

## CLEMENCY IN A TIME OF CRISIS

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### ABSTRACT

*At the state level, the power to pardon or commute a criminal sentence—that is, to grant clemency—is vested in either the Governor, an executive clemency board, or some combination thereof. Until very recently, clemency grants were a consistent feature of our criminal justice system. In the last four decades, though, state clemency grants have declined significantly; in some states, clemency seems to have disappeared altogether. In this Article, I contend that executive clemency should be revived at the state level in response to ongoing systemic criminal justice failings. Part I of this Article describes clemency at the state level today. Despite judicial and scholarly support for the role of clemency in our criminal justice system, state clemency practice fails to live up to its theoretical justifications. Part II of this Article makes the case for a policy of vigorous clemency on both theoretical and practical grounds. Not only was clemency designed, at least in part, to serve an error-correcting function, but also, today, there are several reasons why state executive actors may be able to use their clemency power robustly without suffering politically. In Part III, I address questions of implementation. If state executive actors are to pursue commutations of sentences or pardons, which inmates should be the subject of such pursuits? How can those executive actors best be insulated from political pressure? In sum, this Article argues that revitalizing state clemency is a valuable and viable component of broader criminal justice reform.*

## INTRODUCTION

Every state grants the governor or some executive body the power to grant clemency—that is, the power to pardon or commute a criminal sentence.<sup>1</sup> This power is deeply rooted in American history,<sup>2</sup> and as recently as the first half of the twentieth century, clemency grants were a regular feature of our criminal justice system.<sup>3</sup> Even in states with traditionally high execution rates, governors granted clemency to death row inmates in a substantial number of cases. For example, between 1923 and 1972 Texas executed 461 people, but during the same time period, Texas governors commuted 100 capital sentences.<sup>4</sup> Today, state clemency grants have all but disappeared from the political landscape.<sup>5</sup> Since 1976, when the United States reinstated the death penalty,<sup>6</sup> Texas has executed 477 people, while its governors have granted clemency for only two inmates.<sup>7</sup> Some capital states have not commuted *any* death sentences in the post-*Gregg* era.<sup>8</sup> I discuss a few notable exceptions later in this Article,

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1. Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, CRIM. JUST., Fall 2009, at 31–32.

2. See generally Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 583–605 (1991) (discussing history and origins of clemency).

3. James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 212–13 (2000).

4. *Id.* at 213 tbl.1.

5. See generally Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 353–66 (2003) (discussing the general decline and offering explanations).

6. In 1976, the Court determined in three separate cases, referred to as “the Gregg decision,” that state statutes provided sufficient guided discretion to juries imposing death sentences and that the death penalty was constitutional. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). With these decisions, a more than ten-year moratorium on the death penalty in America came to an end. See *Convicted Georgia Murderer Facing Execution on July 1*, N.Y. TIMES, June 18, 1980 (identifying Gary Gilmore as the first inmate to be executed in the post-*Gregg* era).

7. See *State by State Database*, DEATH PENALTY INFO. CTR., [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (select “Texas” from drop down menu) (last visited Dec. 1, 2011).

8. For example, no capital sentences have been commuted in either Arizona or Mississippi since 1976. See *Id.* (select “Arizona” or “Mississippi” from drop down menu).

but the overall decline in state clemency grants is consistent and pronounced.<sup>9</sup>

This anemic notion of state clemency is misguided—even when the criminal justice system is functioning fairly and efficiently.<sup>10</sup> Clemency is designed to serve several laudable goals: it “serve[s] as a check on the judiciary;”<sup>11</sup> it enables error-correction in a criminal justice system fraught with mistakes;<sup>12</sup> it may “afford relief from undue harshness;”<sup>13</sup> and it “help[s] ensure that justice is tempered by mercy.”<sup>14</sup> Moreover, as Justice Kennedy explained in his 2003 address to the American Bar Association, “[a] people confident in its laws and institutions should not be ashamed of mercy.”<sup>15</sup> Under the best of circumstances, clemency acts as a safety valve and enables gestures of compassion.

However, when the criminal justice system is a shambles—as ours is today—the case for clemency is even stronger. By all accounts, the

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9. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 251 (2003) (noting the decline in and infrequent use of clemency from 1973 to 1999).

10. In this Article, I focus on the need to revitalize state clemency practice, but scholars have noted the infrequent use of clemency at the federal level and have urged reform of the presidential pardon power. See, e.g., Douglas A. Berman, *Turning Hope-and-Change Talk into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59 (2010); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010).

11. Michael A.G. Korcogold, Todd A. Notboom & Sara Gurwitch, *And Justice for the Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 356 (1996).

12. For example, 289 post-conviction DNA exonerations have occurred in the United States: See *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Feb. 8, 2012).

13. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004) (quoting *Ex Parte Grossman*, 267 U.S. 87, 120 (1925)).

14. *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011). See generally Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1359–62 (2008) (explaining the unique role that clemency and jury nullification can play today when judges have little freedom to treat defendants as individuals).

15. Justice Anthony Kennedy, Speech at the Am. Bar Ass’n Annual Meeting (Aug. 9, 2003), available at <http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/>. Regarding clemency, Justice Kennedy went on to say:

The greatest of poets reminds us that mercy is ‘mightiest in the mightiest. It becomes the throned monarch better than his crown.’ I hope more lawyers involved in the pardon process will say to Chief Executives, “Mr. President,” or “Your Excellency, the Governor, this young man has not served his full sentence, but he has served long enough. Give him what only you can give him. Give him another chance. Give him a priceless gift. Give him liberty.”

*Id.*

American criminal justice system is in need of an overhaul.<sup>16</sup> The Sixth Amendment right to counsel, meant to safeguard the liberty interests of indigent criminal defendants, has been widely described as more of a myth than a reality in practice.<sup>17</sup> States regularly flout their constitutional obligations under the Sixth Amendment,<sup>18</sup> while defendants rarely, if ever, have a chance to seek redress in federal court.<sup>19</sup> At the same time, with more than two million adults and children behind bars,<sup>20</sup> the United States leads the world in its rate of incarceration.<sup>21</sup> Our prisoners serve longer sentences than they ever have before,<sup>22</sup> and our states spend hundreds of millions of dollars each year to maintain their corrections systems.<sup>23</sup> In short, “[o]ur resources are misspent, our punishments too severe, our sentences too long.”<sup>24</sup>

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16. Numerous reports and articles have documented the nation’s criminal justice failures, including its over-reliance on incarceration, failure to protect the rights of poor criminal defendants, disproportionate impact upon people of color, and failure to enable rehabilitation and reentry into society. See generally AM. CIV. LIB. UNION, SMART REFORM IS POSSIBLE (2011) [hereinafter SMART REFORM IS POSSIBLE], available at [www.aclu.org/files/assets/smartreformispossible.pdf](http://www.aclu.org/files/assets/smartreformispossible.pdf); NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE (2011), available at [http://naacp.3cdn.net/01d6f368edbe135234\\_bq0m68x5h.pdf](http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf); NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) [hereinafter JUSTICE DENIED], available at <http://www.constitutionproject.org/pdf/139.pdf>.

17. See generally STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004) [hereinafter GIDEON’S BROKEN PROMISE], available at [http://www.americanbar.org/content/dam/aba/administrative/lcgal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/lcgal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (concluding that the promise of equal justice for the indigent remains unfulfilled).

18. *Id.*

19. See Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 806–10 (2009) (explaining why federal habeas today provides little practical relief to most prisoners).

20. ROY WALMSLEY, KING’S COLLEGE LONDON SCHOOL OF LAW, WORLD PRISON POPULATION LIST (8th ed. 2008), available at [http://www.kcl.ac.uk/dcpsta/law/research/icps/downloads/wpp1-8th\\_41.pdf](http://www.kcl.ac.uk/dcpsta/law/research/icps/downloads/wpp1-8th_41.pdf).

21. *Id.*

22. See also Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 312 (2009) (describing legislation in late twentieth century that lengthened average prison sentences).

23. Between 1982 and 1999 federal, state, and local government spending on corrections went from \$9 billion to \$49 billion. AM. BAR ASS’N., JUSTICE KENNEDY COMMISSION, REPORT WITH RECOMMENDATIONS 17 (2004).

24. Kennedy, *supra* note 15.

In recent years, scholars have proposed a number of reform measures designed to reduce our national reliance on incarceration, generating hope in a “decarceration” movement.<sup>25</sup> Such measures include sentencing reform,<sup>26</sup> crime prevention efforts,<sup>27</sup> and emphasis upon offender re-entry into society.<sup>28</sup> Some politicians—including those previously perceived as tough-on-crime—have embraced and implemented these proposals.<sup>29</sup> These are valuable and promising developments. In this Article, I argue that robust state clemency should also be a piece of the reform puzzle.

Part I of this Article describes clemency at the state level today. Despite judicial and scholarly support for the role of clemency in our criminal justice system, state clemency practice fails to live up to its theoretical justifications. In many jurisdictions, clemency has fallen into disuse altogether; when clemency grants do happen, too many appear arbitrary and rooted in favoritism. Part II of this Article makes the case for a policy of vigorous clemency on both theoretical and practical grounds today. Other scholars have argued for the revival of clemency in recent years, especially with respect to discrete inmate populations, but most, if not all, assume that clemency will meet a hostile political climate. In Part II of this Article, I argue that

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25. See Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235 (2009); see also Marc Maurer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUST. 27 (2011) (describing basis for optimism about sentencing reform).

26. After years of criticism, the federal government enacted legislation to reduce the sentencing disparity between crack and powder cocaine. See Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010). Because of the recession and prison overcrowding, many jurisdictions have also begun to explore sentencing reforms. See, e.g., Ron Jackson, Jr., *Alternative Sentencing Programs Show Growing Success in Oklahoma*, OKLAHOMAN (Mar. 27, 2011), <http://newsok.com/alternative-sentencing-programs-show-growing-success-in-oklahoma/article/3552231#ixzz1HtcXbcmB> (discussing sentencing options available).

27. For example, scholars are probing the “school to jail” connection and advocating for solutions that prevent criminal activity. See Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the School to Jail Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 634-37 (2011) (describing the link).

28. See, e.g., Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); see also Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility and Prospects*, 47 CRIM. LAW BULL. 177 (2011).

29. See, e.g., Deborah Sontag, *Perry Displays Varied Stance Toward Crime*, N.Y. TIMES (Oct. 30, 2011), <http://www.nytimes.com/2011/10/31/us/politics/rick-perry-displays-varied-stance-toward-crime.html>.

clemency today is theoretically justified, and moreover, that it may not be politically deleterious under the right circumstances. Part III addresses questions of implementation. For example, if state executive actors are to pursue commutations of sentences or pardons, how can those executive actors best be insulated from political pressure? Which inmates should be the subject of such pursuits? I offer some preliminary answers to these important questions. In conclusion, I note that a revitalized model of state clemency should by no means be viewed as a panacea, but it should be viewed as a viable and valuable reform measure.

### I. STATE CLEMENCY TODAY

Clemency in America is an often misunderstood act of executive grace.<sup>30</sup> Executive clemency includes the power to pardon a criminal defendant, reduce a sentence, or grant a stay of execution.<sup>31</sup> At the state level, the clemency power is vested in the Governor, an executive clemency board, or some combination thereof.<sup>32</sup> For example, Virginia vests its clemency power in the Governor alone, while Texas grants the Governor final decision-making authority but requires a recommendation of clemency from a board.<sup>33</sup> In Ohio, the Governor is required to hear from the board, but the board's recommendation is non-binding.<sup>34</sup> In a handful of states, a board alone makes clemency decisions.<sup>35</sup>

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30. First, there are many forms of clemency. See Ridolfi & Gordon, *supra* note 1, at 3 (defining forms of clemency). Second, contrary to the rare incidence of clemency grants, clemency is often perceived as a widely available source of relief. See, e.g., Alan Prndergast, *Clemency for These Six Prisoners Could Save Millions and Serve Justice—So Why Won't Governor Ritter Try it?*, 2009 WLNR 21126425 \*2 (Oct. 22, 2009) (“When we went to the legislature to get the law changed for juveniles in the adult system, they told us, ‘There’s always clemency,’” recalls Mary Ellen Johnson, director of the Pendulum Foundation, a juvenile-justice nonprofit based in Denver. “They were shocked when we told them that nobody gets clemency.”).

31. Ridolfi & Gordon, *supra* note 1, at 3 (defining forms of clemency).

32. See generally *State by State Database*, DEATH PENALTY INFO. CTR., [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Dec. 13, 2011) (listing clemency process by state).

33. *Id.*

34. *Id.*

35. *Id.*

The Supreme Court has recognized that “[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”<sup>36</sup> Scholars, too, have articulated several justifications for the role of clemency in our criminal justice system: it can correct errors and amend sentences where parole has been abolished;<sup>37</sup> it can facilitate re-entry into society when it comes in the form of a pardon;<sup>38</sup> it can reward rehabilitation in prison and remedy gross sentencing disparities among similarly culpable defendants,<sup>39</sup> and it can prompt broad reform by drawing attention to systemic failings in the justice system.<sup>40</sup> Thus, legal practitioners and scholars alike recognize the valuable role that clemency plays in our criminal justice system.

As recently as the mid-twentieth century, state executive actors shared this view of clemency—at least to the extent that they regularly used their clemency power.<sup>41</sup> Today, despite popular perception to the contrary,<sup>42</sup> state clemency grants have become a truly rare occurrence. In all of the nation’s thirty-eight death penalty states, there have been only 270 commutations since 1976, and 167 of those were part of Governor Ryan’s commutation of Illinois’ entire death row in 2003.<sup>43</sup> In several states there have been only one or two commutations of a death sentence in the last few decades, and in some states there have been none.<sup>44</sup> There is no disputing the fact that clemency is no longer a regularly exercised power at the state level.

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36. *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993).

37. Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT’G REP. 153, 153 (2009).

38. *Id.*

39. Molly M. Gill, *Clemency for Lifers: The Only Road Out is the Road Not Taken*, 21 FED. SENT’G REP. 21, 22 (2009).

40. Barkow, *supra* note 14, at 1361–62 (discussing Governor Ryan’s commutation of death row inmates in Illinois and the attention his decision brought to systemic errors).

41. Acker & Lanier, *supra* note 3, at 211–12.

42. *See supra* note 30 and accompanying text.

43. *See generally Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 25, 2011) (listing commutations since 1976 by state).

44. *See generally id.*

When it has been used in recent years, for the most part, clemency has not earned a good reputation either in the mainstream media or among academics. For example, Governor Charlie Crist's 2010 posthumous pardon of Jim Morrison appeared to reflect the instincts of a fan rather than a governor.<sup>45</sup> Morrison had been convicted of indecent exposure at one of his 1969 concerts, and his case had been on appeal when the singer died in 1971.<sup>46</sup> In his last few months of office, then-Governor Crist explained that pursuing a pardon for Morrison was "the right thing to do."<sup>47</sup> He said at the time:

In some ways it seems like a tragic conclusion to a young man's life to have maybe this be a lasting legacy, where we're not even sure that it actually occurred. The more that I've read about the case and the more I get briefed on it, the more convinced I am that maybe an injustice has been done here.<sup>48</sup>

The Florida Clemency Board unanimously agreed to pardon Morrison in Crist's last month of office.<sup>49</sup>

In light of Morrison's death, his pardon case was not time-sensitive, and moreover, Governor Crist had far more important clemency cases to consider. In May, 2010, the United States Supreme Court held that a life-without-parole sentence for a juvenile non-homicide offender violates the Eighth Amendment ban on cruel and unusual punishment.<sup>50</sup> As a result of the *Graham* decision, Florida was effectively under a Supreme Court mandate to amend the life-without-parole sentences of its juvenile non-homicide offenders. Because of the state legislature's inability to pass corrective

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45. Dave Itzkoff, *Jim Morrison is Candidate for Pardon in '69 Arrest*, N.Y. TIMES, Nov. 16, 2010, at A16 (noting the governor "seemed to side with many Doors fans in explaining his decision to seek a pardon for Morrison" and that the two both attended Florida State University).

46. *Id.*

47. *Id.*

48. *Id.*

49. Susan Candiotti, *Doors Singer Jim Morrison Wins Indecent Exposure Pardon*, CNN (Dec. 9, 2010), [http://articles.cnn.com/2010-12-09/entertainment/ent.jim.morrison.pardon\\_1\\_jim-morrison-exposure-charge-indecnt-exposure?\\_s=PM:SHOWBIZ](http://articles.cnn.com/2010-12-09/entertainment/ent.jim.morrison.pardon_1_jim-morrison-exposure-charge-indecnt-exposure?_s=PM:SHOWBIZ).

50. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).



legislation and the resulting confusion for state court judges, it would have been prudent for Crist to seek executive clemency in order to commute the sentences of the affected juvenile offenders.<sup>51</sup> Instead, as the local newspapers reported, Governor Crist sought clemency for a deceased singer whom he had once admired.<sup>52</sup>

In contrast, many people were stunned by the denial of clemency in the case of Troy Davis. Mr. Davis had been convicted of killing a Georgia police officer in 1989, and in the wake of his conviction, several of the witnesses who had testified against him recanted their testimony.<sup>53</sup> In a rare occurrence, the United States Supreme Court remanded Mr. Davis's case for an evidentiary hearing regarding his innocence.<sup>54</sup> Despite the fact that the District Court failed to find enough evidence to overturn the conviction, serious doubts about Mr. Davis's guilt remained.<sup>55</sup> In addition, there was unprecedented international support for clemency in Mr. Davis's case, including personal pleas for mercy from Pope Benedict the XVI, the former Chief Justice of the Georgia Supreme Court, and President Carter.<sup>56</sup> Despite this groundswell of support for mercy in Davis's case, the Georgia Board of Pardons denied clemency, and the state executed Mr. Davis on September 21, 2011.<sup>57</sup> In light of examples like these, it is no wonder much of the public is skeptical of clemency and views it as an exercise of favoritism rather than reasoned mercy.<sup>58</sup>

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51. See generally Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900005) (discussing the task of implementing the *Graham* decision and its particular application to Florida).

52. See *supra* text accompanying note 45; see also Brendan Farrington, *Charlie Crist Wants the Doors' Jim Morrison Pardoned*, NAPLESNEWS.COM (Nov. 17, 2010, 10:42 P.M.), <http://www.naplesnews.com/news/2010/nov/17/charlie-crist-wants-doors-jim-morrison-pardoned/>.

53. Adam Liptak, *Supreme Court Orders New Look at Death Row Case*, N.Y. TIMES, Aug. 17, 2009, at A15.

54. Adam Liptak, *Justices Deny New Appeal by Convict in Georgia*, N.Y. TIMES, Mar. 28, 2011, at A20 (describing the Supreme Court's remand order).

55. Editorial, *A Grievous Wrong*, N.Y. TIMES, Sept. 20, 2011, at A30, available at <http://www.nytimes.com/2011/09/21/opinion/a-grievous-wrong-on-georgias-death-row.html> (describing doubts that remained the day before Mr. Davis's execution).

56. *Id.*; see also Bill Rankin & Rhonda Cook, *Troy Davis' Life in Board's Hands*, ATLANTA J.-CONST., Sept. 18, 2011, available at <http://www.ajc.com/news/troy-davis-life-in-1183243.html>.

57. Kim Severson, *Troy Davis Executed in Georgia After 4-Hour Delay*, N.Y. TIMES, Sept. 21, 2011, at A1, available at <http://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html>.

58. *Cf.* Berman, *supra* note 10, at 69 ("Many, if not most, Americans now likely associate the

Like much of the public, academics have been highly critical of state clemency practices. The Supreme Court has consistently taken the position that “a petition for commutation, like an appeal for clemency, ‘is simply a unilateral hope,’”<sup>59</sup> and the Court has declined to interfere with state clemency procedures.<sup>60</sup> As a result, there is great variety in state clemency application procedures,<sup>61</sup> as well as in the resources made available to applicants. Applicants have challenged the lack of a public clemency hearing, the absence of an explanation for clemency denial, the absence of clemency records, and the lack of a right to clemency counsel. Courts have uniformly rejected these challenges.<sup>62</sup> Scholars have decried this status quo in clemency procedure, noting that procedures are largely “standardless,” decisions are “discretionary,” and results are “unreviewable.”<sup>63</sup> Yet, in light of the Supreme Court’s decisions in this area, if procedural reform is to happen, it will need to come from the states themselves.

In the next part of this Article, I argue that clemency can and should be put to better, more regular use.

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clemency power with cronyism and scandal, and few have reason to understand the noble and sensible goals that the Framers sought to further by guaranteeing this power to the president in the Constitution.”).

59. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998) (holding that Ohio clemency procedures allowing the applicant to be interviewed without counsel violated neither the Due Process Clause nor the Fifth Amendment privilege against self-incrimination).

60. Justice O’Connor, joined by Justices Souter, Ginsburg, and Breyer articulated the position that states need to provide some “minimal procedural safeguards [that] apply to clemency proceedings.” *Id.* at 289. For example, she explained: “Judicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.” *Id.*; see also *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (holding that Connecticut clemency procedure did not violate the Due Process clause in failing to provide explanation for denial of clemency); Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 *BERKELEY J. CRIM. L.* 37, 50–53 (2009) (describing the lack of successful Due Process challenges to state clemency procedures).

61. See generally *Ridolfi & Gordon*, *supra* note 1.

62. *Moylan & Carter*, *supra* note 60, at 53.

63. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 *N.Y.U. REV. L. & SOC. CHANGE* 255, 257 (1990); see also Adam Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 *J. L. & POL.* 669 (2001) (arguing for Due Process protections in clemency procedures); *Kobil*, *supra* note 2, at 633–36 (discussing proposals for reforming clemency procedure).

## II. THE CASE FOR CLEMENCY IN A TIME OF CRISIS

Over the last few decades, states have consistently shirked their obligation to provide indigent criminal defendants with effective representation at trial, and at the same time, they have consistently increased the consequences for criminal acts and the number of people behind bars. This should not be surprising as scholars have long recognized the political process challenge presented by criminal justice reform; legislative bodies tend to devalue the rights of indigent criminal defendants who “have no lobby,” while they overvalue the short-term gains generated by tough-on-crime stances. While the economic crisis has brought renewed attention to criminal justice matters—generating some hope in lasting reform—robust state clemency has a role to play in the reform movement. In this Part of the paper, I make the case for clemency in a time of crisis. First, I argue that robust clemency is theoretically justified in light of ongoing, entrenched criminal justice failings. Second, I suggest that recent experience calls into question the perceived political risk of clemency grants.

### *A. Robust Clemency Today Is Theoretically Justified*

As mentioned at the outset, courts and scholars have recognized that clemency serves several important functions: it can be a check on the judiciary; it can be a “safety-valve” that allows for error-correction; and it can be an opportunity for state acts of mercy. There may be strong theoretical arguments to be made for reviving clemency in all three of these lights, but in this Article, my primary focus is on clemency in its error-correction capacity. I conceive of clemency as an error-corrector in two specific ways. First, clemency may be justified to correct the errors of systemic indigent defense failings. Second, clemency may be justified to correct the error of draconian sentencing enhancements over the last three decades. In this sub-section, I address each theoretical justification in turn.

### *1. Clemency to Correct Systemic Defense Errors*

In 2003, after a three-year study, Republican Illinois Governor George Ryan determined that the state's criminal justice system was deeply flawed and prone to error.<sup>64</sup> Consequently, Ryan used his clemency power to commute the sentences of the state's entire death row population and to pardon four inmates.<sup>65</sup> With respect to the seventeen exonerations that had taken place in Illinois, Ryan said:

[I]n almost every one of the exonerated seventeen, we not only have breakdowns in the system with police, prosecutors and judges, we have terrible cases of shabby defense lawyers. There is just no way to sugarcoat it. There are defense attorneys that did not consult with their clients, did not investigate the case and were completely unqualified to handle complex death penalty cases. They often didn't put much effort into fighting a death sentence.<sup>66</sup>

Ryan left office days after his commutation announcement, but the findings of his Capital Punishment Commission had a lasting impact. There were no executions under subsequent governors, and in March of 2011, Illinois Governor Pat Quinn signed into law a statewide ban on the death penalty, while commuting the death sentences of fifteen death row inmates to life in prison.<sup>67</sup>

The lack of effective representation identified by Ryan's Capital Punishment Commission is neither unique to capital cases nor to the state of Illinois. Rather, the indigent defense crisis is national in scope and has only deepened since the 2008 recession.<sup>68</sup> Eighty

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64. George Ryan, Governor of Ill., Speech before Northwestern University College of Law (Jan 11, 2003), in N.Y. TIMES, Jan. 11, 2003, <http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html>.

65. *Id.*; Jodi Wilgoren, *4 Death Row Inmates are Pardoned*, N.Y. TIMES, Jan. 11, 2003, <http://www.nytimes.com/2003/01/11/us/4-death-row-inmates-are-pardoned.html>.

66. Ryan, *supra* note 64.

67. Ray Long, *Illinois Death Penalty Ban Takes Effect Friday*, CHICAGO TRIBUNE (June 30, 2011), [http://articles.chicagotribune.com/2011-06-30/news/chi-illinois-death-penalty-ban-takes-effect-friday-20110630\\_1\\_death-penalty-maximum-security-prisons-pontiac-correctional-center](http://articles.chicagotribune.com/2011-06-30/news/chi-illinois-death-penalty-ban-takes-effect-friday-20110630_1_death-penalty-maximum-security-prisons-pontiac-correctional-center).

68. A full description of the national indigent defense crisis is outside the scope of this Article, but

percent of criminal defendants are poor,<sup>69</sup> and public defense systems across the board receive far too little funding to represent these individuals.<sup>70</sup> As a result, public defenders have workloads that exceed nationally recommended guidelines—sometimes egregiously so.<sup>71</sup> A 2009 decision of the Missouri Supreme Court dealing with defender workloads found that defenders were spending less than eight hours on appellate and capital cases.<sup>72</sup> In other cash-strapped jurisdictions, lawyers are hired to represent indigent criminal defendants on the basis of their expedience, rather than their experience or lawyering skill.<sup>73</sup> In many jurisdictions, the most fundamental problem with the defense system is its lack of independence from judicial and political interference.<sup>74</sup> National studies of indigent defense services over several decades have all

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its existence and symptoms have been well documented by scholars and practitioners. *See, e.g.*, NAT'L ASS'N OF CRIM. DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009) [hereinafter *MINOR CRIMES, MASSIVE WASTE*], available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf); JUSTICE DENIED, *supra* note 16; *GIDEON'S BROKEN PROMISE*, *supra* note 17; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994); Adam Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007); Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

69. *Cf.* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 50 (2010).

70. Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 491 (2010).

71. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf> (reporting that 73% of county-based public defender offices exceeded the maximum recommended number of cases per year per attorney); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf> (reporting that 79%, or 15 of 19 state offices, exceeded the maximum recommended number of felony and misdemeanor cases per attorney).

72. *State ex rel. Mo. Public Defender Comm'n v. Pratte*, 298 S.W.3d 870, 873 (Mo. 2009) ("The statewide public defender system, under rules adopted by the commission, had the capacity last fiscal year to spend only 7.7 hours per case, including trial, appellate and capital cases.").

73. *GIDEON'S BROKEN PROMISE*, *supra* note 68, at 11–12 (discussing witness testimony to this effect); *see also* AM. CIVIL LIB. UNION, *FAILING GIDEON: UTAH'S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM* (2011), [http://www.acluutah.org/Failing\\_Gideon.pdf](http://www.acluutah.org/Failing_Gideon.pdf) (discussing this dynamic in Utah, where there is no public funding or oversight of county-run defender programs).

74. *GIDEON'S BROKEN PROMISE*, *supra* note 17, at 20–21.

come to the conclusion that “indigent defense systems are struggling” and “many are truly failing.”<sup>75</sup>

Unfortunately, state legislative and judicial bodies have been reticent to enact sweeping indigent defense reform. To begin, the political pressure to be perceived as tough on crime has made it historically difficult for lawmakers to pursue indigent defense reform.<sup>76</sup> At the same time, state courts have been hesitant to intervene in challenges to indigent defense systems, and the federal courts historically have been unavailable because of federalism principles.<sup>77</sup> Only very recently, as the economy fell into recession, have lawmakers been willing to explore reform efforts that would benefit taxpayers and indigent defendants alike.<sup>78</sup>

Accordingly, clemency grants may be justified as a check on judicial and legislative bodies that have been unable (or unwilling) to insist upon indigent defense reform. Simply because a state actor justifies clemency on the basis of a systemic problem, like a broken indigent defense system, does not require the state actor to grant clemency on a systemic basis. Rather, it may mean that state executive actors pay particular attention to clemency applications that reflect the symptoms of a broken indigent defense system.

For example, in 2002, Leonard Rojas was executed in Texas despite his legitimate claim of ineffective assistance of counsel.<sup>79</sup> Under state law, Mr. Rojas’s habeas attorney was required to conduct a thorough investigation. Instead, his lawyer admitted in an affidavit that he spoke with Rojas only once, read the trial transcript, spoke to one trial attorney, and did no independent investigation.<sup>80</sup> In addition,

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75. JUSTICE DENIED, *supra* note 16, at 2 (italics omitted).

76. James Forman, Jr. *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 994 (2010) (“[P]oliticians make carcens out of being tough on crime, only to lose elections to those who are yet tougher.”).

77. A full discussion of systemic indigent defense litigation is outside the scope of this Article. For an overview, see Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009); see also Adele Bernhard, *Take Courage: What the Courts Can Do To Improve the Quality of Criminal Justice Services*, 63 UNIV. PITT. L. REV. 293 (2002).

78. See generally SMART REFORM IS POSSIBLE, *supra* note 16 (identifying trend of states reforming in part out of fiscal need).

79. Brandi Grissom, *Scrutinizing Perry’s Extensive Execution Record*, N.Y. TIMES, Sept. 2, 2011, at A19 (discussing the Rojas case).

80. Janet Elliott, *Judges Criticize Court of Criminal Appeals Decision*, HOUSTON CHRON. (Feb. 14,

Mr. Rojas's counsel failed to tell him that he lost his appeal for state habeas relief, and without consulting Rojas, his lawyer waived Rojas's right to a federal habeas petition.<sup>81</sup> Perhaps most damning, when the Texas Court of Criminal Appeals appointed the attorney to represent Mr. Rojas in his capital post-conviction review, the attorney had already received two probated suspensions from the State Bar of Texas.<sup>82</sup>

In 2002, when Mr. Rojas sought clemency, countless reports had been generated criticizing the state's indigent defense services, particularly in light of its highly punitive practices.<sup>83</sup> When an inmate grounds his appeal for clemency in a claim of grossly ineffective representation, as Mr. Rojas did, state actors should pay attention—especially if the claim is indicative of systemic failures. While such failures require legislative correction in the long run, state actors can and should use clemency as a tool to correct errors that flow from a broken system. In doing so, executive actors may also prompt legislative attention.

## 2. Clemency to Correct Sentencing Policy Errors

It is also true that clemency grants may be theoretically justified to correct the problem of our national addiction to incarceration. There is no dispute that America today is plagued by its mass incarceration.<sup>84</sup> Some scholars trace this emphasis on incarceration back to Barry Goldwater's 1964 Presidential campaign,<sup>85</sup> while

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2003), <http://www.chron.com/news/houston-texas/article/Judges-criticize-Court-of-Criminal-Appeals-2094712.php>.

81. *Id.*

82. *Id.*

83. See, e.g., TEX. APPLESEED, FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES (2000), [http://www.texasappleseed.net/pdf/projects\\_fairDefense\\_fairref.pdf](http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf) (identifying systemic shortcomings).

84. Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011) ("That the last several decades have seen an explosion of Americans' reliance on imprisonment as a penal sanction is unquestioned. So vast has this expansion been that the term 'mass incarceration' has entered scholarly vocabulary as a way of describing this phenomenon." (footnote omitted)).

85. Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. CIV. RTS. & ECON. DEV. 153, 158 (2010) ("In 1964, in the face of rising crime rates, presidential candidate Barry Goldwater made being 'tough on crime' a national issue. Although Goldwater did not win the election,

others point to President Nixon's rhetoric of the 1970s, both of which placed great emphasis upon the danger of criminals and the need to be tough on crime.<sup>86</sup> In any event, there is consensus that beginning around 1980, penal policy in America shifted dramatically.<sup>87</sup> Prison systems moved away from an emphasis upon preventing future criminal activity to incapacitating criminals through prolonged detention.<sup>88</sup> Since the 1970s, when a perceived spike in the crime rate prompted politicians to pursue tough-on-crime policies,<sup>89</sup> the American prison population has grown exponentially.<sup>90</sup> Moreover, between 1970 and today, several changes in the American criminal justice system converged to generate our status as the world's leading incarcerator: the introduction of mandatory minimums and much longer average prison sentences; the passage of "three-strikes" legislation which has created a pool of inmates serving life sentences; legislation in many states eliminating parole;<sup>91</sup> and the expansion of what constitutes criminal behavior.<sup>92</sup> As is now apparent, the long-term consequences of enacting draconian sentencing policies have been tremendous: we are now a nation identified by its mass incarceration, and our incarceration habits are incredibly expensive.

The Supreme Court's 2011 decision in *Brown v. Plata*,<sup>93</sup> requiring the reduction of California's prison population, has brought mainstream media attention to the blight of America's over-reliance

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his campaign tactic changed the politics of crime on the national stage.").

86. Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587, 619-20 (2010) (describing Nixon's tough-on-crime platform and its impact upon the African-American community).

87. See Clear & Austin, *supra* note 22, at 312.

88. Chase Rivcland, *Prison Management Trends, 1975-2025*, 26 CRIME & JUST. 163, 176-79 (1999) (discussing the shift away from rehabilitative model in 1974).

89. THE JFA INSTITUTE, UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 5-6 (2007).

90. *Id.* In 1970, there were less than 200,000 people in prison; by 2006, there were approximately 1.6 million people in prison. *Id.* at 3. For a visual of this growth from 1980 to 2009, see *Key Facts at a Glance*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm> (last modified Feb. 23, 2012).

91. Adam Gershowitz, *An Informational Approach to the Mass Incarceration Problem*, 40 ARIZ. ST. L.J. 47, 54-57 (2008) (discussing these and other causes).

92. For example, over the last three decades there has been an explosion in the volume of misdemeanor cases nationwide. See MINOR CRIMES, MASSIVE WASTE, *supra* note 68, at 11; Roberts, *supra* note 68, at 281.

93. *Brown v. Plata*, 131 S. Ct. 1910 (2011).



on incarceration. As Justice Kennedy's opinion in *Plata* described, California's prison system currently houses almost twice the inmates for which its facilities were designed.<sup>94</sup> As a result, "as many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers," while "[a]s many as 54 prisoners may share a single toilet."<sup>95</sup> Prisoners face increased exposure to infectious disease;<sup>96</sup> suicidal inmates are housed in "telephone-booth sized cages without toilets" while awaiting a treatment bed;<sup>97</sup> and the "[c]ramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population."<sup>98</sup> Because of this unsafe and chaotic environment, the prison system cannot hire and retain adequate staff with appropriate training.<sup>99</sup> In 2006, four years before the Supreme Court reviewed California's prison conditions, Governor Arnold Schwarzenegger declared a state of emergency in the state prison system, explaining that "immediate action" was "necessary to prevent death and harm caused by California's severe prison overcrowding."<sup>100</sup>

While California's prison crisis is "exceptional,"<sup>101</sup> the state's appetite for incarceration is by no means unique. To the contrary, almost every state in the nation faces similar problems regarding prison costs and overcrowding.<sup>102</sup> Alabama's prison system holds almost twice the inmates for which its facilities were designed, while Delaware, Illinois, North Dakota, Massachusetts, and Hawaii all have prison capacity rates hovering around 150%.<sup>103</sup> Other states are

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94. *Id.* at 1923.

95. *Id.* at 1924.

96. *Id.*

97. *Id.*

98. *Id.* at 1933.

99. *Plata*, 131 S. Ct. at 1927 ("Prisons were unable to retain sufficient numbers of competent medical staff and would 'hire any doctor who had 'a license, a pulse and a pair of shoes.'") (citations omitted).

100. *Id.* at 1924.

101. *Id.* at 1923.

102. See, e.g., Charlic Savagc, *Trend to Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14 (discussing national issue of prison overcrowding and states' increasing willingness to explore alternatives to incarceration).

103. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2009 (2010), available at <http://www.bjs.gov/content/pub/pdf/p09.pdf> (based on custody population as a percentage of lowest capacity).

exploring measures such as early release and electronic monitoring in order to stave off prison overcrowding.<sup>104</sup>

As the *Plata* Court described, this kind of prison overcrowding is not simply a matter of inconvenience for inmates who are forced to live in cramped quarters. Rather, overcrowding leads to the spread of infectious disease; causes prisoner unrest and violence; exacerbates mental illness; deprives inmates of timely access to emergency medical services; and renders the prison unable to hire and retain adequate staff. Indeed, as the *Plata* Court held, these conditions are “cruel and unusual.”<sup>105</sup>

At the same time, prison overcrowding is incredibly expensive.<sup>106</sup> On average, states spend approximately \$22,000 per inmate annually.<sup>107</sup> Massachusetts spends more than \$37,000 per inmate, while Alabama spends only \$8,000 per inmate annually.<sup>108</sup> As the rate of incarceration has increased over time, state prison expenditures have ballooned. In 2008, Pennsylvania spent 1.6 billion dollars on prisons,<sup>109</sup> while California spends more than four billion dollars annually on its prison expenses.<sup>110</sup> Moreover, these figures do not reflect the opportunity cost of mass incarceration. States have a finite amount of money to spend each year; when prison costs are excessive, those costs erode the states’ ability to spend money on education, infrastructure, courts, and other public services. For

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104. Natasha Alladina, Note, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration*, 28 ALASKA L. REV. 125, 126 (2011); Tom Barnes, *State Hopes New Prisons, Early Release Cut Crowding*, PITTSBURGH POST-GAZETTE (Oct. 27, 2008), <http://www.post-gazette.com/pg08301/923163-85.stm>.

105. U.S. CONST. amend. VIII; *Brown v. Plata*, 131 S. Ct. 1910, 1910 (2011).

106. Ironically, while it is expensive to incarcerate individuals, most states do not spend what they should in order to provide inmates with substance abuse treatment, mental health services, educational opportunities and other resources known to foster re-entry into society and to reduce recidivism. For example, Alabama has the fourth highest rate of incarceration in the nation, and its prisons are operating at 200% capacity. Yet, the state spends well below the national average per inmate. See JAMES J. STEPHAN, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: STATE PRISON EXPENDITURES, 2001 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spc01.pdf>; *Corrections Statistics by State*, NAT’L INST. CORR., <http://nicic.gov/StateStats/> (last visited Feb. 8, 2012).

107. STEPHAN, *supra* note 106, at 1.

108. *Id.*

109. Jeff Hawks, *Recidivism: The Point of No Return*, INTELLIGENCER J., May 1, 2008, at B1, available at [http://lancasteronline.com/article/local/220700\\_Recidivism—The-point-of-no-return.html](http://lancasteronline.com/article/local/220700_Recidivism—The-point-of-no-return.html).

110. STEPHAN, *supra* note 106, at 2.

example, Alabama's prison expenditures increased by nearly 45% between 2000 and 2004, while its budget for schools increased only 7.5%.<sup>111</sup> Collectively, the United States spends \$70 billion a year to incarcerate its more than two million prisoners.<sup>112</sup>

As Professors Clear and Austin have described, "[T]he size of a prison population is completely determined by two factors: *how many people go to prison and how long they stay.*"<sup>113</sup> Accordingly, there are only two ways to reduce a prison population: reduce the number of people who enter prison or shorten the length of their stay.<sup>114</sup> State legislative and judicial bodies have responded in recent years to this mass incarceration epidemic, and state executive actors should too. For example, in the last few years, Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio have all passed bipartisan criminal justice reform legislation designed to reduce prison populations and costs.<sup>115</sup> These bills have mandated non-prison punishments for certain offenses and expanded the terms of parole eligibility.<sup>116</sup>

State judges are also aware of burgeoning prison and corrections expenses. Last year, Missouri's state sentencing board began providing state judges with the cost of a given punishment.<sup>117</sup> As judges consider what punishment to impose, they can take into account the fiscal difference between, for example, incarceration and probation.<sup>118</sup> Judges and lawmakers are becoming increasingly aware of the fact that "even if we get significant benefits from incarceration, that comes at a significant cost."<sup>119</sup>

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111. *Excessive Sentences*, EQUAL JUSTICE INITIATIVE, <http://www.cji.org/cji/prisons/excessivesentences> (last visited Feb. 8, 2012).

112. Editorial, *Cutting Prison Costs is a Worthy Cause*, WASH. POST (Apr. 17, 2011), [http://www.washingtonpost.com/opinions/cutting-prison-costs-is-a-worthy-cause/2011/04/13/AF4er6vD\\_story.html](http://www.washingtonpost.com/opinions/cutting-prison-costs-is-a-worthy-cause/2011/04/13/AF4er6vD_story.html).

113. Clear & Austin, *supra* note 22, at 312.

114. *Id.*

115. *See generally* SMART REFORM IS POSSIBLE, *supra* note 16.

116. *Id.*

117. Monica Davcy, *Touching Off Debate, Missouri Tells Judges Costs of Sentences*, N.Y. TIMES, Sept. 18, 2010, at A1.

118. *Id.*

119. *Id.* (quoting law professor Douglas A. Berman).

Executive clemency can provide yet another tool in dismantling corrections policies that have led to years of prison expansion and have drained the public fisc. As with clemency grants made in recognition of failing defense systems, grants made in recognition of ill-advised corrections policies need not be made on a systemic or blanket basis. Rather, state executive actors should be cognizant of the excessive sentences that have been imposed in the last few decades, and when considering clemency applications, they should be looking for cases where the inmate can safely re-enter society and where taxpayer dollars can be saved at the same time.

Even if one accepts the proposition that state actors are justified in granting clemency on error-correcting grounds, as I have argued in this section, one may still query whether such a course of action is politically viable. In the next sub-Part, I turn to that issue.

### *B. Robust Clemency Today is Politically Viable*

In the last few years, and particularly in the wake of the 2008 economic decline, other scholars have noted that clemency has fallen into virtual extinction and have argued for its revival, especially with respect to discrete inmate populations. For example, scholars have called for clemency with respect to women who were convicted of murder when they acted in self-defense against their long-time batterer;<sup>120</sup> others have called for clemency regarding the thousands of individuals serving long sentences for non-violent drug offenses.<sup>121</sup> In the wake of *Graham v. Florida*,<sup>122</sup> some scholars have called for clemency to commute the sentences of juveniles serving life-without-parole sentences.<sup>123</sup>

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120. See, e.g., Carol Jacobsen, Kammy Mizga, & Lynn D'Ori, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31 (2007); see also Bridget B. Romcro et al., *The Missouri Battered Women's Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193 (2004).

121. See generally Berman, *supra* note 10; Molly M. Gill, *Clemency Today, Reform Tomorrow*, 20 FED. SENT'G REP. 318 (2007), available at 2007 WL 5658936.

122. *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding life-without-parole sentence unconstitutional for non-homicide juvenile offenders); see also *supra* note 50 and accompanying text.

123. See, e.g., Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641 (2011).

These proposals assume, either explicitly or implicitly, that attempts to expand the use of clemency at the state level will meet a hostile political climate.<sup>124</sup>

This assumption should not be surprising: decades of conventional wisdom and mainstream press accounts present executive clemency as “political suicide.”<sup>125</sup> In 1992, then-Governor Clinton refused to grant clemency to Arkansas death-row inmate, Rickey Ray Rector, despite arguments that Rector was too mentally impaired to understand his own pending execution.<sup>126</sup> Clinton’s refusal to grant clemency in Rector’s case was widely recognized as a political decision, designed to stave off Republican criticism that he was soft on crime.<sup>127</sup> In 2010, California’s Governor Arnold Schwarzenegger reversed the California Parole Board’s decision to free dozens of inmates, and there was a political dynamic to the decision. Many of the inmates whom the Board had recommended for clemency had not been the “trigger-man” in homicide crimes; some of them had no prior criminal record.<sup>128</sup> Defense lawyers were not surprised by the denial of clemency and explained that the “former governor used that power to burnish a reputation as a hard-nosed law-and-order governor.”<sup>129</sup> In fact, when Governor Schwarzenegger commuted the sentence of *one* inmate from sixteen to seven years under circumstances that seemed blatantly grounded in favoritism, California Republicans issued a statement rebuking the Governor—

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124. See Barkow, *supra* note 37, at 153 (“Politicians remain afraid of soft-on-crime accusations or facing a Willie Horton-style advertisement should an individual on the receiving end of a pardon or commutation go on to commit another crime.”); Thompson, *supra* note 123, at 2699–700 (describing clemency as a political act with political consequences).

125. Korengold, Noteboom, & Gurwitch, *supra* note 11, at 363–65 (discussing the “political suicide” issue); see also LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster’s Moral Choice*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 262–64 (2008) (describing the Willie Horton ad campaign and its portrayal of Presidential Candidate Dukakis as soft-on-crime because of a Massachusetts prison furlough policy).

126. Peter Applebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor’s Politics*, N.Y. TIMES, Jan. 25, 1992, § 1, at 18.

127. *Id.*

128. Jack Dolan, *Schwarzenegger Was Inconsistent on Clemency*, L.A. TIMES, Jan. 16, 2011, at A1.

129. *Id.*

not for nepotism, but for “undermin[ing] the party’s message of being tough on crime while advocating for the rights of victims.”<sup>130</sup>

One may ask then: why would any state actor want to take an enormous political risk by reviving the use of clemency, as I have suggested? In this subsection, I suggest several reasons why the rhetoric around clemency may overstate the risk associated with politicians using their clemency power today.

To begin, there is very little empirical research on clemency grants, and most of the work that has been done has focused on defendant characteristics that may affect clemency decisions, such as age, sex, and state of sentencing.<sup>131</sup> An even smaller subset of research looks at the nexus between political factors, such as whether a governor faces reelection, and grants of clemency.<sup>132</sup> The little data that examines this nexus, though, suggests that the connection may be more tenuous than the rhetoric suggests.

Professor Heise conducted an empirical study in 2003 that was the first to examine the effect that political factors, structural factors, and defendant characteristics had on clemency grants over several decades of clemency decisions.<sup>133</sup> Contrary to prevailing assumptions about the politicization of clemency grants, none of the political variables that Heise considered had a statistically significant impact on state clemency grants.<sup>134</sup> Heise leaves room for the possibility that there is, in fact, a connection, but that the connection evades empirical analysis and is instead idiosyncratic and case-specific.<sup>135</sup> Still, Heise’s work undermines the idea that there is a powerful connection between political variables, especially re-election concerns, and clemency grants.

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130. Tom Verdin, *Schwarzenegger Clemency Denounced by California G.O.P.*, HUFFINGTON POST (Mar. 20, 2011, 7:11 PM), [http://www.huffingtonpost.com/2011/03/20/schwarzenegger-clemency-d\\_0\\_n\\_838179.html](http://www.huffingtonpost.com/2011/03/20/schwarzenegger-clemency-d_0_n_838179.html).

131. Heise, *supra* note 9, at 259–60.

132. *Id.* at 260–61.

133. *Id.* at 262.

134. *Id.* at 296 (“Unexpectedly, none of the political variables examined in this study achieved statistical significance.”).

135. *Id.* at 296–97.

Voter sentiments, as reflected in criminal decision-making and in recent polls, further suggest that clemency grants today may not be politically harmful. Since 1999, the number of death sentences has dropped dramatically, from 277 in 1999 to 78 last year.<sup>136</sup> A 2010 study conducted by the Lake Research Group found growing support among voters for alternatives to the death penalty in murder cases. Sixty-one percent of voters would choose a punishment other than death for murder.<sup>137</sup> Moreover, in death penalty states a majority of voters said that a representative's action to repeal the death penalty would not impact their vote (38%) or would impact it favorably (24%).<sup>138</sup> These results are consistent with the earlier finding that "the greatest concern among voters regarding the death penalty is the danger that an innocent person may be executed."<sup>139</sup> These findings reveal a very different set of voter beliefs than prevailed even a few decades ago. Further, they may serve as a proxy for voter amenability to clemency grants under the right circumstances.

There will always be political actors who will try to turn clemency grants into a political opportunity. As a result, it is tempting to conclude that our nation will never return to the model of state clemency that prevailed in the first half of the twentieth century. Such a conclusion, though, overlooks several changes, especially in recent years, that have the potential to facilitate robust state clemency.

First, there are recent examples of state actors who used their clemency power in a meaningful way without suffering tremendous political consequences. Professor Barkow cites Arkansas Governor Mike Huckabee, Virginia Governor Tim Kaine, and Maryland Governor Robert Ehrlich as examples of Governors who fit this profile.<sup>140</sup> This is not to say that their clemency actions were never

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136. DEATH PENALTY INFO. CTR., *Facts About the Death Penalty* (updated Mar. 1, 2012), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

137. *Poll Shows Growing Support for Alternatives to the Death Penalty: Capital Punishment Ranked Lowest Among Budget Priorities*, DEATH PENALTY INFO. CTR. (Nov. 16, 2010), [http://www.deathpenaltyinfo.org/pollresults#Press\\_Release](http://www.deathpenaltyinfo.org/pollresults#Press_Release).

138. *Id.*

139. Korengold, Notboom, & Gurwich *supra* note 11, at 365.

140. Barkow, *supra* note 14, at 153.

mentioned by their political opponents, but rather that their clemency actions were not determinative of their political careers. During Governor Huckabee's bid for President in 2007, his opponents criticized his numerous clemency grants,<sup>141</sup> and, in particular, the fact that he had supported the parole of a convicted rapist who was subsequently convicted of raping and murdering a Missouri woman within one year of his release.<sup>142</sup> However, Huckabee made numerous clemency grants during his first term as Governor in Arkansas,<sup>143</sup> and he was reelected in that state twice. Moreover, his decision to bow out of the Republican presidential primary most likely had more to do with funding than any other factor, certainly more than his clemency record.<sup>144</sup> Finally, before he announced his decision not to run for President in 2012, "[he] had been showing strong poll numbers, among some of the strongest of his party's possible contenders."<sup>145</sup> If Huckabee was able to grant clemency to more than a 1,000 people during his years as Governor and be a serious contender in two presidential elections, perhaps the rhetoric of clemency as political suicide is overblown.

One may say the same with respect to Governor Ehrlich and Governor Kaine. While Governor Ehrlich reversed the Maryland trend of refusing clemency and was praised in the press for doing so.<sup>146</sup> The fact that he was a one-term governor in the state was most

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141. Michael Luo, *Romney Takes On a Rising Huckabee, Comparing Records*, N.Y. TIMES, Dec. 18, 2007, at A26 (describing a Mitt Romney ad that criticized Huckabee's 1033 commutations and pardons).

142. *Huckabee's Role in Rapist's Parole Comes Under Fresh Scrutiny*, CNN POLITICS (Dec. 5, 2007), [http://articles.cnn.com/2007-12-05/politics/huckabee.dumond\\_1\\_mike-huckabee-arkansas-governor-waync-dumond?\\_s=PM:POLITICS](http://articles.cnn.com/2007-12-05/politics/huckabee.dumond_1_mike-huckabee-arkansas-governor-waync-dumond?_s=PM:POLITICS).

143. Barkow, *supra* note 14, at 153.

144. *Huckabee Bows to Inevitable, Ends G.O.P. Run*, CNN POLITICS (Mar. 5, 2008), [http://articles.cnn.com/2008-03-05/politics/huckabee\\_1\\_mike-huckabee-gop-straw-poll-john-mccain?\\_s=PM:POLITICS](http://articles.cnn.com/2008-03-05/politics/huckabee_1_mike-huckabee-gop-straw-poll-john-mccain?_s=PM:POLITICS) (noting that Mike Huckabee raised nearly \$13 million during his campaign as compared to John McCain's nearly \$55 million and Mitt Romney's \$90 million).

145. Jim Rutenberg, *After Hinting Otherwise, Huckabee Says He Won't Run for President*, N.Y. TIMES, May 14, 2011, at A20.

146. See, e.g., Dan Rodricks, *Clemency Cases: A Tale of Two Governors*, BALTIMORE SUN, Apr. 25, 2010, at 25A (comparing current Governor O'Malley's refusal to grant relief in several high-profile cases with Ehrlich's office making clemency a "priority"); see also, Editorial, *Mr. Ehrlich and Clemency*, WASH. POST (Aug. 27, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600599.html> (noting that his clemency practices had not caused him "to be branded 'soft on crime'").



likely because he was a Republican candidate in a state with twice as many registered Democrats as Republicans rather than a reflection of his clemency practices.<sup>147</sup> Governor Kaine also used his clemency power vigorously,<sup>148</sup> and today polls suggest that Kaine will be a strong contender in the 2012 Virginia Senate race.<sup>149</sup>

More recently, Ohio Governor John Kasich and Oregon Governor John Kitzhaber have made several high-profile clemency decisions within their first year in office. In November of 2011, Governor Kitzhaber, a Democrat, stopped a pending execution and declared a moratorium on the death penalty in Oregon.<sup>150</sup> Describing his action as only the grant of a “temporary reprieve,” Kitzhaber asked the state legislature to bring potential reforms to the 2013 legislative session.<sup>151</sup> Governor Kasich, a Republican who also came to office in 2010, has already commuted two death sentences to life-without-parole. In one case, Kasich explained there was “no doubt that the defendant played a significant, material role in this heinous crime, but precise details of that role are frustratingly unclear to the point that Ohio shouldn’t deliver the ultimate penalty in this case.”<sup>152</sup> In the second case, Kasich cited the defendant’s young age at the time of the murder and his “brutally abusive upbringing.”<sup>153</sup> In a non-capital case, Kasich granted clemency to a mother who had fraudulently enrolled her children in a neighboring school district.<sup>154</sup> By reducing

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147. See Julie Bykowicz, Annie Linskey, & Liz Kay, *O'Malley Defeats Ehrlich*, BALTIMORE SUN (Nov. 3, 2010), [http://articles.baltimoresun.com/2010-11-03/news/bs-md-governor-election-results-20101102\\_1\\_democrat-o-malley-katic-curran-o-malley-martin-o-malley](http://articles.baltimoresun.com/2010-11-03/news/bs-md-governor-election-results-20101102_1_democrat-o-malley-katic-curran-o-malley-martin-o-malley).

148. Barkow, *supra* note 14, at 153.

149. See *Dead Heat In Virginia Senate Race, Quinnipiac University Poll Finds; Voters Split On Obama Job Approval, But Like Him*, QUINNIPIAC U. (June 30, 2011), <http://www.quinnipiac.edu/x5822.xml?ReleaseID=1621>.

150. William Yardley, *Oregon's Governor Says He Will Not Allow Executions*, N.Y. TIMES, Nov. 23, 2011, at A14.

151. *Id.*

152. Alan Johnson, *Kasich Commutes Convicted Killer's Sentence to Life Without Parole*, COLUMBUS DISPATCH (June 8, 2011), <http://www.dispatch.com/content/stories/local/2011/06/08/kasich-sparcs-life-of-convicted-double-murderer.html> (internal quotation marks omitted).

153. Alan Johnson, *Kasich Spares Killer's Life*, COLUMBUS DISPATCH (Sept. 27, 2011), <http://www.dispatch.com/content/stories/local/2011/09/27/kasich-sparcs-killers-life.html> (internal quotation marks omitted).

154. Alan Johnson, *Kasich Reduces Sentence for Akron Mom in School-Residency Case*, COLUMBUS DISPATCH (Sept. 7, 2011), <http://www.dispatch.com/content/stories/local/2011/09/07/akron-mom-williams-bolar.html>.

her sentence and imposing several conditions on the mother, Kasich stated that he was giving the mother “a second chance,” not “a pass.”<sup>155</sup> Kasich’s latter move was especially courageous because the Ohio Parole Board, which makes recommendations to the Governor regarding clemency, had issued a unanimous recommendation to deny clemency in the mother’s case.<sup>156</sup> The Parole Board said that the mother was “deceitful” and faced the same problems as “any other working parent.”<sup>157</sup> Nonetheless, Kasich found her sentence excessive and reduced her felony conviction to a misdemeanor.<sup>158</sup>

It is too early to determine whether Kasich and Kitzhaber will suffer long-term political consequences from their clemency decisions, but to date the fallout has not been significant.<sup>159</sup> Kitzhaber is in a solidly Democratic state, and he was transparent about his position on the death penalty in his most recent run for Governor.<sup>160</sup> If Oregon lawmakers study the death penalty question and assess its costs and benefits for taxpayers, perhaps they will follow the path of New Jersey, New Mexico and Illinois, all of which have repealed the death penalty in recent years. As for Kasich, Professor Doug Berman, an expert on sentencing policy, has praised the Governor’s “already impressive clemency record,” noting that he has “made more profound and effective use of his state clemency authority in just the last three months than US President Barack

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155. *Id.* (internal quotation marks omitted).

156. *Id.*

157. *Id.* (internal quotation marks omitted).

158. *Id.*

159. To be sure, there have been early critics of the clemency decisions, as both Governors undoubtedly knew there would be. One prosecutor in the state said of the Governor’s decision: “It is arrogant and presumptuous for an elected official, up to and including the governor, to say, ‘I don’t care with the voters say, I don’t care what the courts say,’ and impose his own opinion.” Jonathan J. Cooper, *John Kitzhaber, Oregon Governor, Imposes Moratorium On Death Penalty For Rest Of His Term*, HUFFINGTON POST (Nov. 22, 2011), [http://www.huffingtonpost.com/2011/11/23/death-penalty-ban-oregon\\_n\\_1109350.html](http://www.huffingtonpost.com/2011/11/23/death-penalty-ban-oregon_n_1109350.html). It is worth noting that this objection argues too much in that it represents opposition to any acts of gubernatorial clemency, something which the Oregon Constitution authorizes. See OR. CONST. art. V, § 14. It is also worth noting that there have been very positive reactions to these clemency grants in the mainstream press. See, e.g., Mark Osler, *Oregon’s Death Penalty Halt Merciful and Right*, CNN OPINION (Nov. 25, 2011), [http://articles.cnn.com/2011-11-25/opinion/opinion\\_osler-oregon-death-penalty\\_1\\_death-penalty-john-kitzhaber-repricve?\\_s=PM:OPINION](http://articles.cnn.com/2011-11-25/opinion/opinion_osler-oregon-death-penalty_1_death-penalty-john-kitzhaber-repricve?_s=PM:OPINION).

160. See Eric Nisley & Walt Beglau, *Death Penalty: Respecting the Will of Voters*, OREGONIAN (Dec. 3, 2011), [http://www.oregonlive.com/opinion/index.ssf/2011/12/death\\_penalty\\_respecting\\_the.html](http://www.oregonlive.com/opinion/index.ssf/2011/12/death_penalty_respecting_the.html) (criticizing the Governor’s decision but noting that his position had never been a secret).

Obama has in over the last three years.”<sup>161</sup> Kasich’s approach may be more sustainable in the long run to the extent that it is perceived as judicious. In any event, the actions of these Governors from both sides of the political aisle stand as modern examples of robust state clemency.

Even more recently, outgoing Mississippi Governor Haley Barbour granted clemency to 215 individuals, including twenty-six inmates who were released from prison.<sup>162</sup> In Barbour’s case the public outcry was pronounced, and there are lawsuits pending today that challenge the clemency grants.<sup>163</sup> Yet, the Barbour example need not discredit the notion that clemency grants are politically doable today. Rather, the Barbour example provides important information about how clemency grants should be made. Specifically, boards, rather than individual governors, are better suited to making these decisions;<sup>164</sup> clemency decisions and the reasoning behind them should be transparent; and executive actors need to anticipate and address concerns of the public as they announce their clemency decisions.<sup>165</sup> In sum, the Barbour experience with clemency does not undermine the claim that robust clemency is politically doable; it

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161. Douglas Berman, *Sentencing Law and Policy, Following Ohio Parole Board’s Recommendation, Gov. Kasich Commutes Another Murderer’s Death Sentence*, SENTENCING LAW AND POLICY (Sept. 27, 2011) [http://scentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/09/following-ohio-parole-boards-recommendation-gov-kasich-commutes-another-murderers-death-sentence.html](http://scentencing.typepad.com/sentencing_law_and_policy/2011/09/following-ohio-parole-boards-recommendation-gov-kasich-commutes-another-murderers-death-sentence.html).

162. Halcy Barbour, *Statement of Former Gov. Haley Barbour on Clemency*, GOVERNORBARBOUR.COM (Jan. 13, 2011), <http://www.governorbarbour.com/news/2011/dec/1.13barbourclemencystatement.html>.

163. See, e.g., Mary Capps, *Barbour’s Blatant Disregard for the Safety of Women*, SUN HERALD (Biloxi, Miss.), Jan. 20, 2012, available at 2012 WLNR 1285237 (describing one particular source of anger about the pardons in letter to editor); *Miss. High Court Takes Ex-gov Pardons Case*, DELTA DEMOCRAT TIMES (Greenville, Miss.), Feb. 1, 2012, available at 2012 WLNR 2337072 (describing legal challenge to Barbour clemency decisions).

164. In the wake of the Barbour pardons, lawmakers in Mississippi are examining potential reforms to the state’s current clemency process which is left to the Governor’s sole discretion. See Phil West, *Changes Due for Pardons—Bryant, Lawmakers Seek to Reduce Governor’s Authority*, MEMPHIS COM. APPEAL, Jan. 13, 2012, available at 2012 WLNR 870274; see also *infra* Part III (discussing the rationale for a clemency board).

165. In Gov. Barbour’s case, he eloquently explained his decision to grant clemency in 215 cases, but his explanation came after his announcement of the grants. See Haley Barbour, *Why I Released 26 Prisoners*, WASH. POST, Jan. 18, 2012, [http://www.washingtonpost.com/opinions/haley-barbour-on-his-pardons-of-mississippi-prisoners/2012/01/17/gIQAOU9P\\_story.html](http://www.washingtonpost.com/opinions/haley-barbour-on-his-pardons-of-mississippi-prisoners/2012/01/17/gIQAOU9P_story.html).

highlights the pitfalls to avoid when making these important decisions.

Above and beyond actual cases of recent clemency grants, it is important to note that in recent years the entire political climate has changed, ushering in a host of reform measures that also would have been labeled “soft on crime” in another period.<sup>166</sup> Specifically, the economic downturn has forced even states with the toughest record on criminal sanctions to reconsider sentencing policy. In 2007, Texas faced a projected prison population increase of up to 17,000 inmates within five years.<sup>167</sup> Rather than spend the two billion dollars that would have been necessary to accommodate that population increase, the state spent a fraction of that figure establishing diversion and community based treatment programs.<sup>168</sup> Newt Gingrich, a contender for the Republican presidential ticket, recently established the Right on Crime organization, articulating the view that the criminal justice status quo is not sustainable and that conservatives can and should lead criminal justice reform efforts.<sup>169</sup> These are significant political changes, even in a very short period of time, and they are consistent with contemporary voter polls that suggest taxpayers no longer want to foot the bill for an ever-expanding prison population.<sup>170</sup> To the extent that there is newfound, bipartisan support for holistic criminal justice reform, including decarceration efforts, one may view that support as a proxy for the viability of clemency today, as well.

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166. David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011) (discussing recent signs of progress and political trend away from “tough on crime” positions). In recent years, there has been increasing bipartisan support for systemic reform. See, e.g., Shane D’Aprile, *Gingrich Backs NAACP Effort on Criminal Justice Reform*, HILL (Apr. 7, 2011, 9:35 AM), <http://thehill.com/blogs/ballot-box/gop-presidential-primary/154549-gingrich-backs-naacp-effort-on-criminal-justice-reform> (describing the Republican’s support for the NAACP criminal justice reform proposals); *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited Feb. 8, 2012).

167. THE PEW CTR. ON THE STATES, PRISON COUNT 2010, at 3 (2010), [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf).

168. *Id.*; see also AM. CIV. LIB. UNION, *supra* note 16 (highlighting Texas reforms).

169. See generally *Statement of Principles*, *supra* note 166; Steve Yoder, *The GOP, “Tough on Crime” No More?*, SALON (Nov. 7, 2011), [http://www.salon.com/2011/11/07/the\\_gop\\_tough\\_on\\_crime\\_no\\_more/](http://www.salon.com/2011/11/07/the_gop_tough_on_crime_no_more/).

170. See, e.g., Jack Dolan, *Californians Would Rather Ease Penalties Than Pay for More Prisons*, L.A. TIMES, July 21, 2011, <http://articles.latimes.com/2011/jul/21/local/la-me-poll-prisons-20110721>.

Finally, the Supreme Court's decision in *Plata* last term has provided state executive actors with an important shield if they choose to revive state clemency in this time of crisis.<sup>171</sup> That is, *Plata* made clear that systemic lawsuits challenging prison overcrowding and conditions of confinement have more than a chance of success—they have an ally in the Court.<sup>172</sup> State executive actors can use this to their advantage should they choose to pursue a methodical and judicious clemency agenda. In some states, for example, particularly those that have experienced prison litigation, executive actors can frame the question as *who* chooses who will leave prison before the end of their sentence rather than whether any inmates will do so. Framed this way, voters may prefer that an elected state official (or an appointed state board) do the choosing rather than a remote federal judge.

For all of these reasons, clemency in a time of crisis not only is theoretically defensible, but it may be politically doable—even advantageous—under the right circumstances.

### III. QUESTIONS OF IMPLEMENTATION

Having made the theoretical and practical case for clemency today, in this Part of the Article I address questions of implementation, specifically: 1) who should make clemency decisions? and 2) who should benefit from clemency grants?

#### *A. Who Should Make Clemency Decisions?*

Who—or what body of people—should render clemency decisions? As noted at the outset of this Article, states vary in their clemency protocols: in fifteen states the Governor has the sole decision-making authority; in eight states the Governor must have the recommendation of a board or panel; in ten states, the Governor may receive a non-binding recommendation from a board; and in five

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171. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

172. *Id.*

states a board alone makes clemency decisions.<sup>173</sup> Alexander Hamilton advised that a sole executive was best suited to make clemency decisions on the theory that “a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever.”<sup>174</sup> And yet there is broad academic support for the model of an administrative clemency board.<sup>175</sup> Professor Heise’s empirical work demonstrated that “the manner in which states structure clemency decision-making authority matters.”<sup>176</sup> Specifically, boards are more likely to generate favorable clemency decisions.<sup>177</sup> This should not be surprising given the degree to which politicians perceive clemency grants as politically risky—even if that perception is exaggerated. Boards can provide some protection from that political risk.

Yet, boards in their own right are not a perfect solution. If they are too large, the sense of responsibility experienced by any single board member may be too diffuse, and decisions may be made with less than full care and attention.<sup>178</sup> Moreover, boards require procedural safeguards in order to function effectively.<sup>179</sup>

Colorado offers a good case in point. In 2006, Colorado enacted a statute that precluded life-without-parole sentences for juvenile

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173. *Clemency*, *supra* note 43.

174. THE FEDERALIST NO. 74 (Alexander Hamilton).

175. Heise, *supra* note 9, at 301; *see also* MARGARET COLGATE LOVE, EXECUTIVE SUMMARY OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 5–6 (2005), available at <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/exccsumm.pdf> (noting that states that have issued most pardons have a board protected from political process); Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 228–32 (despite flaws, clemency boards still more desirable alternative); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 622–36 (describing the value of a clemency commission in its ideal form).

176. Heise, *supra* note 9, at 301.

177. *Id.*; *see also* Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT’G REP. 184 (2001) (describing a historical example of a clemency board in action).

178. *See generally* Adam Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669 (2001).

179. Victoria J. Palacios, *Faith in Fantasy: The Supreme Court Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 370–71 (1996) (describing a citizen selection board).

offenders, but the law did not apply retroactively.<sup>180</sup> As a result, forty-eight juvenile offenders in Colorado were left serving life-without-parole sentences.<sup>181</sup> In 2007 Colorado Governor Bill Ritter formed the state's Juvenile Clemency Board by executive order.<sup>182</sup> The Board was tasked with reviewing clemency and commutation requests by juvenile inmates who were tried as adults and sentenced to state prison.<sup>183</sup> The Juvenile Clemency Board would have been the optimal vehicle for consideration of those forty-eight life-without-parole cases, and yet more than three years later, that Board has considered twelve juvenile life-without-parole cases and it has granted to clemency to none of them.<sup>184</sup>

This inefficacy can be attributed to several factors: the law-enforcement-heavy composition of the Board, the total lack of transparency in the Board's process and decision-making, and the fact that, at the end of the day, the Governor retains the sole authority to render clemency decisions.<sup>185</sup> Because the Juvenile Clemency Board has proven so ineffective at addressing the juvenile life-without-parole issues, state lawmakers plan to ask the current Governor John Hickenlooper to assess whether the Juvenile Clemency Board is meeting its mandate.<sup>186</sup> In any event, the Colorado Juvenile Clemency Board demonstrates that a board is a necessary, but not sufficient, condition to an effective and fair clemency system.

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180. Juan Espinosa, *Juvenile "Lifers" Afraid to Hope*, PUEBLO CHIEFTAIN (Colorado), Apr. 3, 2011, [http://www.chieftain.com/news/local/juvenile-lifers-afraid-to-hopc/article\\_20718c28-5dac-11e0-a031-001cc4c03286.html](http://www.chieftain.com/news/local/juvenile-lifers-afraid-to-hopc/article_20718c28-5dac-11e0-a031-001cc4c03286.html).

181. *Id.*

182. John C. Ensslin, *Board to Review Cases of Teens Sent to Prison*, ROCKY MOUNTAIN NEWS, Aug. 30, 2007, <http://m.rockymountainnews.com/news/2007/Aug/30/board-to-review-cases-of-teens-sent-to-prison>.

183. *Id.*

184. Espinosa, *supra* note 180.

185. Gene Davis, *Frustration Over Juvenile Clemency Board*, DENVER DAILY NEWS (July 30, 2009), <http://www.statebillnews.com/2009/07/frustration-over-juvenile-clemency-board/>; Ensslin, *supra* note 182.

186. Patrick Malone, *Bill to Adjust Juvenile Life Term Dies*, PUEBLO CHIEFTAIN (Apr. 7, 2011), [http://www.chieftain.com/news/local/bill-to-adjust-juvenile-life-terms-dies/article\\_84fa7a90-60d3-11e0-87af-001cc4c002c0.html](http://www.chieftain.com/news/local/bill-to-adjust-juvenile-life-terms-dies/article_84fa7a90-60d3-11e0-87af-001cc4c002c0.html).

Rather, certain procedural safeguards are needed.<sup>187</sup> First, the composition of the Board should be representative of the public rather than heavily favoring the perspective of the law-enforcement community. Voices from the law-enforcement community are important, but they should be tempered by the voices of, for example, those who advocate for holistic criminal justice reform and effective re-entry. Second, the Board should reflect diversity in race, ethnicity and gender.<sup>188</sup> Third, the Board should be operating under clear and specific guidelines as to clemency decisions, and those guidelines should be made transparent, especially to inmates applying for clemency. The criteria may need to vary by jurisdiction, but some common features should be: the extent to which there is doubt about the actual innocence of the applicant; the extent to which the inmate is serving a sentence disproportionate to what co-defendants or similarly situated defendants are serving; the extent to which an applicant has rehabilitated himself; the extent to which the inmate has been a resource to others within the prison system; the extent to which the inmate is suffering from mental or physical health problems that make the current sentence excessive; and the extent to which the inmate was deprived of his right to the effective assistance of counsel.<sup>189</sup> Scholars have recognized that clemency boards are not perfect, but I join the camp of those who think such boards are the best hope for robust clemency at the state level.

#### *B. Who Should Benefit from Clemency?*

As to the question of who should benefit from clemency grants, the short answer is: it depends on the jurisdiction. In this Article I have conceived of clemency primarily in its error-correcting

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187. See, e.g., Stephen E. Silverman, *There is Nothing Certain Like Death in Texas: States Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375, 395-97 (suggesting several procedural safeguards); see also Alyson Dinsmore, *Comment: Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1853-57 (2002) (discussing additional safeguards and their introduction through statute).

188. Palacios, *supra* note 179, at 371.

189. See Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. C.L. & C.R. 191, 192 (2003) (listing reasons for granting clemency); Ridolfi & Gordon, *supra* note 1, at 3.



capacity. Accordingly, clemency should be deployed to correct errors that are specific to a given jurisdiction.

For example, as I discussed in Part I of this Article, Florida houses the majority of inmates who were juvenile non-homicide offenders and who are now serving life-without-parole sentences.<sup>190</sup> Those sentences are now unconstitutional, and yet the legislature has not been able to pass a law that would provide an alternative sentence to these inmates. Nor is a life sentence, with parole, available under state law.<sup>191</sup> This is the kind of glaring error that clemency can readily address. The Board (on which the Governor sits in Florida) need not simply release these inmates. Instead it could look to other jurisdictions that have legislation regarding the sentencing of juveniles and commute the sentences to a term of years after which the juvenile offender becomes parole-eligible. Unless and until the inmate is equipped for parole, it need not be granted, but the option should be available. If presented well to the public, this act would not be political suicide. Rather, it can be framed (accurately) as an executive agency bringing the state into compliance with a Supreme Court mandate.

In California, a different type of error-correction may be warranted. California's death row houses more than 700 inmates—making it by far the largest death row in the nation and almost twice the size of the next biggest death row, in Florida.<sup>192</sup> At the same time, though, California has only executed thirteen inmates since the Supreme Court's reauthorization of the death penalty.<sup>193</sup> Housing someone on death row, as opposed to housing them in a maximum

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190. *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010) (citing P. ANNINO, D. RASMUSSEN & C. RICE, *JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION* (2009), available at [http://www.law.fsu.edu/faculty/profiles/annino/Report\\_juvenile\\_lwop\\_092009.pdf](http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf)). The report estimated that there were 109 juvenile non-homicide offenders serving a life-without-parole sentence nationwide, seventy-seven of whom were in Florida.

191. See *supra* note 51 and accompanying text.

192. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Feb. 24, 2012).

193. *Searchable Execution Database*, DEATH PENALTY INFO. CTR., [http://www.deathpenaltyinfo.org/views-executions?exec\\_name\\_1=&scx=All&state%5B%5D=CA&scx\\_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All](http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&scx=All&state%5B%5D=CA&scx_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All) (last visited Feb. 8, 2012).

security prison for a non-capital crime, is incredibly expensive—to say nothing of the costs of legal representation in a capital case as opposed to a non-capital case.<sup>194</sup> A recent California study estimates that it costs an additional \$90,000 per year to house an inmate on death row instead of in a maximum security facility where an inmate serving life-without-parole would typically be housed. Given the size of California's death row, the study estimates that commuting California's death row population to life-without-parole sentences would save the state \$170 million annually.<sup>195</sup> Pennsylvania is in a similar position. With 219 inmates on death row, the state has the fourth largest death row in the nation.<sup>196</sup> Yet it has only executed three people since 1976.<sup>197</sup> In jurisdictions like California and Pennsylvania maintaining large death rows may no longer be feasible—or justifiable to taxpayers. By commuting these sentences to life-without-parole, state actors can remedy the error of excessive sentences while freeing up millions of tax dollars.

While some problems are nationwide—like access to counsel and overreliance on incarceration—manifestations of these problems will vary from state to state. In other states, classes of offenders may not immediately come to mind, but instead, clemency should be pursued on several fronts: for those who may have been the victim of racial discrimination in sentencing; for those who have demonstrated significant rehabilitation; for those who suffered tremendous abuse that may explain, if not excuse, their actions; and for those who are elderly and in poor health. When executive actors exercise their clemency authority, they should take these regional differences and priorities into account.

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194. Charles Riley, *One California Budget Fix: Abolish Death Row*, CNN MONEY (June 20, 2011), [http://money.cnn.com/2011/06/20/news/economy/california\\_death\\_penalty/index.htm](http://money.cnn.com/2011/06/20/news/economy/california_death_penalty/index.htm).

195. DEATH PENALTY INFO. CTR., *California Cost Study 2011*, <http://www.deathpenaltyinfo.org/california-cost-study-2011> (last visited Feb. 8, 2012).

196. DEATH PENALTY INFO. CTR., *FACTS ABOUT THE DEATH PENALTY* (2012), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

197. *Id.*

### C. Public Education

Finally, a word about public education is in order. For a revitalized clemency model to be viable, the public needs to be aware of both the fiscal and social costs of current corrections policies. To some extent, this public education process is already underway. As I discussed in Part II of this Article, the recession has forced some changes in criminal justice policy. In addition, the *Plata* decision has been covered widely by national newspapers, drawing attention to our nation's mass incarceration epidemic. Yet, the promising bipartisan support for significant criminal justice reform has not received the media attention that it deserves.

Advocates of criminal justice reform, including clemency reform, should pursue a localized education plan that responds to pressing voter concerns. For example, the California state budget crisis is due to many factors, but it is related to the state's last three decades of criminalization and prison expansion.<sup>198</sup> California Governor Jerry Brown's proposed 2012-2013 budget allocated roughly the same amount of funding for higher education as it did for corrections.<sup>199</sup> While California voters are indeed vocally angry about the state's slashing of public education funds,<sup>200</sup> voters may not know that only one decade ago, California allocated more than twice as much

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198. California is in the midst of implementing a plan to reduce its prison population. Richard Winton & Andrew Blankstein, *California Jails Receiving More State Prisoners Than Expected*, L.A. TIMES, Nov. 16, 2011, <http://articles.latimes.com/2011/nov/16/local/la-me-11-15-jails-20111116> (describing the state's "realignment" process under which state prisoners are being moved to county jails in order to comply with a Supreme Court ordered prison population reduction). Even with the court-ordered reduction, though, California's prison population is at a historic high. JOSEPH M. HAYES, PUB. POLICY INST. OF CAL., CALIFORNIA'S CHANGING PRISON POPULATION (2011), available at [http://www.ppic.org/content/pubs/jtf/JTF\\_PrisonsJTF.pdf](http://www.ppic.org/content/pubs/jtf/JTF_PrisonsJTF.pdf) (describing a 73% prison population increase between 1990 and 2005).

199. CALIFORNIA DEP'T OF FIN., GOVERNOR'S BUDGET SUMMARY—2012–2013, at 19, available at <http://www.ebudget.ca.gov/pdf/BudgetSummary/SummaryCharts.pdf> (showing 7.8% of expenditures going toward corrections and 7.1% going to higher education).

200. See, e.g., Maria L. La Ganga & Carla Rivera, *Students Protest at Several California Universities*, L.A. TIMES (Nov. 15, 2011), <http://articles.latimes.com/2011/nov/15/local/la-me-college-occupy-20111116> (describing college students' protests regarding tuition increases and education cuts); Anthony York & Nicholas Riccardi, *Deeper Cuts to State Budget Expected*, L.A. TIMES (Nov. 17, 2011), <http://articles.latimes.com/2011/nov/17/local/la-me-state-budget-20111117> (describing parent and teacher protests in response to education funding cuts).

funding to higher education as it did to adult and youth corrections.<sup>201</sup> Sentencing reformers need to make explicit the link between prison expansion and education cuts. Only when the public is well-educated about the costs of current corrections policies will citizens fully understand the benefits, and admittedly, the risks,<sup>202</sup> of reviving state clemency.

### CONCLUSION

In this Article I have discussed two of our nation's most pressing criminal justice failings: the ongoing indigent defense crisis and our overreliance on incarceration. I have further suggested that state actors can justify their robust use of clemency today in response to these ongoing, systemic failures. By way of conclusion, I want to mention two caveats. First, the fact that I have conceived of clemency in its error-correcting capacity in this Article does not mean that I view this as clemency's exclusive role. Even if we were to make effective representation available as a matter of course to criminal defendants and even if we were to dramatically reduce our reliance on incarceration, clemency would still have an important place in our system—just as it did in when our Constitution was drafted. Second, a revitalized and robust clemency power at the state level cannot replace thoughtful, bipartisan legislative reforms designed to address these criminal justice failings. States with truly broken indigent defense systems need to begin with the basics: a state-funded system that is independent of political and judicial influence; workload limits that respect the demands of effective representation; and resource parity between the defense and prosecutorial functions. Likewise, our current reliance on incarceration requires systemic reforms such as expanded bail and parole opportunities; diversion and decriminalization; and a renewed

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201. GOVERNOR'S BUDGET HIGHLIGHTS, 2000-2001, CAL. DEPT. OF FINANCE, at 83, available at <http://www.dof.ca.gov/budget/historical/2000-01/documents/Highlights00-01.pdf> (showing corrections expenditures as 5.8% of total expenditures and higher education as 11.5%).

202. With any proposed clemency plan, there is the risk that a released inmate will commit another crime.

emphasis on rehabilitation so that offenders are prepared to re-enter society and avoid recidivism. Unless and until state legislatures take up these measures, though, state actors are amply justified in using clemency judiciously to correct errors that flow from these systemic failures.

