation.²⁰⁸ Retributivists view the history of executive clemency as marred by haphazard, arbitrary, or abusive discretion.²⁰⁹ In contrast, they believe the remission of punishment must be administered in a principled, consistent fashion.²¹⁰ Strict adherence to this philosophy leaves no room for an executive to make discretionary clemency decisions based on utilitarian concerns about the public welfare or pangs of compassion.²¹¹

Professor Kobil contributes to the retributivist critique of clemency by distinguishing between “justice-enhancing” and “justice-neutral” clemency decisions.²¹² He calls grants of clemency justice-enhancing when they serve the goal of fairness under the law, such that each person receives the punishment he or she deserves.²¹³ Notwithstanding the difficulty of objectively establishing the particular punishment deserved by each offender for each offense, our system of criminal justice aspires to such an ideal.²¹⁴ Within this schema, justice-enhancing clemency is a magnificent retributivist tool—an “ideal vehicle for remedying many of the problems inherent in an imperfect, overloaded, and increasingly rigid system of criminal justice.”²¹⁵

On the other hand, justice-neutral clemency is not retributivist, but utilitarian.²¹⁶ It aims to further goals unrelated to a strict notion of jus-

²⁰⁶ See generally Kobil, *supra* note 45; Rapaport, *supra* note 94.

²⁰⁷ See MOORE, *supra* note 15, at 89; Kobil, *supra* note 45, at 579.

²⁰⁸ See Kobil, *supra* note 45, at 592, 638.

²⁰⁹ See *id.* at 572–73.

²¹⁰ *Id.* at 575.

²¹¹ See *id.*; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1431 (2004).

²¹² Kobil, *supra* note 45, at 579.

²¹³ *Id.*

²¹⁴ *Id.* at 580.

²¹⁵ *Id.* at 613.

²¹⁶ See *id.* at 582–83, 592.

tice in relation to the specific offense.²¹⁷ Kobil does not disavow the use of justice-neutral clemency entirely.²¹⁸ Utilitarian concerns, such as specific or general deterrence, may play a role in assigning or remitting punishment once a determination has been made as to just deserts.²¹⁹

However, these two distinct categories of clemency should be administered separately according to separate principles.²²⁰ According to retributivists, justice-enhancing clemency should be governed by consistent standards of punishment and administered according to a formal procedure.²²¹ When the purpose of clemency is for justice to be served, the decision-making must be accountable to principles of due process rather than tainted by the political, discretionary concerns that inform utilitarian, justice-neutral clemency decisions.²²² For justice-neutral decisions about remission of punishment, it may suffice for an executive to administer clemency on an ad hoc basis.²²³ However, retributivists decry that executives usually fail to distinguish between the two types of clemency and approach all clemency decisions with discretion.²²⁴ As a result, clemency decision-making is erratic, constrained only by the executives' personal prejudices as to the meaning of fairness.²²⁵

To avoid the unprincipled decision-making that retributivists condemn, the clemency power should be delegated by the executive to a professional, independent commission.²²⁶ The commission's members—like the federal judiciary and in contrast to the Massachusetts Advisory Board—would be appointed by the executive with the advice and consent of the legislature and would serve without term limits during good behavior.²²⁷ In many respects, this new brand of clemency resem-

²¹⁷ See Kobil, *supra* note 45, at 581. For example, Alexander Hamilton envisioned the pardon power being used as a means to “restore the tranquility of the commonwealth” in the wake of national conflict, by formally absolving those who had transgressed against the State. THE FEDERALIST NO. 74, at 417 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The Civil War presents multiple instances of pardon being used in this manner. See MOORE, *supra* note 15, at 51. During the war, President Lincoln pardoned deserters on condition that they return and fight for the Union. *Id.* Afterward, Presidents Johnson and Grant pardoned Confederate leaders in an effort to demonstrate publicly the resolution of the conflict. *Id.*

²¹⁸ Kobil, *supra* note 45, at 580–81.

²¹⁹ *Id.*

²²⁰ *Id.* at 622.

²²¹ *Id.* at 575.

²²² *Id.* at 633–34.

²²³ Kobil, *supra* note 45, at 604.

²²⁴ *Id.* at 602, 604.

²²⁵ *Id.*

²²⁶ *Id.* at 623–24.

²²⁷ See MASS. GEN. LAWS ch.27, § 4; Kobil, *supra* note 45, at 623.

bles an additional layer of appellate review, but Professor Kobil contends that it will yield a finer quality of justice than criminal adjudications themselves.²²⁸ Regardless of the particular administrative structure employed, it is fundamental to the retributivist approach to clemency that justice be evenhandedly administered according to consistent principles.²²⁹

2. Compassionate Clemency: Redemption, Rehabilitation, Mercy, and Discretion

Other scholars argue that the retributivist camp turns its back on the most important characteristic of clemency—lenity driven by compassion.²³⁰ They contend that championing a narrow vision of “clemency-as-remedial-retributive-justice” misses the point of clemency entirely and disrespects the true historical tradition of the executive clemency power.²³¹ In contrast to the retributivists, Professors Elizabeth Rapaport and Margaret Colgate Love extol the virtues of mercy—clemency granted not merely for the sake of right, but for its own sake.²³²

Rapaport describes clemency as the discretionary power of the executive to exact less than the full measure of punishment from a wrongdoer, and she emphasizes its importance from a redemptive perspective.²³³ She criticizes the retributivist model for failing to consider a prisoner’s post-conviction achievements as potential grounds for clemency.²³⁴ According to a retributivist perspective, taking post-conviction achievements into account would interfere with the principle of fully punishing each wrongdoer according to his or her just deserts.²³⁵ “Redemptive clemency may be deserved in the sense that it is earned,” she explains, but retributivists believe it is not owed, because a person’s post-conviction actions can “create no retributively-justified entitlement.”²³⁶

²²⁸ See Rapaport, *supra* note 94, at 1532.

²²⁹ Kobil, *supra* note 45, at 575.

²³⁰ See Rapaport, *supra* note 94, at 1503.

²³¹ See *id.*

²³² *Id.*; Love, *supra* note 41, at 1485. Love’s scholarly perspective is informed by practical experience in the field. Love, *supra* note 41, at 1483 n.1. From 1990 to 1997, she served as a Pardon Attorney in the Department of Justice. *Id.*

²³³ Rapaport, *supra* note 94, at 1503.

²³⁴ *Id.* at 1523.

²³⁵ *Id.*

²³⁶ *Id.*

The redemptive approach to criminal justice identifies two types of post-conviction achievement that should serve as the basis of clemency: rehabilitation or heroic service rendered while incarcerated.²³⁷ Opportunities to perform heroic service are few and far between, but rehabilitation is something all prisoners can strive for.²³⁸ The rehabilitation movement as a whole may not be in vogue and institutionally supported, but the clemency process should credit individual inmates who undergo positive personal transformations.²³⁹

The redemptive perspective sees punishment in terms of its dynamic, transformative potential rather than strictly in terms of just deserts.²⁴⁰ It supplants a polarized vision of good (free) and bad (incarcerated) people with an understanding that all people have the capacity for both weakness and high moral achievement.²⁴¹ Finally, redemptive criminal justice incorporates the value of hope into the justice system: clemency on the grounds of rehabilitation “would foster hope for release and reconciliation among those willing to take on the rigors of self-transformation.”²⁴²

In keeping with redemptive clemency, Professor Rapaport strenuously defends clemency’s historical discretionary quality.²⁴³ She describes clemency as a last resort where institutionalized public power has failed to respond to the call of justice.²⁴⁴ In light of this critical last resort function, redemptive criminal justice resists the retributivist suggestion that clemency should operate as another level of criminal justice bureaucracy, with a “full-blown executive apparatus . . . that paral-

²³⁷ *Id.*

²³⁸ See Rapaport, *supra* note 94, at 1523.

²³⁹ *Id.* at 1524. By way of example, Rapaport offers the case of Precious Bedell. *Id.* Bedell was sentenced to twenty-five years to life for the second-degree murder of her toddler daughter. *Id.* The death occurred when Bedell, angry at her daughter for her behavior at a restaurant, took her into a restroom, propped her on the sink, and hit her. *Id.* Her daughter fell, broke her skull on the hard bathroom floor, and died. *Id.* at 1524–25. While in prison in New York, Bedell matured, participated in therapy programs, took responsibility for her action, educated herself, and helped develop programs to give women at risk of harming their children the tools to avoid violence and be good parents. *Id.* at 1525. She transformed herself into a different person than she was at the time of her crime and became a model prisoner. *Id.* Nonetheless, she was twice denied clemency. *Id.* Rapaport decries the fact that, from a retributivist perspective, Bedell’s progress is irrelevant to the issue of clemency. *Id.* at 1526.

²⁴⁰ *Id.* at 1528.

²⁴¹ *Id.* at 1529.

²⁴² *Id.* at 1530.

²⁴³ Rapaport, *supra* note 94, at 1533.

²⁴⁴ *Id.*

lels the judicial system.”²⁴⁵ Such a system is not merely inefficient; it sacrifices the essential discretionary quality of clemency that functions as a check on the judicial system.²⁴⁶ Indeed, Rapaport praises clemency for its very anti-bureaucratic nature and for its ability to function in opposition to the normative views of the citizenry.²⁴⁷

Professor Margaret Colgate Love also argues passionately for the preservation of discretion.²⁴⁸ In addition, she advances the theory that an executive has not only the power to grant clemency, but also a duty to do so.²⁴⁹ The power to pardon, in her opinion, is a constitutional obligation of office, not a personal privilege.²⁵⁰

As part of that obligation, Love suggests that executive clemency should be exercised not only for the fulfillment of justice, but also for the sake of mercy and for the good of the community.²⁵¹ Love encourages executives to utilize the pardon power as a tool to communicate the value of mercy.²⁵² Granting clemency has symbolic expressive value, because the President or the Governor heads an entire branch of government and is looked to for leadership by members of his administration and by ordinary citizens.²⁵³ As a result, the pardon power can be a vehicle for encouraging compassion in criminal justice policy, leading lower administrators by example, championing positive self-transformation, and sharing a moral vision with the general public.²⁵⁴

²⁴⁵ Love, *supra* note 41, at 1502.

²⁴⁶ See *id.* at 1502–03. The retributivist ideal of standards-driven equity is hampered by the reality of a criminal justice system with built-in biases. See KENNEDY COMM’N REPORTS, *supra* note 29, at 49. Legislation does not always treat all offenders equally, and police and prosecutors exercise discretion in furtherance of their professional bias toward exacting punishment. See *id.*; WHITMAN, *supra* note 26, at 56–57. Discretion in granting clemency is necessary for balance. Rapaport, *supra* note 94, at 1535. According to Rapaport, “[w]hen we seek to banish discretion, we impoverish justice and consort with comforting fictions.” *Id.*

²⁴⁷ See Rapaport, *supra* note 94, at 1534. Clemency has played a trailblazing function in history as a result of its discretionary nature, crediting emergent claims for mitigation before they became integrated into the criminal law. *Id.*; MOORE, *supra* note 15, at 53. According to Rapaport, discretion allows for innovation, whereas bureaucratization impedes it. Rapaport, *supra* note 94, at 1534.

²⁴⁸ See Love, *supra* note 41, at 1483.

²⁴⁹ *Id.* at 1485.

²⁵⁰ See *id.*

²⁵¹ *Id.* at 1505.

²⁵² *Id.* at 1485, 1512.

²⁵³ See Love, *supra* note 41, at 1512–13.

²⁵⁴ See *id.* Illinois Governor George Ryan commuted the sentences of all 156 inmates on death row in his state after DNA evidence demonstrated a pattern of wrongful convictions. Jeff Flock, “Blanket Commutation” Empties Illinois Death Row, CNN.COM, Jan. 13, 2003, <http://www.cnn.com/2003/LAW/01/11/illinois.death.row>. Governor Ryan explained that

IV. TIGHTENING CHAINS: ANALYZING TWENTY-FIVE YEARS OF CHANGES IN MASSACHUSETTS CLEMENCY GUIDELINES

Philosophical approaches to clemency inform the way in which clemency is carried out in practice.²⁵⁵ In the end, the most important factor for the health of executive clemency in the Commonwealth is the attitude of the Governor.²⁵⁶ Even though governors are rarely scholars and their attitudes toward clemency may not reflect explicit philosophical perspectives, philosophical trends can be seen in the language that governors use to explain their approach to clemency decisions.²⁵⁷ In Massachusetts, the Governor's perspective on clemency is most clearly reflected in guidelines he issues to the Advisory Board of Pardons.²⁵⁸ Each governor may establish his or her own set of guidelines regarding executive clemency, upon which the Board is obliged to base its judgments.²⁵⁹

Over the last twenty-five years, Massachusetts governors have issued increasingly stringent guidelines.²⁶⁰ This comes as little surprise, given both the general trend toward harshness in criminal justice policy and the fact that Massachusetts has shifted from electing liberal Democrats to electing increasingly conservative Republican governors.²⁶¹ Nonetheless, it is instructive to track changes in successive governors' clemency guidelines to understand how politics, philosophy, and the clemency process itself formed the recipe for today's grant rate of zero.²⁶² The textual changes describe a radical shift in the Commonwealth's philosophical approach to executive clemency and shed a clearer light on the decline in grants.²⁶³ Furthermore, because tough-on-crime policies

he acted, at least in part, to set an example of justice and fairness. Governor George Ryan, Speech at Northwestern University College of Law (Jan. 11, 2003), http://www.stopcapital-punishment.org/ryans_speech.html.

²⁵⁵ See generally MOORE, *supra* note 15.

²⁵⁶ See Kobil, *supra* note 45, at 601.

²⁵⁷ See Romney Guidelines, *supra* note 128, at 1.

²⁵⁸ See, e.g., *id.*; Commutation Guidelines and Petition Issued by Governor William F. Weld, Commonwealth of Mass. Executive Dep't 1 (Sept. 1991) (on file with the Boston College Third World Law Journal) [hereinafter Weld Commutation Guidelines]; Commutation Guidelines Issued by Governor Michael S. Dukakis, Commonwealth of Mass. Executive Dep't 1 (Nov. 20, 1983) (on file with the Boston College Third World Law Journal) [hereinafter Dukakis Commutation Guidelines].

²⁵⁹ See Romney Guidelines, *supra* note 128, at 2.

²⁶⁰ See discussion *infra* Parts IV.A–B.

²⁶¹ See Grosky, *supra* note 90.

²⁶² See discussion *infra* Parts IV.A–B.

²⁶³ See Grosky, *supra* note 90. Compare Dukakis Commutation Guidelines, *supra* note 258, at 1 (describing commutation as integrally related to the rehabilitative purposes of

and politics describe a national trend, the changes in Massachusetts likely contain lessons for the nation as a whole.²⁶⁴

A. *The Shift Away from Rehabilitation in Commutation Decisions*

Governor Dukakis issued a set of guidelines for commutation and pardon in 1983 and modified the commutation guidelines in 1988.²⁶⁵ Moderate Republican Governor Weld made further changes in the early 1990s.²⁶⁶ Then Governor Romney modified the guidelines again in 2003.²⁶⁷ One of the most striking changes from one governor to another is the change in language about rehabilitation as a ground for commutation.²⁶⁸

In 1983, Governor Dukakis's Commutation Guidelines placed a heavy emphasis on rehabilitation, framing the clemency process in those terms.²⁶⁹ Dukakis used strongly enthusiastic—almost inspirational—language to encourage people in prison to strive for self-improvement.²⁷⁰ He wrote that “[t]he *real possibility of future commutation relief is intended to serve as a strong motivation* for confined persons to utilize available resources for self-development and improvement efforts and as an incentive for them to become law-abiding citizens.”²⁷¹

In addition, Governor Dukakis made clear that rehabilitation was to be measured in an individualized manner.²⁷² He described the com-

confinement), *with* Romney Guidelines, *supra* note 128, at 1 (emphasizing executive discretion and the extreme irregularity of clemency).

²⁶⁴ See KENNEDY COMM'N REPORTS, *supra* note 29, at 68.

²⁶⁵ Pardon Guidelines Issued by Governor Michael S. Dukakis, Commonwealth of Mass. Executive Dep't 1 (Feb. 16, 1988) (on file with the Boston College Third World Law Journal) [hereinafter Dukakis Pardon Guidelines 1988]; Pardon Guidelines Issued by Governor Michael S. Dukakis, Commonwealth of Mass. Executive Dep't 1 (Nov. 20, 1983) (on file with the Boston College Third World Law Journal) [hereinafter Dukakis Pardon Guidelines 1983]; Dukakis Commutation Guidelines, *supra* note 258, at 1.

²⁶⁶ Pardon Guidelines Issued by William F. Weld, Commonwealth of Mass. Executive Dep't 1 (Feb. 1992) (on file with the Boston College Third World Law Journal) [hereinafter Weld Pardon Guidelines]; Weld Commutation Guidelines, *supra* note 258, at 1.

²⁶⁷ Romney Guidelines, *supra* note 128, at 1. Until the Romney administration, Commutation and Pardon Guidelines were issued in separate documents. See generally, e.g., Weld Pardon Guidelines, *supra* note 266; Weld Commutation Guidelines, *supra* note 258. Romney's Guidelines contain both in one document, but different considerations are still articulated for commutations and pardons. See Romney Guidelines, *supra* note 128, at 2, 6.

²⁶⁸ See Romney Guidelines, *supra* note 128, at 6; Dukakis Commutation Guidelines, *supra* note 258, at 1.

²⁶⁹ See Dukakis Commutation Guidelines, *supra* note 258, at 1.

²⁷⁰ See *id.*

²⁷¹ *Id.* (emphasis added).

²⁷² See *id.*

mutation process as “[t]he process of ascertaining whether or not rehabilitative ends of confinement . . . have been met in individual cases.”²⁷³ In order to be eligible for commutation based on rehabilitation, a petitioner was required to demonstrate that he or she had, “within his or her capacity, made exceptional strides in self-development and improvement.”²⁷⁴ Self-development and self-improvement were measured solely in relation to the petitioner’s initial levels of personal actualization.²⁷⁵ Governor Weld added an additional, objective criterion: the petitioner had to show that he or she was not only a better person than at the beginning of his or her sentence, but also that her or she “would be a law-abiding citizen.”²⁷⁶ Finally, Governor Romney did away with the most individualized language in the guidelines, removing the reference to the petitioner’s personal capacity.²⁷⁷ Consequently, a petitioner today must show that he or she “has made exceptional strides in self-development and self-improvement and would be a law-abiding citizen.”²⁷⁸ Instead of framing rehabilitation in strictly personal terms, the new standard focuses on the seemingly objective standard of whether the person would be law-abiding, but leaves that determination to the personal prejudices of Board members.²⁷⁹

B. *Clemency Is a Privilege, Not a Right*

In addition to the shift away from rehabilitation, the textual changes in successive governors’ guidelines clearly reflect another important trend. From Governors Dukakis to Romney, the attitude toward clemency changes from one of urgency to one of indulgence; from a sense that clemency is a matter of executive obligation to a sense that it is unworthy of significant attention.²⁸⁰ The 1983 Commutation Guide-

²⁷³ *Id.*

²⁷⁴ Dukakis Commutation Guidelines, *supra* note 258, at 1. Rehabilitation is one of a few rationales for commutation presented in Massachusetts’s clemency guidelines. See Romney Guidelines, *supra* note 128, at 6. Other rationales for commutation in Massachusetts have been based on a concern about gross inequities in the judicial process or a concern for the physical well-being of prisoners suffering from terminal illness or chronic disability. See *id.* This Note focuses on rehabilitation because it is the most democratic means of achieving commutation; it is the least subject to the petitioner’s unique circumstances.

²⁷⁵ See Dukakis Commutation Guidelines, *supra* note 258, at 1.

²⁷⁶ See Weld Commutation Guidelines, *supra* note 258, at 1.

²⁷⁷ See Romney Guidelines, *supra* note 128, at 6.

²⁷⁸ *Id.*

²⁷⁹ See *id.*

²⁸⁰ See *id.* at 1; Dukakis Commutation Guidelines, *supra* note 258, at 1, 2. As a practical manifestation of his commitment to the clemency process, Governor Dukakis promised to

lines reflect a conviction that the Governor's constitutional authority to grant clemency carries an implicit duty to treat such matters seriously.²⁸¹ According to Dukakis, commutation is "an integral part of the correctional process."²⁸² Furthermore, Dukakis's 1983 Pardon Guidelines assert that "persons who exhibit a substantial period of good citizenship subsequent to criminal conviction and who have a specific compelling need to clear their record *deserve* consideration for Pardon relief."²⁸³

Governors Weld and Romney did away with this language.²⁸⁴ The Weld Guidelines make no mention of petitioners deserving consideration as a matter of right.²⁸⁵ In addition, they back away from Dukakis's description of commutation as essential by introducing commutation first as "an extraordinary remedy."²⁸⁶ In the introduction to the most recent set of guidelines, Governor Romney takes his disavowal even further, excising the statement that commutation is integral to the correctional process.²⁸⁷ By contrast, he makes every rhetorical effort to marginalize the clemency power and assure the reader that he will exercise his authority parsimoniously: "The Governor views the granting of executive clemency as an act of grace and not merely a remedy, which should be only awarded under the most rare and extraordinary circumstances."²⁸⁸

Viewing clemency as "an act of grace," Governor Romney rejects any suggestion of constitutional obligation and reverts to a conception of clemency as handed down from on high.²⁸⁹ Certainly, the idea of mercy assumes relations of status hierarchy.²⁹⁰ "Mercy comes de haut en bas: superiors accord it to inferiors. In this, mercy is akin to degrada-

"act promptly on all recommendations received from the Advisory Board." Dukakis Commutation Guidelines, *supra* note 258, at 2; Dukakis Pardon Guidelines 1983, *supra* note 265, at 5. In contrast, Governor Romney chose to not act at all in response to the Board's favorable recommendation of clemency for Arnie King. See *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold King, *supra* note 13.

²⁸¹ See Dukakis Commutation Guidelines, *supra* note 258, at 1, 2.

²⁸² See *id.* at 1.

²⁸³ Dukakis Pardon Guidelines 1983, *supra* note 265, at 1 (emphasis added).

²⁸⁴ See generally Romney Guidelines, *supra* note 128; Weld Pardon Guidelines, *supra* note 266; Weld Commutation Guidelines, *supra* note 258.

²⁸⁵ See generally Weld Pardon Guidelines, *supra* note 266; Weld Commutation Guidelines, *supra* note 258.

²⁸⁶ Weld Commutation Guidelines, *supra* note 258, at 1.

²⁸⁷ See Romney Guidelines, *supra* note 128, at 1.

²⁸⁸ See *id.*

²⁸⁹ See *id.*; WHITMAN, *supra* note 26, at 12.

²⁹⁰ WHITMAN, *supra* note 26, at 12.

tion: when we show a person mercy, we confirm his inferior status."²⁹¹ However, mercy correspondingly suggests magnanimity, individualization of justice, and a willingness to find reasons why the petitioner deserves milder punishment.²⁹² Governor Romney's tightfisted approach to clemency neglects this side of the equation.²⁹³

C. *Philosophy Abused at the Hands of Politics; Clemency Suffers*

All of these changes over time spell bad news for Arnie King.²⁹⁴ King has spent twenty-five years executing a personal ethical transformation, and Massachusetts governors have spent twenty-five years tipping the scales, devaluing such a transformation and disallowing the individualized consideration that would permit such a transformation to be acknowledged and considered significant by the Advisory Board.²⁹⁵ Governor Romney's Guidelines reflect a dramatic shift away from rehabilitation and toward retributivism, yet they retain an emphasis on discretion that allows the Governor to refuse to grant clemency at will.²⁹⁶

Of course, politicians are not philosophical purists. Any governor's guidelines will reflect a variety of philosophical and political principles rather than a coherent penological philosophy.²⁹⁷ As a practical matter, mixing and matching is not necessarily a problem.²⁹⁸ Criminal justice policy in the United States has long reflected a variety of social and moral concerns, including retribution, deterrence, prevention, incapacitation, and behavioral correction.²⁹⁹ Neither retributivist nor re-

²⁹¹ *Id.*

²⁹² See Love, *supra* note 41, at 1485; Rapaport, *supra* note 94, at 1524–25.

²⁹³ See Romney Guidelines, *supra* note 128, at 1.

²⁹⁴ See Walker, *supra* note 1.

²⁹⁵ See *id.*; discussion *supra* Parts IV.A–B.

²⁹⁶ See Romney Guidelines, *supra* note 128, at 1.

²⁹⁷ See *id.* Likewise, neither philosophy lends itself to facile political categorization. The retributivist emphasis on just deserts appears to be in line with conservative tough-on-crime rhetoric, yet the associated insistence on equity is likely to find favor with liberals who are concerned that punishment not be meted out unevenly along lines of race or class. See MOORE, *supra* note 15, at 93; Cullen & Gendreau, *supra* note 72, at 122. On the other hand, liberals might be moved by the redemptive perspective's language about compassion and human potential, yet find themselves uneasy with the notion of unfettered executive discretion, which could undermine the principle of equal justice under law or, worse still, be used inequitably to benefit a privileged elite. See Cullen & Gendreau, *supra* note 72, at 122.

²⁹⁸ See Kobil, *supra* note 45, at 580–81.

²⁹⁹ See KADISH ET AL., *supra* note 193, at 101.

demptive philosophy alone is sufficient to serve the variety of goals of criminal justice in America.³⁰⁰

However, contemporary tough-on-crime politics have taken advantage of competing conceptions of clemency to achieve a severe result.³⁰¹ Retributivism compels action in certain circumstances and proscribes action in other circumstances.³⁰² When clemency is governed by principles of just deserts and formal standards, the executive is under no obligation to act magnanimously and play the role of the merciful sovereign.³⁰³ On the other hand, redemptive clemency offers compassion, but it is discretionary; compassion can always be withheld.³⁰⁴ If clemency is an act of grace, then the executive does not have to heed the recommendations of a review board or be compelled to grant clemency, even when a retributivist would expect clemency as a matter of right.³⁰⁵

In today's tough-on-crime climate, rhetoric from both philosophical perspectives may be combined to nearly preclude clemency altogether.³⁰⁶ The net result is a systemic failure, an outcome that is anathema to both philosophies.³⁰⁷ It is universally dismaying that the important tool of clemency simply is not being used.³⁰⁸

V. RECOMMENDATIONS TO RENEW AND IMPROVE EXECUTIVE CLEMENCY IN MASSACHUSETTS

In order to renew the exercise of the clemency power in Massachusetts and throughout the United States, policymakers must begin with a foundational belief that clemency is vital to the American constitutional criminal justice system.³⁰⁹ This belief is grounded in the knowledge that the criminal justice system is imperfect and will never be without flaws or inequities.³¹⁰ To begin, bias is entrenched in the system, such that it metes out disproportionate punishment for poor peo-

³⁰⁰ See *id.*

³⁰¹ See Romney Guidelines, *supra* note 128, at 1; MOORE, *supra* note 15, at 8–9, 226; Rapaport, *supra* note 94, at 1517.

³⁰² See MOORE, *supra* note 15, at 95–96; Rapaport, *supra* note 94, at 1517.

³⁰³ See MOORE, *supra* note 15, at 226.

³⁰⁴ See Rapaport, *supra* note 94, at 1504.

³⁰⁵ See MOORE, *supra* note 15, at 8–9.

³⁰⁶ See Romney Guidelines, *supra* note 128, at 1.

³⁰⁷ See Rapaport, *supra* note 94, at 1506.

³⁰⁸ See *id.*

³⁰⁹ See KENNEDY COMM'N REPORTS, *supra* note 29, at 66, 71.

³¹⁰ See *id.* at 71–72.

ple of color—an intolerable result.³¹¹ Even ignoring bias, however, it is simply impossible to foresee all mitigating circumstances at sentencing.³¹² Clemency is a tool to adjust the output of the criminal justice machine; its *raison d'être* is to compensate for failures of justice and foresight.³¹³

Clemency can be renewed in Massachusetts by a combination of means. First, the clemency process must be buffered as much as possible from political winds.³¹⁴ Second, the Governor needs to be more accountable for his or her decisions, particularly for clemency petitions denied.³¹⁵ Finally, there must be a renewed emphasis on rehabilitation as a legitimate ground for clemency.³¹⁶

A. *Diminishing the Role of Politics*

Policymakers should consider a number of means to prevent clemency from being held hostage to politics. One way to protect clemency from politics is to remove the Governor's own political concerns from the executive clemency guidelines.³¹⁷ The Governor should not write his or her own clemency guidelines.³¹⁸ If the Governor writes the guidelines he or she will follow, as is the case in Massachusetts today, petitioners are entirely subject to the vicissitudes of the Governor's personal preferences, anxieties and ambitions.³¹⁹ Consequently, the clemency power is exercised inconsistently and inequitably from governor to governor.³²⁰ Instead, guidelines for the Board and the Governor should be promulgated by a state administrative agency or the legislature. No governmental entity is immune from political pressures, but the effect of political pressure may be diminished by ensuring that a single entity is not responsible for both defining the criteria by which clemency should be granted and making the final determination regarding individual clemency petitions.³²¹

³¹¹ See *id.* at 51.

³¹² See *id.* at 71–72.

³¹³ See *id.*

³¹⁴ LOVE, *supra* note 49, at 20–21; see Kobil, *supra* note 45, at 613.

³¹⁵ Kobil, *supra* note 45, at 637.

³¹⁶ See Rapaport, *supra* note 94, at 1524–26.

³¹⁷ See LOVE, *supra* note 49, at 20–21.

³¹⁸ See Grosky, *supra* note 90.

³¹⁹ See *id.*

³²⁰ See *id.*

³²¹ See *id.*

A second means of taking politics out of clemency decision-making in Massachusetts is to remove the Council from the process.³²² Currently, too many elected officials are responsible for clemency decisions, leading to self-servingly cautious and bureaucratic determinations.³²³ Denying clemency will always be a safer political course than granting it.³²⁴ However, by eliminating the role of the Council in the process, and thereby reducing the number of actors who have political interests on the line, the bias against granting clemency will be diminished.³²⁵

Diversifying the Board will also take some of the political pressure off the clemency process.³²⁶ Existing law suggests that the Board should be made up of members with wide-ranging expertise, and the Board's own guidelines likewise call for Board members to be drawn from a variety of professional fields.³²⁷ What is now simply a recommendation should be made a requirement.³²⁸ Ensuring that the decision-making body evaluating clemency petitions reflects multiple professional perspectives will guard against the built-in prejudice towards clemency that exists when that body is exclusively composed of law enforcement officials.³²⁹

B. *Increasing Accountability for Denials*

The Governor must also be held accountable for his or her clemency decisions.³³⁰ Particular attention should be paid to denials.³³¹ Today, denials are silent, and that silence enables governors to deny clemency without calling any critical attention to those decisions.³³² Three simple structural changes will draw more attention to denied clemency petitions. First, lawmakers should require the Governor to annually report denials, not just grants, to the General Court.³³³ Such a require-

³²² See discussion *supra* Part II.B.2. Because the Massachusetts Constitution endows the Council with the power of advice and consent with respect to clemency decisions, removing the Council from the process would require a constitutional amendment. See MASS. CONST. pt. 2, ch. II, § I, art. VIII.

³²³ See discussion *supra* Part II.B.2.

³²⁴ See KENNEDY COMM'N REPORTS, *supra* note 29, at 69.

³²⁵ See discussion *supra* Part II.B.2.

³²⁶ See PAROLE PRACTICES IN MASSACHUSETTS, *supra* note 150, at 29.

³²⁷ See *id.* at 34; MASS. GEN. LAWS ch. 27, § 4.

³²⁸ See PAROLE PRACTICES IN MASSACHUSETTS, *supra* note 150, at 29, 36.

³²⁹ See *id.*

³³⁰ See Kobil, *supra* note 45, at 637.

³³¹ See KENNEDY COMM'N REPORTS, *supra* note 29, at 71; Grosky, *supra* note 90.

³³² See MASS. GEN. LAWS ch. 127, § 152.

³³³ See LOVE, *supra* note 49, at 105 tbl.3.

ment would ensure that denials of clemency are publicized, at least within the limited forum of the legislature; denials of clemency ought not to be issued entirely under the radar.³³⁴

Second, when a petition is recommended favorably by the Board, there should be a presumption in favor of clemency.³³⁵ The Code of Massachusetts Regulations should be amended so that any clemency petition that receives a favorable recommendation from the Board be considered granted, not denied, if the Governor does not act within a year.³³⁶ No petition that has received a favorable report from the Board should be allowed to perish as a result of the Governor's inaction.³³⁷

Lastly, a new accountability mechanism should be established for cases in which the Governor denies petitions that the Board recommended favorably.³³⁸ In such cases, the Governor should be required to issue an opinion explaining his or her reasons for the denial.³³⁹ The Governor would retain the ultimate authority with regard to clemency decisions, but would not retain the unchecked privilege of exercising that authority without any accountability.³⁴⁰ These three measures, in combination, would ensure that the Governor pays closer attention to denials of clemency, and that negative decisions receive external attention as well.

C. *Reviving Rehabilitation as a Ground for Clemency*

A final way of encouraging a renewal of clemency, both in Massachusetts and in other jurisdictions, is to revive an emphasis on rehabilitation as a basis for clemency.³⁴¹ In Massachusetts, rehabilitation remains a ground for granting clemency in theory, but successive governors have deemphasized it within the text of their clemency guidelines.³⁴² Language in the guidelines indicating that prisoners' self-development would be credited and rewarded in clemency decisions has

³³⁴ See *id.*

³³⁵ See Dukakis Commutation Guidelines, *supra* note 258, at 1; Dukakis Pardon Guidelines 1983, *supra* note 265, at 1.

³³⁶ See 120 MASS. CODE REGS. 902.12(2) (2006).

³³⁷ See *id.*; *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold L. King, *supra* note 13.

³³⁸ See 120 MASS. CODE REGS. 902.12(2); *In re Arnold L. King*, *supra* note 21, at 2; Support the Release of Arnold L. King, *supra* note 13.

³³⁹ See Rapaport, *supra* note 94, at 1535.

³⁴⁰ See *id.*

³⁴¹ See *id.* at 1524–26.

³⁴² See discussion *supra* Part IV.A.

faded away in recent decades.³⁴³ With this policy shift away from rehabilitation, grants of clemency correspondingly vanished.³⁴⁴

It is time to refocus the debate on the ways in which clemency can be earned.³⁴⁵ In light of the sharp decline in clemency that accompanied a policy shift away from rehabilitation, it would appear that the clemency process would yield more grants again if and when it explicitly recognizes petitioners' potential for personal transformation and rewards their individual achievements.³⁴⁶ In order to re-activate the clemency power, the guidelines for the use of that power should be re-drafted to vigorously promote clemency based on rehabilitation.³⁴⁷

CONCLUSION

Executive clemency is a vital part of the criminal justice system. It serves as a safety valve on the system, a particularly critical function in light of the system's disproportionate impact on poor people of color. The near-universal decline in grants of clemency in recent years is part and parcel of a trend toward harsher, unremitting justice, yet that very trend creates a need for more clemency, not less.

Massachusetts represents an instructive example of the decline in clemency, demonstrating both that the administrative process is structured with internal biases against clemency and also that the number of grants is heavily dependent on the attitude of the executive. Nonetheless, this examination of clemency in Massachusetts offers inspiration for ways to renew the clemency power. The system can be reformed by eliminating political pressures on the process, holding the executive accountable for denials of clemency as well as grants, and promoting rehabilitation as a legitimate rationale for granting clemency.

³⁴³ See discussion *supra* Parts IV.A–B.

³⁴⁴ See Romney Guidelines, *supra* note 128, at 6; Dukakis Commutation Guidelines, *supra* note 258, at 1; Grosky, *supra* note 90.

³⁴⁵ See Rapaport, *supra* note 94, at 1523.

³⁴⁶ See Romney Guidelines, *supra* note 128, at 6; Dukakis Commutation Guidelines, *supra* note 258, at 1; Grosky, *supra* note 90; Rapaport, *supra* note 94, at 1523.

³⁴⁷ See Rapaport, *supra* note 94, at 1523; Romney Guidelines, *supra* note 128, at 6; Dukakis Commutation Guidelines, *supra* note 258, at 1; Grosky, *supra* note 90. As noted earlier, rehabilitation is a hallmark of the redemptive perspective on clemency. However, rehabilitation can be celebrated by retributivists too. For a retributivist defense of granting clemency based on ethical transformations, see B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, U. PA. L. REV. 1115, 1116, 1124–25 (2001) (describing character retributivism as “the notion that wrongdoers should be punished in proportion to their own inner wickedness”).

A renewal of the executive clemency power in the United States is overdue. Though the subject deserves additional scholarly attention, it is not merely academic. Arnie King and the thousands of clemency petitioners around the country deserve a system that works.