

MAY GOD—OR THE GOVERNOR—HAVE MERCY: EXECUTIVE CLEMENCY AND EXECUTIONS IN MODERN DEATH-PENALTY SYSTEMS

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This article is the twelfth in a series analyzing death-penalty legislation that has been published in the Criminal Law Bulletin.

Introduction

On December 29, 1970, in one of his last acts before leaving office, Governor Winthrop Rockefeller commuted the death sentences of all 15 of the condemned prisoners on Arkansas's death row. He later described executive clemency in capital cases as "a form of moral leadership"¹ that is "an intricate and necessary part of a fair and impartial system of justice."² Over two decades later another Arkansas Governor, Bill Clinton, then hip-deep in campaigning for primary votes in New Hampshire en route to his eventual contest with George Bush in the 1992 presidential election, was asked to halt the execution of Rickey Ray Rector. Rector literally had blown away a substantial portion of his brain through a self-inflicted gunshot wound minutes after murdering a police officer. President Bush had scored devastating points against the previous Democratic presidential challenger, Michael Dukakis, by invoking the spectre of Willie Horton (who had raped a woman while on furlough from a Massachusetts prison) to suggest that Dukakis, an opponent of capital punishment, molly-coddled prisoners and was soft on crime.³

Candidate Clinton curtailed his campaigning in New Hampshire to return

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¹ Winthrop Rockefeller, "Executive Clemency and the Death Penalty," 21 *Catholic U. L. Rev.* 94, 100 (1971).

² *Id.* at 102.

³ See generally David C. Anderson, *Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice* (1995); Stephen B. Bright, "The Politics of Capital Punishment: The Sacrifice of Fairness for Executions," in James R. Acker, Robert M. Bohm & Charles S. Lanier (eds.), *America's Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, 117, 119-120 (1998); Glenn L. Pierce & Michael L. Radelet, "The

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to Arkansas for Rector's scheduled execution. Despite receiving pleas to grant Rector clemency, Governor Clinton declined to intervene. The brain-damaged man, who from time to time lapsed into crazed fits of barking and howling, set aside the piece of pecan pie that was to be the dessert in his last meal on the apparent assumption that he would return to eat it after keeping his date with the death chamber. He also indicated that he intended to vote for Clinton for president. Rector became one of four Arkansas prisoners executed under Bill Clinton's tenure as governor.⁴

It is impossible to say whether Rickey Ray Rector deserved to live or to die any more than any of the death-sentenced offenders spared by former Governor Rockefeller. An element of caprice inevitably accompanies executive clemency decisions. Early Roman leaders were said to have spared the lives of condemned offenders who by chance encountered a vestal virgin during their execution processions.⁵ Others cheated the executioner through the fortuitous timing of royal births, coronations, and other official celebrations.⁶ Contemporary executive clemency decisions aptly have been described as "standardless in procedure, discretionary in exercise, and unreviewable in result."⁷

If nothing else, Rickey Ray Rector's timing was bad—unlike that of triple murderer Darrell Mease, whose scheduled execution in Missouri was called off in January 1999 after Pope John Paul II visited St. Louis and made a personal appeal to Governor Mel Carnahan to spare the offender's life. The governor, who had allowed 26 previous executions to go forward, relented and reduced Mease's sentence to life imprisonment without the possibility of parole.⁸ After the Pope's departure, Governor Carnahan in rapid-fire succession rejected the clemency requests made on behalf of at least four other death-sentenced prisoners.⁹ Elsewhere, Illinois Governor Jim Edgar commuted Guinevere Garcia's death sentence in early 1996, over her stated opposition, just hours before she was to become only the second woman to be

Role and Consequences of the Death Penalty in American Politics," 18 N.Y.U. Rev. Law & Social Change 711, 711–712 (1990–1991).

⁴ Marshall Frady, "Death in Arkansas," *The New Yorker* 105–133 (Feb. 22, 1993).

⁵ Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 16 (1989).

⁶ National Governors' Association Center for Policy Research, *Guide to Executive Clemency Among the American States* 7 (1988).

⁷ Hugo Adam Bedau, "The Decline of Executive Clemency in Capital Cases," 18 N.Y.U. Rev. Law & Social Change 255, 257 (1990–1991) (footnotes omitted).

⁸ Gustav Niebuhr, "Governor Grants Pope's Plea for Life of a Missouri Inmate," *New York Times*, p. 1, Jan. 29, 1999.

⁹ Evelyn Nieves, "Being in the Wrong Place at the Right Time," *New York Times*, p. 5, May 9, 1999.

executed in the United States¹⁰ in the post-*Furman* era,¹¹ and the first since 1984.¹² Karla Faye Tucker instead claimed that distinction, dying by lethal injection in Texas after the state Board of Pardons and Parole ignored the pleas of the Pope and many other religious leaders and refused to recommend that Governor George W. Bush extend clemency.¹³

The more than 550 offenders put to death in this country since 1977 have languished in prison, on average, for over nine years between the time of sentencing and execution.¹⁴ Executive clemency decisions typically are made in the last few days and even the frantic hours and minutes before a scheduled

¹⁰ "Clemency Brings New Viewpoint," Albany Times Union, p. A9, Jan. 17, 1996; Lorraine Schmall, "Forgiving Guin Garcia: Women, the Death Penalty, and Commutation," 11 Wisc. Women's L. J. 283 (1996).

¹¹ In *Furman v. Georgia*, 408 U.S. 238 (1972), the death penalty was declared unconstitutional as then administered throughout the country. Four years later, the Supreme Court upheld revised "guided discretion" capital punishment legislation against constitutional challenge, while declaring mandatory capital punishment statutes to be unconstitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Executions resumed in 1977, following a 10-year moratorium, when Gary Gilmore was executed by firing squad in Utah. See generally James R. Acker, "The Death Penalty: A 25-Year Retrospective and a Perspective on the Future," 21 *Crim. Justice Rev.* 139 (1996); Carol S. Steiker & Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," 109 *Harv. L. Rev.* 355 (1995).

¹² Margie Velma Barfield was slated to die in North Carolina on November 2, 1984, just four days before the U.S. Senate race between then-Governor James Hunt and the incumbent, Senator Jesse Helms, was to be decided at the polls. The scheduling of the execution so close to election day placed Governor Hunt in a politically compromised position. He had to choose between allowing the first woman in over two decades to be executed, and commuting Barfield's death sentence and risking a negative voter reaction in a heavily pro-death-penalty state. Governor Hunt ultimately declined to intervene, and Barfield was executed. See Franklin E. Zimring & Gordon F. Hawkins, *Capital Punishment and the American Agenda* 126-128 (1986). See generally Joseph B. Ingle, "Final Hours: The Execution of Velma Barfield," 23 *Loyola of Los Angeles L. Rev.* 221 (1989).

¹³ Texas is one of several states in which the Governor has no authority to commute a capital sentence without the prior approval and recommendation of an administrative board or panel. See notes 97-98 and accompanying text, *infra*. For a brief discussion of the execution of Karla Faye Tucker, see Irene Merker Rosenberg & Yale L. Rosenberg, "Lone Star Musings on 'Eye for an Eye' and the Death Penalty," 1998 *Utah L. Rev.* 505; Robert F. Drinan, "Will Religious Teachings and International Law End Capital Punishment?" 29 *St. Mary's L. J.* 957, 958 (1998); Samuel R. Gross, "Update: American Public Opinion on the Death Penalty: It's Getting Personal," 83 *Cornell L. Rev.* 1448, 1485 (1998).

¹⁴ U.S. Dept. of Justice, Bureau of Justice Statistics, *Bulletin: Capital Punishment 1997*, p. 12 (1998) (among prisoners executed between 1977 and 1997, the average time lapsing between the imposition of sentence and execution was approximately 9 years and 3 months). In the future, the average delay between sentence and execu-

execution; thus, the need for a special telephone line linking the governor's mansion and the death chamber.¹⁵ There is no denying the paramount significance of commutation deliberations, which generally represent the locus poenitentiae in the execution process. They are the last official decision

tion may be reduced somewhat by operation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Among its other provisions, the AEDPA requires that all state prisoners file federal habeas corpus petitions not later than one year after direct review of their convictions and sentences has been completed. This filing period is tolled pending the completion of state post-conviction proceedings, 28 U.S.C. § 2244(d) (West Supp. 1999). States that comply with the "opt-in" provisions of the AEDPA, which require the appointment of qualified counsel for state post-conviction litigation, 28 U.S.C. § 2261 (West Supp. 1999), benefit from an even shorter deadline: a federal habeas corpus petition must be filed not later than 180 days after the conclusion of direct review in state court. This period is tolled while the United States Supreme Court considers a case on certiorari and while state post-conviction proceedings remain pending, 28 U.S.C. § 2263 (West Supp. 1999). See generally Larry W. Yackle, "A Primer on the New Habeas Corpus Statute," 44 Buffalo L. Rev. 381, 387, 393–395 (1996).

¹⁵ Robert Elliott, who served as the official executioner for six states during the early 20th century and who in that capacity personally threw "the switch which . . . hurled into eternity three hundred and eight-seven occupants of the electric chair," described attending a movie that included the following scene: A minute or two after the youth had been electrocuted, the governor telephoned the warden that he was granting a reprieve for the consideration of new evidence. The person who was really guilty had confessed. But it was, of course, too late. The man was dead. The state had executed an innocent person. Robert Elliott, *Agent of Death: The Memoirs of an Executioner* 14, 253–254 (1940). The following week Elliott handled the execution of a man who went to the electric chair proclaiming his innocence. At the precise instant the man was electrocuted, the telephone installed within the death chamber rang. Elliott's "heart seemed to stop beating." *Id.* At 255. After agonizing moments passed, the executioner and deputy warden were apprised that the operator had rung the wrong extension. *Id.* At 256.

Former Governor Edmund (Pat) Brown of California reports that in the 1957 execution of Burton Abbott in California's gas chamber, then-Governor Goodwin Knight's clemency secretary placed a phone call to San Quentin prison with instructions that the Governor had granted a temporary stay of the execution. The phone call was received two minutes after the deadly cyanide gas was released, and thus came too late to stop the execution. Edmund G. (Pat) Brown with Dick Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* xi–xii (1989).

Recently, President Joseph Estrada's attempt to grant a reprieve to a condemned rapist in the Philippines was thwarted when his phone call—made within five minutes of the scheduled execution—met with repeated busy signals. The execution of Eduardo Agbayani was carried out, with prison officials unaware that the President was attempting to contact them to halt the procedure. "Busy Philippine Line Stops Order to Halt an Execution," *New York Times*, p. A4, June 26, 1999.

Mistakes of this nature also pre-date the telephone. In New Hampshire in 1790, Ruth Day was hanged "moments before the governor's messenger arrived on horseback with an executive reprieve." Donal E. MacNamara, "Convicting the Innocent," 15 *Crime & Delinq.* 57, 60 (1969).

standing between a condemned offender and the lethal injection gurney or the electric chair.

This article reviews constitutional and legislative provisions governing executive clemency in the states' diverse death-penalty systems, focusing on who is given the authority to make clemency decisions and the accompanying decision-making procedures. The article also describes the methods of execution adopted in capital-punishment states, a topic that inevitably must be confronted in the overwhelming majority of cases where death sentences are not commuted to a lesser punishment. Death row populations have swelled to record highs,¹⁶ and execution rates continue to accelerate.¹⁷ As more and more prisoners approach their dates with the executioner, commutation decisions and executions loom with increasing regularity. These terminal stages of the capital-punishment process are of indisputable significance. They represent the final determination of whether death-sentenced prisoners will continue to live and, if not, how they will die.

Executive Clemency: Why, Whether, Who, and How

Executive clemency¹⁸ can be granted in distinct forms, with different consequences for the affected offender. A *pardon* effectively nullifies both a conviction and a sentence. This type of clemency can be bestowed in full or in part, and either unconditionally or conditionally. Pardons typically are issued following conviction, but in many jurisdictions they also can be granted prospectively.¹⁹ The recipient of a pardon normally is not exonerated of

¹⁶ As of April 1, 1999, approximately 3,565 prisoners inhabited the country's death rows. Death Penalty Information Center, "Death Row Inmates by State," <http://www.essential.org/dpic>. That total represents an increase of nearly 200 from April 1, 1998, when 3,387 prisoners were under sentence of death. U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics — 1997*, p. 527, Table 6.76 (Kathleen Maguire & Ann L. Pastore eds., 1998). At year's end 1976, after the Supreme Court decided the seminal cases approving "guided discretion" death-penalty legislation, see note 11, *supra*, 420 condemned prisoners awaited execution. By the end of 1980, death row populations reached 691; by the end of 1985, 1,591; at year's end 1990, 2,356; and by the conclusion of 1995, 3,054. *Id.* at 531, Table 6.82.

¹⁷ Between 1977, when Gary Gilmore's execution marked the first in the post-*Furman* era, and 1983, no more than five executions occurred during any year. The annual number of executions ballooned to 21 in 1984, and grew to 74 by 1997. In 1998, 68 prisoners were executed, and 49 had been executed through June 3, 1999. Death Penalty Information Center, "Executions Since 1976," <http://www.essential.org/dpic>.

¹⁸ "An act of clemency . . . is an official act by an executive that removes all or some of the actual or possible punitive consequences of a criminal conviction." Moore, note 5 *supra*, at 4.

¹⁹ *Id.* at 5.

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wrongdoing; the more common interpretation is that guilt is not erased but the offender simply is forgiven.²⁰

Pardons rarely are considered in capital cases. Far more commonly at issue are commutations, a variety of clemency in which a lesser punishment is substituted for a more severe one.²¹ A death-row prisoner typically seeks a reduction of his or her capital sentence to life imprisonment, either with or without parole eligibility. The act of commuting a sentence “does not cancel guilt, nor does it imply forgiveness.”²²

A reprieve temporarily postpones or delays a scheduled punishment. It usually is granted to allow time for additional judicial or executive review of a conviction or sentence.²³ Following the expiration of a reprieve, the original sentence is implemented unless intervening events produce a change. Reprieves normally are granted in capital cases when an execution has been scheduled before the courts have finished reviewing a case, or to allow the governor or pardons board additional time to consider commuting a death sentence.²⁴

This article focuses on commutation decisions in capital cases, beginning with the reasons traditionally offered in justification of this form of clemency. We next consider the frequency with which death sentences have been commuted over the years, including a description of the case factors most commonly associated with favorable clemency decisions. We conclude with a review of who is authorized to commute death sentences in different jurisdictions—for example, a state’s governor, a parole or pardons board, or some combination thereof—and of the required procedures leading up to commutation decisions.

The Justifications for Clemency

The roots of clemency in America extend at least as far back as English

²⁰ National Governors’ Association Center for Policy Research, note 6 *supra*, at 4. However, in a few states, a pardon does indicate that a transgression is both “forgotten” as well as forgiven. *Id.*; Daniel T. Kobil, “Do the Paperwork or Die: Clemency, Ohio Style?,” 52 *Ohio St. L. J.* 655, 660–661 (1991) (describing consequences of a pardon under Ohio law).

²¹ Moore, note 5 *supra*, at 5. The power to commute a sentence is normally implicit in the executive’s general pardoning power. For example, the United States Constitution authorizes the President to grant “Reprieves and Pardons,” but makes no mention of the chief executive’s power to issue commutations. U.S. Const. Art II, § 2. Nevertheless, the President’s pardoning power has been construed to include the authority to commute sentences. *Schick v. Reed*, 419 U.S. 256, 260 (1974).

²² National Governors’ Association Center for Policy Research, note 6 *supra*, at 5. See also Daniel T. Kobil, “The Quality of Mercy Strained: Wrestling the Pardoning Power from the King,” 69 *Tex. L. Rev.* 569, 577 (1991).

²³ See Moore, note 5 *supra*, at 5; National Governors’ Association Center for Policy Research, note 6 *supra*, at 5.

²⁴ Other forms of executive clemency, including the remission of fines and forfeitures, amnesty, and the restoration of civil rights, have little relevance to capital cases. See generally Moore, note 5 *supra*, at 5; National Governors’ Association Center for Policy Research, note 6 *supra*, at 6.

medieval law. The early criminal law was uncompromising. Defenses based on justification and excuse, including self-defense, insanity, infancy and others, were not recognized. However, the crown was invested with the authority to make appropriate adjustments to the inflexible application of the law by pardoning offenders and commuting their sentences.²⁵ Because many felonies carried mandatory punishment by death under the common law, clemency played an especially important and prominent role in capital cases.²⁶

Several justifications have been offered in support of the exercise of executive clemency. Reducing an offender's sentence or conferring a pardon can be described at one level simply as an act of mercy, unencumbered by the assumption that the offender somehow earned or deserved the particular dispensation.²⁷ The Supreme Court initially defined a presidential pardon as "an act of grace,"²⁸ and consistently has interpreted the chief executive's clemency powers broadly:²⁹ "The benign prerogative of mercy reposed in [the President] cannot be fettered by any legislative restrictions."³⁰

Nevertheless, the Court also has taken pains to reaffirm the important role that executive clemency serves in the administration of justice. As Justice Holmes observed:

A pardon in our day is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.³¹

The Court's lead opinion in *Gregg v. Georgia* recognized that a state capital-punishment system that did not comprehend executive clemency "would be totally alien to our notions of criminal justice."³² Later, in *Herrera v. Collins*, the Court observed that "all . . . States that authorize capital punishment have constitutional or statutory provision for clemency,"³³ and emphasized that "[e]xecutive clemency has provided the 'fail safe' in our

²⁵ Elkan Abramowitz & David Paget, "Executive Clemency in Capital Cases," 39 N.Y.U.L. Rev. 136, 188 (1964).

²⁶ See infra notes 56–57 and accompanying text. See generally Bruce Ledewitz & Scott Staples, "The Role of Executive Clemency in Modern Death Penalty Cases," 27 U. Richmond L. Rev. 227, 229–230 (1993).

²⁷ See Kobil, note 22 supra, at 578. See generally Paul W. Cobb, Jr., "Reviving Mercy in the Structure of Capital Punishment," 99 Yale L. J. 389 (1989).

²⁸ *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

²⁹ See, e.g., *Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855).

³⁰ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

³¹ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

³² *Gregg v. Georgia*, 428 U.S. 153, 199 n. 50 (1976) (opinion of Stewart, J.).

³³ *Herrera v. Collins*, 506 U.S. 390, 414 (1993) (footnote omitted).

criminal justice system.”³⁴ The Court’s most recent, and most direct consideration of executive clemency as an aspect of a state’s capital-punishment system, heralded clemency as “traditionally available to capital defendants as a final and alternative avenue of relief”³⁵

Thus, although mercy often weighs heavily in executive clemency decisions, other important systemic interests relevant to the punishment process are involved.³⁶ Some commentators contend that clemency decisions should adhere to a retributivist model, and be made in accordance with offenders’ just deserts.³⁷ Others advocate a quasi-judicial role for executive clemency, viewing the process as a final opportunity to correct and identify errors and aberrations that may have eluded or been immune to judicial review.³⁸

The reasons advanced in support of decisions to commute capital sentences in specific cases vary tremendously. One broad category of explanations involves judicial expediency, or judicial economy. Relying on this rationale, the executive authority nullifies a death sentence so that additional, potentially lengthy court proceedings can be averted.³⁹ For example, under Texas’s statutory and case law, only the jury responsible for convicting a defendant can sentence that offender to death.⁴⁰ Because of this quirk, a limited remand for resentencing is not possible if a death sentence is invalidated on appeal: either a mistrial must be declared and the defendant afforded a new trial on both guilt and (if necessary) sentencing, or else the original sentence must be commuted to life imprisonment to preserve the conviction and elim-

³⁴ *Id.* at 415.

³⁵ *Ohio Adult Parole Authority v. Woodard*, 140 L.Ed.2d 387, 398 (1998) (plurality opinion). See also *Fay v. Noia*, 372 U.S. 391, 476 (1963) (Harlan, J., dissenting) (arguing that the death-sentenced defendant in that case should seek relief “with the New York Governor’s powers of executive clemency, not with the federal courts”); *Thompson v. Oklahoma*, 487 U.S. 815, 869 (1988) (Scalia, J., dissenting) (arguing that the execution rate for juveniles has been low, in part, because of “the exercise of executive clemency”).

³⁶ *Ohio Adult Parole Authority v. Woodard*, 140 L.Ed.2d 387 (1998) (five members of the Court recognizing that a death-sentenced prisoner retains a constitutionally protected interest in life following the imposition of sentence and prior to execution, so that minimal due process safeguards attach to executive clemency decisions). See notes 105–115 and accompanying text, *infra*. See generally Louis D. Billionis, “Legitimizing Death,” 91 *Mich. L. Rev.* 1643, 1698–1701 (1993).

³⁷ Moore, note 5 *supra*.

³⁸ See, e.g., Bedau, note 7 *supra*, at 257; Ledewitz & Staples, note 26 *supra*, at 234–235. Cobb, note 27 *supra*, at 402–403; Michael L. Radelet & Barbara A. Zsembik, “Executive Clemency in Post-*Furman* Capital Cases,” 27 *U. Richmond L. Rev.* 289, 290 (1993).

³⁹ *Id.* at 292. Michael A. G. Korengold, Todd A. Noteboom & Sara Gurwitch, “And Justice for Few: The Collapse of the Capital Clemency System in the United States,” 20 *Hamline L. Rev.* 349, 350 (1996).

⁴⁰ See *Tex. Code Crim. P. Ann.* § 37.07(3)(c) (West 1981).

inate the need for a retrial.⁴¹ Numerous Texas death sentences have been commuted for this reason.⁴² Clemency also has been used in other jurisdictions to reduce capital sentences to life imprisonment in anticipation of or in response to court decisions undermining the original punishment.⁴³

Conversely, a host of equitable, practical, and “humanitarian”⁴⁴ justifications have been offered in support of commuting death sentences. One particularly compelling reason involves doubts about the defendant’s guilt,⁴⁵ or about the reliability of the evidence supporting a capital sentence.⁴⁶ The fairness or propriety of a death sentence also may be doubted on other grounds. For example, a condemned offender may have received dispropor-

⁴¹ See *Ocker v. State*, 477 S.W.2d 288 (Tex. Crim. App. 1972); *Whan v. State*, 485 S.W.2d 275 (Tex. Crim. App. 1972).

⁴² For example, capital sentences were commuted to life imprisonment in 36 Texas cases between 1980 and 1990 for reasons of judicial expediency. Radelet & Zsembik, note 38 *supra*, at 293–296.

⁴³ *Id.* at 293 (noting that Governor Godwin of Virginia commuted the death sentence of five prisoners in 1976 who had been sentenced under mandatory capital-punishment laws shortly after the United States Supreme Court ruled that mandatory death-penalty statutes enacted in other states were unconstitutional). In addition, *Furman v. Georgia*, 408 U.S. 238 (1972) and its companion cases invalidated the death sentences imposed on three offenders, from two different states, but its reasoning required the invalidation of essentially all of the death sentences imposed on the over-600 men and women then on the country’s death rows. Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 292–293 (1973). It is likely that some of those death sentences were reduced by executive clemency, although many were ordered reduced by judicial decision. See generally James W. Marquart & Jonathan R. Sorensen, “A National Study of the *Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders,” 23 *Loyola of L.A.L. Rev.* 5 (1989).

⁴⁴ Radelet & Zsembik, note 38 *supra*, at 292, 297.

⁴⁵ Chief Justice Rehnquist’s majority opinion in *Herrera v. Collins*, 506 U.S. 390 (1993) emphasized that “[e]xecutive clemency has provided the ‘fail safe’ in our criminal justice system,” *id.*, at 415, and suggested that “history is replete with examples of wrongly convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.” *Id.* See also James W. Marquart, Sheldon Ekland-Olson & Jonathan R. Sorensen, *The Rope, The Chair, and the Needle: Capital Punishment in Texas, 1923–1990*, p. 111 (1994) (discussing cases of death-sentenced Texas prisoner who was pardoned based on his apparent innocence). Cases also exist where, although the defendant’s innocence has not been established so as to justify a pardon, sufficient doubts may exist about guilt to warrant reduction of a death sentence to a sentence of imprisonment. See Bedau, note 7 *supra*, at 260; Radelet & Zsembik, note 38 *supra*, at 301; Abramowitz & Paget, note 25 *supra*, at 160–161; Marquart, Ekland-Olson & Sorensen, *supra*, at 111–115. ;

See also Texas Governor Bush’s statement on the commutation of the death sentence of serial Killer Henry Lee Lucas, which states: “In this case, at the time it made its decision, the jury did not know and could not have known that Henry Lee Lucas had a pattern of lying and confessing to crimes that evidence later proved that he did not commit. His confession, now recanted, was the only evidence which linked him to this crime. Today’s knowledge about his pattern of lies raises doubt.

tionately harsh treatment compared to accomplices involved in the same case,⁴⁷ or relative to offenders in other potentially capital cases.⁴⁸ Or, the offender may have been mentally ill or mentally retarded, youthful, or suffering from another affliction that calls into question the propriety of a capital sentence.⁴⁹

The passage of time, in combination with intervening events, can produce changes relevant to commutation decisions. Thus, a defendant whose capital sentence was considered deserved when originally imposed may have demonstrated in some fashion—such as through conduct evidencing significant remorse, rehabilitation, or redemption—that death no longer is an appropriate punishment.⁵⁰ Some clemency authorities may be swayed by other persuasive voices, such as a victim's relatives, or a prosecutor, judge, or juror, that an execution should be halted.⁵¹ Others have a granted com-

Henry Lee Lucas is unquestionably guilty of other despicable crimes for which he has been sentenced to spend the rest of his life in prison. However, I believe there is enough doubt about this particular crime that the State of Texas should not impose its ultimate penalty by executing him." Office of the Governor, June 26, 1998. Available: http://www.governor.state.tx.us/news___speeches/archive-press/lucas6-26.html.

⁴⁶ See Victoria J. Palacios, "Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases," 49 *Vand. L. Rev.* 311, 333–334 (1996); Ledewitz & Staples, note 26 *supra*, at 234–235.

⁴⁷ See Ursula Bentele, "The Death Penalty in Georgia: Still Arbitrary," 62 *Washington U.L.Q.* 573, 629–631 (1985) (discussing case of Charles Hill, whose Georgia death sentence was commuted following evidence that a codefendant, who directly caused the victim's death, had received a sentence of life imprisonment); Radelet & Zsembik, note 38 *supra*, at 301–302 (describing cases involving commuted death sentences where equally or more culpable codefendants had not been sentenced to death); Abramowitz & Paget, note 25 *supra*, at 163–164 (discussing death sentences commuted in an attempt to correct disparate sentences imposed against similarly situated codefendants); Marquart, Ekland-Olson & Sorensen, note 45 *supra*, at 103 (identifying 10 Texas pre-*Furman* cases in which death sentences were commuted after it was noted that accomplices had received lesser sentences); Bedau, note 7 *supra*, at 260.

⁴⁸ See Abramowitz & Paget, note 25 *supra*, at 164–165; Cobb, note 27 *supra*, at 402–403; Schmall, note 10 *supra*, at 286; Bedau, note 7 *supra*, at 260.

⁴⁹ See Marvin E. Wolfgang, Arlene Kelly & Hans C. Nolde, 53 *J. Criminal Law, Criminology & Police Science* 301, 304–305, 310 (1962); Radelet & Zsembik, note 38 *supra*, at 301; Abramowitz & Paget, note 25 *supra*, at 165–168; Kobil, note 22 *supra*, at 625–626; Kobil, note 20 *supra*.

⁵⁰ See Ledewitz & Staples, note 26 *supra*, at 236–237; Bedau, note 7 *supra*, at 261. Bilonis, note 36 *supra*, at 1701 n. 24 (discussing commutation of William Neal Moore's death sentence in Georgia based on evidence of Moore's rehabilitation and conversion to Christianity while on death row); Abramowitz & Paget, note 25 *supra*, at 168; Korengold, Noteboom & Gurwitch, note 39 *supra*, at 358.

⁵¹ See Abramowitz & Paget, note 25 *supra*, at 170 (discussing policies of former New York Governors Smith and Lehman, who commuted death sentences whenever one or more dissents accompanied the New York Court of Appeals decision af-

mutations based on a principled belief that capital punishment generally is unacceptable.⁵²

No matter what reasons support granting clemency in a particular case, the widespread perception exists that sparing a death-sentenced offender is politically risky at best, and can be a fatal liability to an official who has future aspirations for public office. Several observers have warned that a governor's decision to commute a death sentence is tantamount to committing political suicide,⁵³ in light of overwhelming public support for capital

firming a capital conviction); *id.* at 171–172 (discussing significance of favorable clemency recommendation by involved prosecutors and trial judges); Marvin E. Wolfgang, "Murder, the Pardon Board, and Recommendations by Judges and District Attorneys," 50 *J. of Criminal Law, Criminology & Police Science* 338 (1959); Margaret Vandiver, "The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924–1996," 27 *U. Richmond L. Rev.* 315, 332–333 (1993) (reporting views expressed in letters included within Florida clemency files describing racial attitudes and the letter writers' recommendations regarding the propriety of capital punishment in cases involving African-American victims); Bentele, note 47 *supra*, at 630 (discussing Georgia case involving Charles Hill, whose death sentence was commuted after the judge and assistant district attorney involved in the trial so recommended); Hugo A. Bedau, "Capital Punishment in Oregon, 1903–1964," 45 *Oregon L. Rev.* 1, 28 (1965) (discussing Oregon death-penalty cases in which commutations were granted following favorable recommendations of judges, prosecutors, or other influential citizens); Mike Allen, "Virginia Prisoner Receives Rare Mercy on Death Row," *New York Times*, p. 20, Nov. 10, 1996 (describing Virginia Governor George Allen's decision to commute the death sentence of Joseph Payne, after the murder victim's mother requested mercy for Payne, after four of the 12 trial jurors who had voted to sentence Payne to death reported changing their minds, and after a prosecution witness who had testified against Payne reportedly failed a polygraph exam; the Governor stated, however, that the jurors' change of mind did not influence his decision).

⁵² Several Governors have commuted all or many death sentences they considered during their administrations because of their personal convictions that capital punishment was wrong. Those Governors included Endicott Peabody of Massachusetts (1963–1965), Robert Holmes of Oregon (1957–1959), Toney Anaya of New Mexico (1986), Winthrop Rockefeller of Arkansas (1970), Edmund G. (Pat) Brown of California (1959–1966), and Governor Lee Cruce of Oklahoma (1913). See Abramowitz & Paget, note 25 *supra*, at 175–176; Palacios, note 46 *supra*, at 350; Radelet & Zsembik, note 38 *supra*, at 300–301; Rockefeller, note 1 *supra*; Brown, with Adler, note 15 *supra*; Joseph B. Schimmel, Comment, "Commutation of the Death Sentence: Florida Steps Back From Justice and Mercy," 20 *Fla. St. U. L. Rev.* 253, 258 (1992); Bedau, note 51 *supra*, at 28; Korengold, Noteboom & Gurwitch, note 39 *supra*, at 362.

⁵³ See, e.g., Bedau, note 7 *supra*, at 268 ("there is a perception that a governor who commutes a death sentence verges on committing political suicide"); Ledewitz & Staples, note 26 *supra*, at 229 ("governors may assume that wholesale commutations would be political suicide"); Allen, note 51 *supra*, at 20 ("Commuting death sentences has become political poison for governors"); Palacios, note 46 *supra*, at 349 ("the political consequences of granting commutations are simply too great").

punishment⁵⁴ and the frequent barracuda-like enthusiasm of rivals to exploit death-penalty issues in their campaign rhetoric.⁵⁵ Perhaps owing in large part to this perception, the exercise of clemency in capital cases has plummeted precipitously in recent years.

Exercising Clemency in Capital Cases: Historical and Contemporary Trends

Historically, executive clemency was dispensed regularly in capital cases in order to help offset harsh laws that automatically required punishment by death on conviction for crimes. Over 200 felonies carried mandatory death sentences in England during the late 18th and early 19th centuries. In compensation for such tyrannical sentencing policies, as many as seven out

⁵⁴ For example, over the years 1976 to 1996, between 66 percent and 74 percent of respondents sampled in national surveys have reported favoring the death penalty in response to the question, "Do you favor or oppose the death penalty for persons convicted of murder?" *Sourcebook of Criminal Justice Statistics—1997*, note 16 supra, at 140–141, Table 2.60. See also Phoebe C. Ellsworth & Samuel R. Gross, "Hardening of the Attitudes: Americans' Views on the Death Penalty," 50 *J. Social Issues* 19, 40 (1994) ("Support for the death penalty is at an all time high, both in the proportion of Americans who favor capital punishment and in the intensity of their feelings"); Alexis M. Durham, H. Preston Elrod & Patrick T. Kinkade, "Public Support for the Death Penalty: Beyond Gallup," 13 *Justice Quarterly* 705 (1996). Nevertheless, the apparent public support for the death penalty appears to waiver when people are asked whether they prefer capital punishment to named alternative sanctions, such as life imprisonment without parole (LWOP), or LWOP plus restitution to the relatives of the homicide victim. When such preference-based questions are asked, fewer than 50 percent of respondents in some polls report that they prefer the death penalty to alternate sanctions. See William J. Bowers, Margaret Vandiver & Patricia H. Dugan, "A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer," 22 *Amer. J. Criminal Law* 77 (1994); James A. Fox, Michael L. Radelet & Julie L. Bonsteel, "Death Penalty Opinion in the Post-*Furman* Years," 13 *N.Y.U. Rev. Law & Social Change* 499 (1990–1991). See also Gross, note 13 supra, at 1455–1458.

Moreover, when a recent Harris poll (No. 45, July 28, 1999) asked a nationwide sample of Americans if "innocent people sometimes [are] convicted of murder," 95 percent responded that yes, it "sometimes happens." When these 95 percent subsequently were asked "If you believed that quite a substantial number of innocent people are convicted of murder, would you then believe in or oppose the death penalty for murder?" a substantial majority (51 percent) responded that they "would oppose" the death penalty for murder.

⁵⁵ See Stephen B. Bright, "The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting," 36 *Santa Clara L. Rev.* 1069 (1996); Pierce & Radelet, note 3 supra; Bright, note 3 supra; Palacios, note 46 supra, at 363–365; Nieves, note 9 supra, at 20 (describing political backlash following Missouri Governor Mel Carnahan's decision to commute the death sentence of Darrell Mease in response to a personal plea for mercy from the Pope). See also Kevin Murphy, "Ashcroft Proposes rule in Response to Carnahan," *The Kansas City Star*, March 25, 1999, at A1; see also Kit Wagar, "Leniency for Spared Killer Surfaces as Senate Issue," *The Kansas City Star*, April 24, 1999, at B3.

of every eight offenders were pardoned or saw their death sentences commuted during this era.⁵⁶ Even though far fewer crimes were punishable by death in the colonies, royal governors perpetuated the tradition of liberally reducing mandatory capital sentences. For instance, during 18th century British colonial rule in New York, clemency decisions rescued roughly half of death-sentenced offenders from the gallows.⁵⁷ The frequent dispensation of clemency in capital cases continued following the American Revolution.

State governors and pardon boards perpetuated the practice of commuting death sentences at significant rates during the pre-*Furman* years of the 20th century. Several of these rates are reported in Table 1, for the states and years for which data are available.

Table 1
Commutation Rates in Capital Cases Within Select Jurisdictions Prior to *Furman v. Georgia* (1972)

State	Time Interval	No. of Capital Sentences Commuted	No. of Executions	Ratio of Executions to Commutations
Arizona ⁵⁸	1930-1963	1	36	36:1
California ⁵⁹	1944-1963	28	156	5.6:1
Connecticut ⁶⁰	1920-1962	8	20	2.5:1
Florida ⁶¹	1924-1966	59	196	3.3:1
Georgia ⁶²	1946-1963	41	152	3.7:1
Illinois ⁶³	1930-1963	10	90	9:1
Iowa ⁶⁴	1930-1963	5	18	3.6:1

⁵⁶ Note, "A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings," 90 Yale L.J. 889, 895-896 & n. 27 (1981); Korengold, Noteboom & Gurwitch, note 39 supra, at 353; Moore, note 5 supra, at 17-18.

⁵⁷ James R. Acker, "New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives," 54 Albany L. Rev. 515, 565 (1990).

⁵⁸ Abramowitz & Paget, note 25 supra, at 191.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Vandiver, note 51 supra, at 321-322.

⁶² Cobb, note 27 supra, at 393 n. 25. For the same time interval, Abramowitz & Paget, note 25 supra, at 191, report 41 Georgia commutations and 146 executions.

⁶³ Abramowitz & Paget, note 25 supra, at 191.

⁶⁴ Id.

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State	Time Interval	No. of Capital Sentences Commuted	No. of Executions	Ratio of Executions to Commutations
Maryland ⁶⁵	1935-1961	35	61	1.7:1
Massachusetts ⁶⁸	1900-1958	37	65	1.8:1
New Jersey ⁶⁷	1907-1960	34	157	4.6:1
New York ⁶⁸	1890-1970	213	692	3.2:1
North Carolina ⁶⁹	1903-1963	235	358	1.5:1
Oregon ⁷⁰	1903-1964	23	58	2.5:1
Pennsylvania ⁷¹	1914-1958	71	341	4.8:1
Texas ⁷²	1923-1972	100	461	4.6:1

As the commutation and execution statistics presented in Table 1 reflect, the exercise of executive clemency regularly deflected the blow of capital sentences prior to *Furman*. The intersection of a number of factors, including idiosyncratic case facts, the predispositions of the commuting authority, and prevailing public sentiment help explain why individual prisoners were spared in some cases while others met their date with the executioner. In Pennsylvania, the type of case least likely to result in a capital sentence being commuted involved a murder committed during the perpetration of another felony, such as rape, burglary, or robbery, by a black offender, age 20 to 24, who was represented by court-appointed counsel. Very young (15 to 19) and older (over 55) capital offenders stood a greater chance for clem-

⁶⁵ Cobb, note 27 supra, at 393 n. 25. Abramowitz & Paget, note 25 supra, at 191, report 35 commutations and 57 executions in Maryland between 1936 and 1961.

⁶⁶ Abramowitz & Paget, note 25 supra, at 191.

⁶⁷ Hugo A. Bedau, "Death Sentences in New Jersey," 19 Rutgers L. Rev. 1, 7 (1964).

⁶⁸ Acker, note 57 supra, at 565-566.

⁶⁹ Abramowitz & Paget, note 25 supra, at 192.

⁷⁰ Bedau, note 51 supra, at 5-6 (five of the commutations occurred when Oregon legislatively abolished the death penalty in 1914 and, following its restoration, again abolished capital punishment in 1964).

⁷¹ Wolfgang, Kelly & Nolde, note 49 supra, at 301.

⁷² Marquart, Ekland-Olson & Sorensen, note 45 supra, at 101, 106. In reality, 147 commutations were granted in capital cases in Texas during this period, but Marquart et al. exclude the 47 that occurred in 1972 as a result of the Supreme Court's decision in *Furman*. Two death-sentenced offenders who died before their sentences were carried out are excluded from the analysis, as well. Another researcher reports similar results, indicating that between 1924 and 1968, 85 capital sentences were commuted among the 460 persons sentenced to death in Texas. Rupert C. Koeninger, "Capital Punishment in Texas, 1924-1968," 15 Crime & Delinquency 132, 140 (1969).

ency, as did offenders with private counsel, and those whose killings did not involve a contemporaneous felony.⁷³

Racial considerations, which have proven so vexing in the context of capital charging and sentencing decisions,⁷⁴ also may have played a part in some states' clemency decisions. Pennsylvania is one such state, although the data are suggestive rather than conclusive.⁷⁵ In Texas, 61 percent of condemned white offenders were executed between 1923 and 1972, compared to 82 percent of the black offenders on death row. Race of victim differences were even more dramatic: death sentences were commuted in 50 percent of Texas cases involving Hispanic victims, in 33 percent of black-victim cases, and in just 19 percent of white-victim cases.⁷⁶ A study of capital clemency decisions in Florida between 1924 and 1966 revealed similar race-of-victim discrepancies: death sentences were commuted in 44.3 percent of black-victim cases, compared to 15.2 percent of cases involving white victims. Only 5.3 percent of death sentences for crimes involving a black offender and a white victim were commuted.⁷⁷ Nonwhites were roughly 50 percent less likely than whites to have their death sentences commuted in New Jersey between 1907 and 1964, although data limitations preclude identifying race as a determining factor.⁷⁸ All three women on New Jersey's death row during that period had their death sentences commuted,⁷⁹ and young (15–19) offenders and offenders with relatively minor prior records

⁷³ Wolfgang, Kelly & Nolde, note 49 supra (reporting the results of a study of commuted death sentences in Pennsylvania between 1914 and 1958, and noting the interrelationship of three factors that appeared to help account for whether death sentences were executed or commuted: the type of murder committed (whether a separate contemporaneous felony had been perpetrated), the race of the offender, and whether representation was provided by court-appointed or privately retained counsel).

⁷⁴ See generally David C. Baldus, George G. Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990); Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* (1989); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, "Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia," 83 *Cornell L. Rev.* 1638 (1998); James R. Acker, "Social Sciences and the Criminal Law: Capital Punishment by the Numbers—An Analysis of *McCleskey v. Kemp*," 23 *Crim. Law Bull.* 454 (1987).

⁷⁵ Wolfgang, Kelly & Nolde, note 49 supra, at 306, 311.

⁷⁶ Marquart, Ekland-Olson & Sorensen, note 45 supra, at 116–119.

⁷⁷ Vandiver, note 51 supra, at 324–330, 343 (noting that additional information would allow for more potentially explanatory variables to be controlled, but indicating a strong likelihood of race effects).

⁷⁸ Bedau, note 67 supra, at 18–19. Bedau's similar study of executive clemency in capital cases in Oregon between 1903 and 1964 uncovered no evidence of racial discrimination in that state. Bedau, note 51 supra, at 11.

⁷⁹ Bedau, note 67 supra, at 11. Two women sentenced to die in Pennsylvania between 1914 and 1958 were executed, and two had their sentences commuted. Wolfgang, Kelly & Nolde, note 49 supra, at 301. The small number of females sentenced

also were more likely to have their capital sentences reduced to imprisonment.⁸⁰

The best prediction regarding executive clemency in capital cases in the post-*Furman* period is that it will not be forthcoming. Excluding those death sentences commuted for reason of judicial expediency, such as to avoid a retrial,⁸¹ only 40 offenders between 1973 and June of 1999 have had their capital sentences commuted.⁸² Measured against the 553 executions during that same time frame,⁸³ the ratio of capital sentences carried out to those commuted is 13.8 to one, or roughly three to nine times greater than the comparable ratios during pre-*Furman* years for most of the states displayed in Table 1. Five of the 40 post-*Furman* commutations were granted by outgoing New Mexico Governor Toney Anaya in 1986, based on his general opposition to capital punishment,⁸⁴ and another eight were conferred by Ohio Governor Richard Celeste in 1991 as he left office.⁸⁵

The most common reasons offered in support of favorable clemency decisions involved doubts about the offender's guilt, the offender's mental retardation or mental illness, and equitable considerations in light of less harsh sanctions imposed against other participants in the same crime.⁸⁶ The relative dearth of commutations in capital cases in recent times, doubtlessly attributable in substantial part to the perceived political risks associated with taking such action⁸⁷ amidst a climate of popular support for the death penalty,⁸⁸ does not bode well for those who continue to look to executive clem-

to death obviously makes generalizing from these figures hazardous. See generally Schmall, note 10 supra.

⁸⁰ Bedau, note 67 supra, at 15–17, 25, 52.

⁸¹ See notes 39–43 and accompanying text, supra.

⁸² Death Penalty Information Center, "Facts About Clemency," Internet website <http://www.essential.org/dpic/clemency.html>. This source updates the compilation of post-*Furman* capital case clemency decisions prepared by Radelet & Zsembik, note 38 supra.

⁸³ Death Penalty Information Center, "Executions," Internet website <http://www.essential.org/dpic/dpicexec.html>.

⁸⁴ See Toney Anaya, "Statement by Toney Anaya on Capital Punishment," 27 U. Richmond L. Rev. 177 (1993) ("I have consistently opposed capital punishment as being inhumane, immoral, anti-God, and incompatible with an enlightened society."); Radelet & Zsembik, note 38 supra, at 298.

⁸⁵ See Kobil, note 20 supra. Unlike Governor Anaya's commutations, which cleared New Mexico's death row, Governor Celeste left undisturbed the death sentences of over 100 Ohio capital offenders. Radelet & Zsembik, note 38 supra, at 298. Celeste's authority to grant clemency in the eight cases was upheld over allegations of procedural irregularity. *State ex rel. Mauer v. Sheward*, 644 N.E.2d 369 (Ohio 1994).

⁸⁶ Radelet & Zsembik, note 38 supra, at 300–302; Death Penalty Information Center, note 82 supra.

⁸⁷ See note 53 supra and accompanying text.

⁸⁸ See note 54 supra and accompanying text.

ency as a corrective mechanism for the rough edges and potential injustices associated with contemporary death-penalty systems.⁸⁹

The Commuting Authority

The power to confer clemency came to rest exclusively with the crown early in English history.⁹⁰ The King's authority to pardon offenders and commute sentences was exercised through royal colonial governors during this country's formative years. However, a majority of the original states, chagrined by their experiences with abuses of centralized power, abandoned the British model in favor of ceding joint clemency authority to legislative councils and the governor, or solely to the legislature.⁹¹ The federal Constitution is true to English custom and vests pardoning authority exclusively with the President.⁹² Most states that entered the union after the original

⁸⁹ See *Herrera v. Collins*, 506 U.S. 390 (1993) ("Executive clemency has provided the 'fail safe' in our criminal justice system [H]istory is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence [O]ver the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made") (citations and footnote omitted). See generally Palacios, note 46 *supra*, at 312 (criticizing the Court's decision in *Herrera*, and arguing that "[b]y substituting the fantasy of commutations for meaningful appellate review, the Court has perpetuated a system in which capital convictions and sentences lack integrity, while capital defendants suffer injustice").

⁹⁰ Parliament recognized the throne's sole authority to grant clemency during the reign of Henry VIII, in 1535. Kobil, note 22 *supra*, at 586.

⁹¹ Eight of the original thirteen states declined to vest exclusive clemency authority with their governor. See *id.* at 604; Abramowitz & Paget, note 25 *supra*, at 140–141.

⁹² "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const. Art. II, § 2 [2]. Alexander Hamilton argued in the *Federalist Papers* in favor of giving the President clemency powers, and against distributing such authority more broadly. "As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat would naturally inspire scrupulousness and caution On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men." *The Federalist No. 74*, at 447–448 (Alexander Hamilton) (Clinton Rossiter ed. 1961). The President's constitutional authority to grant "Reprieves and Pardons" includes the power to commute punishments. *Biddle v. Perovich*, 274 U.S. 480 (1927). However, "the federal clemency power comes into play only when federal law is violated." Daniel T. Kobil, "The Evolving Role of Clemency in Capital Cases," in James R. Acker, Robert M. Bohm & Charles S. Lanier (eds.), *America's Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 531, 534 (1998).

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thirteen also reverted to the practice of giving undivided clemency powers to their governors.⁹³

Contemporary death-penalty states conform to one of three basic models defining who has the authority to confer clemency: (1) providing the governor with exclusive clemency powers, either with or without the obligation to consider a nonbinding recommendation made by a pardons board or a similar body; (2) authorizing the governor to grant clemency, but conditioning that power on the prior positive recommendation of a pardons board or a similar body; (3) locating clemency authority exclusively within a pardons board or similar body, of which the governor may or may not be a member.

Twenty-five of the thirty-eight states with capital-punishment laws allow their governors essentially unfettered authority to make commutation decisions. In fourteen of those states the decision rests exclusively with the governor, who may act without consulting others.⁹⁴ In the remaining 11 states the governor has the authority to decide whether a capital sentence should be commuted, but only after considering the recommendations made by a pardons board or a similar body.⁹⁵ California's governor has unconstrained clemency authority with respect to all first-time offenders, but under

⁹³ Abramowitz & Paget, note 25 *supra*, at 141; Kobil, note 22 *supra*, at 605.

⁹⁴ Cal. Const. art. V, § 8(a) (West 1996); Cal. Penal Code Annot. § 4812 (West 1982) (governor may request the Board of Prison Terms to investigate and make a report and recommendation regarding the exercise of clemency); see *infra* note 96, and accompanying text, relating to cases involving offenders with two or more felony convictions); Colo. Const. art. IV, § 7 (1998); Colo. Rev. Stat. § 16-17-102 (1998) (before approving clemency application, governor must solicit comments of prosecuting attorney and trial judge); Ky. Const. § 77 (Michie/Bobbs-Merrill 1988); Miss. Const. art. V, § 124 (1998); Miss. Code Ann. § 47-7-31 (1993) (on request of governor, department of corrections shall investigate and issue a report regarding applications for executive clemency); N.J. Const. art. V, § II para. 1 (West 1971); N.J. Stat. Ann. § 2A:167-4 (West 1985); *id.*, at § 2A:167-7 (governor, in discretion, may refer commutation request to state parole board for investigation, report, and recommendation); N.M. Const. art. V, § 6 (1992); N.M. Stat. Ann. § 31-21-17 (1992) (on request of governor, parole board shall investigate and report on any case involving a request for pardon or commutation); N.Y. Const. art. IV, § 4 (McKinney 1987); N.Y. Exec. Law § 15 (McKinney 1993); N.C. Const. art. III, § 5(6) (1984); Or. Const. art. V, § 14 (1997); Or. Rev. Stat. § 144.640 (1997); *id.* at § 144.650 (on governor's request, those served with notice of application for clemency must respond); S.D. Const. art. IV, § 3 (1978); S.D. Codified Laws Ann. § 24-14-5 (1998) (governor may submit application for clemency to board of pardons and paroles for its recommendation); Tenn. Const. art. III, § 6 (1995); Tenn. Code Ann. § 40-27-101 (1997); Va. Const. art. V, § 12 (Michie 1995); Va. Code Ann. § 53.1-229 (Michie 1998); *id.* at § 53.1-231 (at governor's request, parole board shall investigate and report on cases where executive clemency is sought); Wash. Const. Art. III § 9 (West 1988), Wash. Rev. Code Ann. § 10.01.120 (West 1990); Wyo. Const. Art. IV § 5 (Lexis Law Pub. 1999); *id.* at art. III § 53; Wyo. Stat. Ann. § 7-13-804 (Lexis Law Pub. 1999).

⁹⁵ Ala. Const. art. V, § 124 (1977); Ark. Const. art. VI, § 18 (Michie 1987); Ark. Stat. Ann. § 16-93-204 (Michie Supp. 1997); *id.* at 16-93-207(a) (governor must give 30 days notice of intention to commute sentence, or commutation is void); Ill.

the California Constitution, "The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, four judges concurring."⁹⁶

In eight states the governor may commute a death sentence only if a board of pardons or an analogous body first recommends that favorable action should be taken.⁹⁷ The governor in those states may decline to confer clemency even if the board makes a positive recommendation, but is powerless to grant clemency absent the board's prior approval. Governors typically wield considerable, and sometimes even determinative influence under this type of clemency system, because they normally appoint or help appoint the clemency boards, and may even serve as a board member.⁹⁸

Governors in five states have no authority to commute death sentences.

Const. art. V, § 12 (West/Smith-Hurd 1993); Ill. Ann. Stat. Ch. 730, § 5/3-3-13 (West/Smith-Hurd 1997); Ind. Const. art. V, § 17 (Michie 1997); Ind. Code Ann. § 11-9-2-2-(b) (Michie Supp. 1998); id. at § 11-9-2-3 (Michie 1992); Kan. Const. art. 1, § 7 (1988); Kan. Stat. Ann. § 22-3701(4) (Supp. 1998); Md. Const. Art. II § 20 (1981); Md. Ann. Code art. 41, § 4-513 (1997); id. at art. 41, § 4-504(b)(3) (Supp. 1998); Mo. Const. art. IV, § 7 (West 1995); Mo. Ann. Stat. § 552.070 (West 1987); id. at § 217.800(2) (West 1996); Mont. Const. art. VI, § 12 (1997); Mont. Code Ann. § 46-23-301(2)(3) (1997); N.H. Const. part 2, art. 52 (1988); N.H. Rev. Stat. Ann. Tit. I § 4:23 (1988); Ohio Const. art. III, § 11 (Anderson Supp. 1998); Ohio Rev. Code Ann. §§ 2967.03, 2967.04, 2967.07, 2967.12 (Anderson 1996); S.C. Const. art. IV, § 14 (Law Co-op. 1977); S.C. Code Ann. § 16-3-20(A) (Law Co-op. Supp. 1998); id. at § 24-21-910 (Law Co-op. Supp. 1998).

⁹⁶ Cal. Const. art. V, § 8(a) (West 1996); see also Cal. Penal Code § 4852 (West 1982).

⁹⁷ Ariz. Const. art. V, § 5 (1984); Ariz. Rev. Stat. Ann. § 31-402 (West Supp. 1998); Del. Const. art. VII, § 1 (1975); Fla. Const. art. IV, § 8(a) (West Supp. 1999); Fla. Stat. Ann. § 940.01(1) (West 1996); Idaho Const. art. IV, § 7 (1993); Idaho Code § 20-240 (1997) (with respect to murder and other designated offenses, board of pardons only has power to recommend commutations and pardons, subject to approval or disapproval by governor); La. Const. art. IV, § 5(E)(1) (West Supp. 1999); La. Rev. Stat. Ann. § 15:572(A) (West 1992); Okla. Const. art. VI, § 10 (West Supp. 1999); Okla. Stat. Ann. tit. 57, §§ 332, 332.2 (West Supp. 1999); Pa. Const. art. IV, § 9(a) (West Supp. 1999) (requiring unanimous recommendation of board of pardons for governor's commutation or pardon in cases involving death penalty or life imprisonment); Pa. Stat. Ann. tit. 71 § 299 (West Supp. 1999); Tex. Const. art. IV, § 11(b) (West 1997); Tex. Code Crim. Pro. Art. 48.01 (West Supp. 1999).

⁹⁸ See generally Ledewitz & Staples, note 26 *supra*, at 228. For example, in Florida, the Governor may commute a sentence or pardon an offender only with the approval of three members of the cabinet. However, as a member of the cabinet, the Governor participates in recommendations for pardons and commutations of sentence. See Fla. Const. art. IV, § 8(a) (West Supp. 1999). High-ranking cabinet members other than the governor comprise the board of pardons in other of these states. For example, in Delaware, the board of pardons is made up of the chancellor, the lieutenant governor, the secretary of state, the state treasurer, and the auditor of accounts. Del. Const. art. VII, § 2 (1975). In Pennsylvania, the board of pardons consists of the lieutenant governor, the attorney general, and three other members (one crime victim, one corrections officer, and one physician, psychiatrist or

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Connecticut, Georgia, Nebraska, Nevada, and Utah all rely on pardons boards or an analogous decision-making body to make clemency decisions.⁹⁹ The governors in those states have varying amounts of control over the membership of the pardons boards,¹⁰⁰ and in Nebraska and Nevada they serve as members of the boards.¹⁰¹ State attorneys general also are voting members of the pardons boards in the latter two states. The involvement of a state's chief law enforcement official in the clemency process is a questionable practice, at best. An obvious potential conflict of interest is presented when the attorney general is asked to consider commuting a death sentence

psychologist) appointed by the governor with the concurrence of two-thirds of the senate. Pa. Const. art. IV, § 9(b) (West Supp. 1999); Pa. Stat. Ann. tit. 71, § 113 (West Supp. 1999). In Louisiana, the governor appoints the five members of the board of pardons. La. Const. art. IV, § 5(E)(2) (West Supp. 1999). The governor of Texas appoints the 18 members of the board of pardons and parole with the advice and consent of the state senate. Tex. Govt. Code § 508.031(a) (West 1998). In Oklahoma, three members of the pardon and parole board are selected by the governor, and the top judges on the Oklahoma Supreme Court and the state court of criminal appeals each designate one member. Okla. Const. art. VI, § 10 (West Supp. 1999). In Arizona, the governor appoints a selection committee, which nominates three qualified candidates to fill each vacancy on the board of executive clemency, and the governor then names board members from the list that is submitted. Ariz. Rev. Stat. § 31-401(A) (West Supp. 1998). In Idaho, the state board of corrections appoints the pardon board, "each member of which shall be subject to the advice and consent of the senate . . ." Idaho Code § 20-210 (Supp. 1999).

⁹⁹ Conn. Const. art. IV, § 13 (West 1998) (limiting the governor's authority to the granting of reprieves); Conn. Gen. Stat. Ann. § 18-26(a) (West 1998); Ga. Const. art. IV, § II, para. II (1998); Ga. Code Ann. §§ 42-9-42(a), 42-9-56 (1997); Neb. Const. art. IV, § 13 (1995); Neb. Rev. Stat. § 83-1,132 (1994); Nev. Const. art. V, § 14 (Michie 1998); Nev. Rev. Stat. Ann. § 213.085 (Michie 1996); Utah Const. art. VII, § 12 (Supp. 1998); Utah Code Ann. §§ 77-27-5(1)(a) (Supp. 1998), 77-27-5.5 (1995).

¹⁰⁰ Members of the Connecticut board of pardons are appointed by the governor "with the advice and consent of either house of the general assembly." Conn. Gen. Stat. Ann. § 18-24a (West 1998). Three of the five members of the board must be attorneys; one "shall be skilled in one of the social sciences;" and one must be a physician. "Not more than three of such members holding office at any one time shall be members of any one political party." *Id.* The Georgia board of pardons and paroles consists of five members, appointed by the Governor for seven year terms subject to the confirmation of the Senate. Ga. Const. art. IV, § 2, para. 1 (1998); Ga. Code Ann. § 42-9-2(a) (1997). The five full-time and five pro tempore members of Utah's board of pardons and parole are appointed by the governor with the advice and consent of the state senate. Utah. Const. art. VII, § 12(1) (Supp. 1998); Utah Code Ann. § 77-27-2(1) (Supp. 1998).

¹⁰¹ In Nebraska, the board of pardons consists of the governor, the attorney general, and the secretary of state; the governor chairs the board. Neb. Const. art. IV, § 13 (1995); Neb. Rev. Stat. § 83-1,126 (1994). The Nevada state board of pardon commissioners is composed of the governor, the justices of the state supreme court, and the state attorney general. Nev. Const. art. V, § 14(1) (Michie 1998); Nev. Rev. Stat. Ann. § 213.010 (Michie 1996).

imposed at the urging of a local prosecutor, and perhaps even defended by members of the attorney general's staff.¹⁰²

The Clemency Process

A governor or pardons board that is to accomplish the important functions of clemency, such as guarding against miscarriages of justice, fine-tuning punishment decisions in the name of achieving just deserts, or dispensing mercy where appropriate, clearly cannot afford to be blind to the distinctive facts of individual cases. The National Governors' Association's *Guide to Executive Clemency Among the American States* makes the need for reliable information explicit: "Requests for clemency always pose a problem in ensuring that there is sufficient information to reach a decision."¹⁰³ The need for complete and accurate information is especially acute in capital cases, where commutation decisions involve such momentous consequences. Thus, it is distressing that only the most rudimentary due process protections attach to clemency proceedings in capital cases, and complementary statutory procedures may be non-existent. The National Governors' Association lamentably acknowledges that "[t]he clemency investigative process varies from State to State, both in methodology and in thoroughness."¹⁰⁴

The Supreme Court recently considered a due process challenge to Ohio's capital case clemency procedures in *Ohio Adult Parole Authority v. Woodard*.¹⁰⁵ The Ohio Constitution gives the governor the authority to grant commutations "upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations . . . as may be prescribed by law."¹⁰⁶ The Ohio Adult Parole Authority is required by statute to investigate all applications for commutation of sentence and issue its report and recommendations to the governor.¹⁰⁷ Under procedures adopted by the parole authority, if a stay of execution is not granted at least 45 days before a scheduled execution, the parole board conducts a clemency review hearing. The hearing must be completed at least

¹⁰² In *Otey v. Stenberg*, 34 F.3d 635 (8th Cir.), cert. denied, 512 U.S. 1279 (1994), the Eighth Circuit Court of Appeals rejected a due process challenge to Nebraska's practice of including the state attorney general on the board of pardons, even though two assistant attorneys general opposed the defendant's application for clemency in this capital case. See also *Joubert v. Nebraska Board of Pardons*, 87 F.3d 966 (8th Cir.), cert. denied 518 U.S. 1035 (1996). See generally Coleen E. Klasmeier, "Towards a New Understanding of Capital Clemency and Procedural Due Process," 75 *Boston Univ. L. Rev.* 1507, 1532-1533 (1995) (discussing *Otey*).

¹⁰³ National Governors' Association Center for Policy Research, note 6 *supra*, at 177.

¹⁰⁴ *Id.* The states' clemency systems and their general operating procedures are described in detail in this publication. See *id.* at 15-181.

¹⁰⁵ 140 L. Ed.2d 387 (1998).

¹⁰⁶ Ohio Const. art. III, § 11 (Anderson Supp. 1998).

¹⁰⁷ Ohio Rev. Code Ann. § 2967.07 (Anderson 1996).

21 days in advance of the execution date, and it takes place as scheduled even if a stay of execution subsequently has issued.¹⁰⁸ In *Woodard*, a death-sentenced Ohio prisoner failed to obtain a stay more than 45 days before the date set for his execution. A clemency review hearing thus was scheduled before the parole board. The prisoner received ten days advance notice of the hearing. He also was notified that he had a right to a pre-hearing interview with one or more members of the parole board, although such notice was provided just three days prior to the scheduled interview. Counsel was barred from attending the interview, and could participate at the hearing only at the discretion of the chair of the parole board. The prisoner was not allowed to testify at the hearing before the parole board, nor to submit evidence.¹⁰⁹

Although eight members of the Court rejected the contention that Ohio's clemency procedures violated the federal Due Process clause,¹¹⁰ the justices' views in support of that result were splintered. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas were of the opinion that death-sentenced prisoners in Ohio, like other prisoners,¹¹¹ possessed neither a federal nor a state-created interest in clemency sufficient to trigger due process protections.¹¹² Justices O'Connor, Souter, Ginsburg, and Breyer disagreed. They had no hesitation in concluding that a prisoner under sentence of death has a constitutionally protected interest in life that invokes due process protections for purposes of state clemency review.¹¹³ However, those justices were of the opinion that Ohio's practice of affording a condemned

¹⁰⁸ Brief for Petitioners, *Ohio Adult Authority v. Woodard*, No. 96-1769, U.S. Supreme Court, Oct. Term, 1996, p. 5. See also *Ohio Adult Parole Authority v. Woodard*, 140 L.Ed.2d 387, 393 (1998).

¹⁰⁹ *Id.*, 140 L.Ed.2d, at 394; *id.* at 401–402 (O'Connor, J., concurring in the judgment). The prisoner additionally argued that the procedures providing for an interview with one or more members of the parole board, in the absence of counsel and with no grant of immunity, violated his Fifth and Fourteenth Amendment rights against compelled self-incrimination. The Court unanimously rejected this latter claim.

¹¹⁰ See generally Phillip John Strach, Note, "Ohio Adult Parole Authority v. *Woodard*: Breathing New 'Life' Into an Old Fourteenth Amendment Controversy," 77 *North Carolina L. Rev.* 891 (1999).

¹¹¹ *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981) (rejecting claim made by Connecticut prisoners serving sentences of life imprisonment that federal due process protections attach to state clemency proceedings).

¹¹² *Ohio Adult Parole Authority v. Woodard*, 140 L.Ed.2d 387, 395–399 (1998). The Chief Justice's opinion did concede that "respondent maintains a residual life interest, e.g., in not being summarily executed by prison guards." *Id.* at 396. However, it concluded that "the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges. Respondent is already under a sentence of death, determined to have been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before." *Id.* at 399 (footnote omitted).

¹¹³ "A prisoner under a death sentence remains a living person and consequently has an interest in his life . . . I do not . . . agree with the suggestion in the

prisoner the right to an interview with a member of the parole board, and the parole board's subsequent clemency hearing, provided adequate procedural safeguards.¹¹⁴ Justice Stevens cast the fifth and decisive vote affirming that due process requirements apply to clemency decisions in capital cases, although he alone was unwilling to conclude that Ohio's procedures were constitutionally adequate.¹¹⁵

Legislative initiatives specifying fact-finding procedures for capital case clemency decisions in virtually all jurisdictions are either nonexistent or conspicuously incomplete.¹¹⁶ These deficiencies exist even though many state constitutions explicitly authorize legislative regulation of the administrative and procedural aspects of clemency decisions.¹¹⁷ Several statutory and state constitutional provisions go so far as to require a hearing in connection with clemency applications.¹¹⁸ Other provisions simply direct that an

principal opinion that, because clemency is committed to the discretion of the executive, the Due Process clause provides no constitutional safeguards." *Id.* at 400 (O'Connor, J., concurring in the judgment).

¹¹⁴ *Id.* (stressing that "some minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where a State arbitrarily denied a prisoner any access to its clemency process") (emphasis in original).

¹¹⁵ *Id.* at 402-405 (Stevens, J., concurring in part and dissenting in part). Justice Stevens argued that the case should be remanded so the district court could determine whether Ohio's clemency procedures satisfied due process requirements. Even he was of the opinion that "[t]here are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required. Presumably a State may eliminate this aspect of capital sentencing entirely, and it unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy." *Id.* at 403.

¹¹⁶ General descriptions of state clemency procedures may be found in National Governors' Association Center for Policy Research, note 6 *supra*, and in National Coalition to Abolish the Death Penalty, *Executive Clemency Process and Execution Warrant Procedures* (1993).

¹¹⁷ See, e.g., Cal. Const. art. V, § 8 (West 1996); Colo. Const. art. IV, § 7 (1998); Idaho Const. art. IV, § 7 (1993); Ill. Const. art. V, § 12 (West/Smith-Hurd 1993); Ind. Const. art. V, § 17 (Michie 1997); Kan. Const. art. I, § 7 (1988); Mo. Const. art. IV, § 7 (West 1995); Mont. Const. art. VI, § 12 (1997); Neb. Const. art. IV, § 13 (1995); N.M. Const. art. V, § 6 (1992); N.Y. Const. art. IV, § 4 (McKinney 1987); N.C. Const. art. III, § 5 (1984); Ohio Const. art. III, § 11 (Anderson Supp. 1998); Okla. Const. art. VI, § 10 (West Supp. 1999); Or. Const. art. V, § 14 (1997); Utah Const. art. VII, § 12(2)(a) (Supp. 1998); Va. Const. art. V, § 12 (Michie 1995); Wash. Const. art. III, § 9 (West 1988); Wyo. Const. art. IV, § 5 (Lexis Law Pub. 1999).

¹¹⁸ See, e.g., Ariz. Rev. Stat. Ann. § 31-40(c)(2) (West Supp. 1998); Del. Const. art. VII, § 1 (1975); Idaho Const. art. IV, § 7 (1993); Ill. Ann. Stat. ch. 730, § 5/3-3-13(c) (West/Smith-Hurd 1997); Ind. Code Ann. § 11-9-2-2(3) (Michie Supp. 1998); La. Rev. Stat. Ann. § 15:572.4(c) (West Supp. 1999); Mont. Code Ann. § 46-23-303 (1997); Pa. Const. art. IV, § 9(a) (West Supp. 1999); Pa. Stat. Ann. tit. 71, § 299(b)

EXECUTIVE CLEMENCY AND EXECUTIONS

examination or investigation must be conducted,¹¹⁹ and still others are silent about the need for either a hearing or an investigation.¹²⁰ Many states mandate that notice be given of clemency applications, although such provisions typically are designed to ensure that prosecuting attorneys, trial judges, and victims or victim-representatives associated with the case have an opportunity to be heard.¹²¹

Clemency practices vary widely throughout the states. As previously

(West Supp. 1999) (hearings for offenders serving life sentences or committing crimes of violence granted only on majority vote of board of pardons); S.D. Codified Laws Ann. § 24-14-1 (1998); Utah Const. art. VII, § 12(2)(b) (Supp. 1998); Utah Code Ann. § 77-27-5(1)(c) (Supp. 1998); *id.* at § 77-27-5.5(7)(a) (1995) (board of pardons and parole may deny commutation hearing in a capital case if it finds application does not present a substantial issue).

¹¹⁹ See, e.g., Ark. Stat. Ann. §§ 16-93-204(a), (b) (Michie Supp. 1997); Cal. Penal Code § 4812 (West 1982) (board of prison terms investigates on governor's request); Ga. Code Ann. § 42-9-20 (1997) (board of pardons and paroles members have duty to make personal study of clemency requests in capital cases); *id.* at § 42-9-43(a); Kan. Stat. Ann. § 22-3701(4) (Supp. 1998); Md. Ann. Code art. 41, § 4-504 (Supp. 1998); Miss. Code Ann. § 47-7-31 (1993) (department of corrections shall investigate on request of governor); Mo. Ann. Stat. § 217.800(2) (West 1996); *id.* at § 552.070 (West 1987); Neb. Rev. Stat. § 83-1,129(3) (1994) (clemency applications shall be considered with or without a hearing); N.J. Stat. Ann. § 2A: 167-7 (West 1985) (governor has discretion to refer application for clemency to state parole board for its investigation); N.M. Stat. Ann. § 31-21-17 (1992) (parole board shall investigate commutation application on request of governor); Ohio Rev. Code Ann. § 2967.07 (Anderson 1996); Okla. Const. art. VI, § 10 (West Supp. 1999); Okla. Stat. Ann. tit. 57, § 332.2 (West Supp. 1999); S.C. Code Ann. § 24-21-910 (Law Co-op. Supp. 1998); Tenn. Code Ann. § 40-28-106 (Supp. 1998) (board of probation and parole shall investigate commutation applications on governor's request); Va. Code Ann. § 53.1-231 (Michie 1998) (on request of governor, state parole board shall investigate and issue a report in clemency applications).

¹²⁰ For example, Texas has come under considerable criticism for the lack of regular procedures associated with capital clemency recommendations made by the state board of pardons and paroles. Board members typically conducted no hearings, communicated by telephone instead of meeting in person, and followed no written rules or procedures in cases involving requests for the commutation of death sentences. See Klasmeier, note 102 *supra*; Daniel Lim, Note, "State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings," 28 Colum. J. Law & Soc. Prob. 47 (1994); Kathleen A. O'Shea, *Women and the Death Penalty in the United States, 1900-1998*, pp. 334-335 (1999).

¹²¹ See, e.g., Ariz. Rev. Stat. Ann. § 31-402(c)(2) (West Supp. 1998); Ark. Stat. Ann. §§ 5-4-607(a)(1), (c) (Michie 1997); Colo. Rev. Stat. § 16-17-102 (1998); Conn. Gen. Stat. Ann. § 18-27a(b) (West 1998); Ind. Code Ann. § 11-9-2-2(1) (Michie Supp. 1998); La. Rev. Stat. Ann. § 15:572.4(B) (West Supp. 1999); Mont. Code Ann. § 46-23-303 (1997); Nev. Rev. Stat. Ann. §§ 213.010(3), 213.020(2) (Michie 1996); N.H. Rev. Stat. Ann. § 4:21 (1988); Ohio Rev. Code Ann. §§ 2967.03, 2967.12(A), (B) (Anderson 1996); Okla. Stat. Ann. tit. 57, § 332.2(B), (C) (West Supp. 1999); Or. Rev. Stat. § 144.650(1) (1997); Pa. Stat. Ann. tit. 71, § 299(d) (West Supp. 1999); S.D. Codified Laws Ann. § 24-14-3 (1998); Tenn.

indicated, hearings are neither always required nor always conducted in all jurisdictions.¹²² Where hearings are held, the offender is allowed to make a personal appearance in some states, but not in others.¹²³ The appointment and participation of counsel for the offender varies across jurisdictions.¹²⁴ Hearings must be open in some states,¹²⁵ although some information occasionally is required to be kept confidential.¹²⁶ The clemency authority or a board responsible for investigating and making clemency recommendations frequently is given subpoena power to compel the attendance of witnesses and the production of documents.¹²⁷ A few states have enacted substantive standards against which clemency applications are to be evaluated.¹²⁸ Some

Code Ann. § 40-28-106(b) (Supp. 1998); Wyo. Stat. § 7-13-804(b) (Lexis Law Pub. 1999).

¹²² See, e.g., Bentele, note 47 *supra*, at 628-629 (reporting that the Georgia Board of Pardons and Paroles had summarily denied four of the seven applications for clemency it had received in capital cases without a hearing, and had conducted hearings in the other three cases).

¹²³ See Note, 90 Yale L.J., note 56 *supra*, at 901; Palacios, note 46 *supra*, at 346.

¹²⁴ For example, Florida provides a statutory right to court-appointed counsel for offenders seeking clemency in capital cases. Fla. Stat. Ann. § 925.035(4) (West Supp. 1999). See Schimmel, note 52 *supra*, at 262-263. Several other states permit counsel to be involved in clemency proceedings, although they do not necessarily provide court-appointed counsel. See Brief for Respondent, *Ohio Adult Parole Authority v. Woodard*, No. 96-1769 (U.S. Supreme Court, Oct. Term 1997), at A20 through A22 (identifying 32 states that allow counsel to participate in capital clemency proceedings, including three that provide court-appointed counsel for indigent offenders).

¹²⁵ See, e.g., Del. Bd. Pardon Rule 5(a) (1999); Idaho Const. art. IV, § 7 (1993); La. Rev. Stat. Ann. § 15:573 (West 1992); Pa. Const. art. IV, § 9(a) (West Supp. 1999); Utah Const. art. VII, § 12(2)(b) (Supp. 1998); Utah Code Ann. § 77-27-5(1)(c) (Supp. 1998).

¹²⁶ See, e.g., Fla. Rules Exec. Clemency 15(E), 16 (West 1992), cited in Schimmel, note 52 *supra*, at 264; Ga. Code Ann. § 42-9-53 (1997); Ill. Ann. Stat. ch. 730, § 5/3-3-13(c) (West/Smith-Hurd 1997) (report and recommendation of prisoner review board to governor are confidential); Mo. Ann. Stat. § 552.070 (West 1987) (“All information gathered by the board [of inquiry] shall be received and held by it and the governor in strict confidence”).

¹²⁷ See, e.g., Cal. Penal Code § 4812 (West 1982); Neb. Rev. Stat. § 83-1,128 (1994); N.H. Rev. Stat. Ann. § 4:28 (1988); N.Y. Correc. Law § 261 (McKinney 1987); S.D. Codified Laws Ann. § 24-13-8 (Michie 1998); Tenn. Code Ann. § 40-28-106(a)(2) (Supp. 1998).

¹²⁸ See Ariz. Rev. Stat. Ann. § 31-402(C)(2) (West Supp. 1998) (for offenders committing felonies after January 1, 1994, the board of executive clemency shall not recommend clemency to the governor unless it finds “by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is a substantial probability that when released the offender will conform the offender’s conduct to the requirements of the law”); Colo. Rev. Stat. § 16-17-101 (1998) (governor may commute capital sentence “when he deems it proper and advisable and consistent with the public

jurisdictions expressly deny the right of appeal,¹²⁹ and others disavow that existing regulations create procedural rights worthy of constitutional recognition.¹³⁰ Legislative or constitutional provisions occasionally provide that if a death sentence is commuted, the offender must serve life imprisonment without parole or another minimum prison term.¹³¹

The Supreme Court's unwillingness in *Woodard* to recognize anything beyond the most minimal due process requirements for capital clemency proceedings, in combination with the essential default of legislatures to regulate in the breach, has created an unfortunate procedural vacuum in the deliberations leading up to "the last word that spells life or death."¹³² Executive clemency aptly has been described as "a 'Wizard of Oz process'

interests and the rights and interests of the condemned"); Georgia Parole Board Basics, State Board of Pardons and Paroles, at 4 (June, 1980) (for board to grant capital clemency, "substantial evidence of sufficiently mitigating facts" must exist) (cited in Bentele, note 47 supra, at 628); Mont. Code Ann. § 46-23-301(2) (1997) (nonbinding recommendations of clemency board in capital cases are to be based on "(a) all of the circumstances surrounding the crime for which the applicant was convicted; and (b) the individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time the offense was committed, and at the time of the application for clemency").

¹²⁹ See, e.g., La. Rev. Stat. Ann. § 15:572.6 (West 1992); Mont. Code Ann. § 46-23-301(3) (1977); Utah Code Ann. § 77-27-5(3) (Supp. 1998).

¹³⁰ See, e.g., S.D. Codified Laws Ann. § 24-13-6 (Michie 1998); 28 C.F.R. § 1.10 (1998) (regarding applications for federal clemency).

¹³¹ See Ala. Code § 15-22-27(b) (1995) (offender whose death sentence is commuted is not parole-eligible until service of at least 15 years of a life sentence); Ark. Stat. Ann. § 5-4-607(c) (Michie 1997) (if death penalty is commuted to a term of years, no parole eligibility until the full term is served); Colo. Rev. Stat. § 16-17-101 (1998) (death sentence can be commuted "to imprisonment for life or for a term of not less than twenty years at hard labor"); Ga. Code Ann. § 42-9-42(a) (1997) (board of pardon and paroles may commute death sentence to life imprisonment, on majority vote); Nev. Const. art. V, § 14(2) (Michie 1998) (except as provided by law, sentences of death or life imprisonment without parole may not be commuted to sentence that allows parole); S.C. Code Ann. § 14 (Law Co-op. 1977) (governor may commute death sentence to sentence of life imprisonment); S.C. Const. art. IV, § 16-3-20(A) (Law Co-op. Supp. 1998) (offender whose death sentence is commuted to life imprisonment is not eligible for parole); Tenn. Code Ann. §§ 40-27-105, 40-27-106 (1997) (governor may commute death sentence to life imprisonment); Wash. Rev. Code Ann. § 10.01.120 (West 1990) (governor may commute death sentence to life imprisonment at hard labor); *id.* at § 10.95.090 (West 1990); Wyo. Const. art. III, § 53 (Lexis Law Pub. 1999) (authorizing legislature to create a sentence of life imprisonment without parole that is not subject to commutation, and to limit commutation of a death sentence to life imprisonment without parole that is not subject to further commutation).

¹³² *Solesbee v. Balkcom*, 339 U.S. 9, 13 (1950).

because it completely lacks standards,"¹³³ and as being fraught with "haphazardness"¹³⁴ that immediately would be condemned as arbitrary if it surfaced elsewhere in the capital-punishment process.¹³⁵ Justice Black observed a half century ago that, "We would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases where human lives depend upon their decision."¹³⁶ The information sorely needed in advance of clemency decisions in death-penalty cases—reliable and comprehensive facts about the offender's past and present circumstances, and all matters relevant to his or her crime—can only be ensured if regular fact-finding procedures are adopted. Procedural reforms would enhance, rather than constrain or undermine the prudent exercise of executive discretion.

At a minimum, executive clemency procedures should include notice and a meaningful opportunity to be heard for the offender and representatives of the state.¹³⁷ The most ambitious proposals rival trial-like procedures. One prominent scholar on the subject has advocated that clemency proceedings include the following minimal safeguards:

1. An independent, thorough investigation of the circumstances surrounding the clemency application conducted by the clemency authority;
2. The right of the defendant to attend a hearing before an impartial decision-maker, with a provision for recusal where it can be demonstrated that the decision-maker is biased;
3. The right of the defendant to present evidence and witnesses, secured by some sort of subpoena power;
4. The right of the defendant to challenge evidence and confront witnesses through cross-examination;
5. The right of the defendant to representation by counsel (including the appointment of counsel for indigent defendants) and an adequate opportunity to prepare for the hearing;
6. The right of the defendant to have the hearing transcribed by videotape or a court reporter; and
7. The right of the defendant to receive a written summary of the findings and the decision.¹³⁸

A hearing in which both the applicant for clemency and the state are ac-

¹³³ Palacios, note 46 supra, at 346 (quoting experienced capital litigator Richard Burr, the former director of the Capital Punishment Project of the NAACP Legal Defense and Educational Fund).

¹³⁴ Kobil, note 22 supra, at 611.

¹³⁵ See Radelet & Zsembik, note 38 supra, at 305 ("We conclude that the exercise of executive clemency in post-*Furman* capital cases is idiosyncratic at best, and arbitrary at worst. Overall, it seems to add, rather than subtract, an element of luck in the ultimate decision of who ends up being executed").

¹³⁶ *Solesbee v. Balkcom*, 339 U.S. 9, 13 (1950).

¹³⁷ Cf., *McGee v. Arizona State Board of Pardons and Paroles*, 376 P.2d 779 (1962) (due process requires notice and opportunity to be heard on application for commutation of death sentence).

¹³⁸ Daniel T. Kobil, "The Evolving Role of Clemency in Capital Cases," in James R. Acker, Robert M. Bohm & Charles S. Lanier (eds.), *America's Experiment*

tive participants is likely to be both fairer and to produce more reliable information than entrusting a clemency board or a similar body with the task of unilaterally investigating the application and issuing a report or recommendation to the clemency authority. There is no reason that an independent investigation could not be conducted to complement the facts presented at a hearing. But there is too great a risk that important information will not be uncovered if the offender and representatives of the state do not participate in the fact-finding process. The clemency application also should be made available for public comment, to ensure that others interested in the outcome have an opportunity to offer their input.¹³⁹

A condemned prisoner typically will have been isolated for several years on death row before a clemency application is ripe for consideration.¹⁴⁰ In order to be able to prepare effectively for a clemency hearing, an offender needs assistance; specifically, an attorney and investigative, medical, psychiatric, and other experts, as well as the resources required to bring to light information that may be crucial to a commutation or pardoning decision.¹⁴¹ Both the offender and the state should have the right to call and examine witnesses and present other evidence.¹⁴² Absent compelling concerns for confidentiality, both sides should have access to reports and documentary evidence that the clemency authority may consider.¹⁴³

All persons involved in the clemency decision-making process should be impartial. This basic fairness requirement should apply to the final authority as well as those offering recommendations about whether or not clemency should be granted. One case violating this principle involved the New York prosecution and execution of Charles Becker. Manhattan District Attorney Charles Whitman successfully prosecuted Becker for murder and secured his death sentence. Whitman used the prosecution of Becker, who

with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction 531, 542 (1998).

¹³⁹ See Note, 90 Yale L.J., note 56 *supra*, at 908.

¹⁴⁰ Some commentators have advocated early clemency proceedings, which would potentially obviate the need for expensive and protracted judicial review of capital sentences. See Bedau, note 7 *supra*, at 271; Schimmel, note 52 *supra*, at 270.

¹⁴¹ Considerable information relevant to a clemency decision already may have been assembled in connection with the offender's trial, appeal, and post-conviction proceedings. Nevertheless, counsel has a distinct role to play at clemency proceedings. The attorney may have to respond to assertions made by representatives of the state or the victim, and may have to present new information, such as newly discovered evidence relevant to innocence, or other information that was unknown or unavailable at earlier proceedings. See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 147–148 (1989) (guideline and commentary regarding duties of clemency counsel); Brief Amicus Curiae of the American Bar Association, Ohio Adult Parole Authority v. Woodard, No. 96-1769 (U.S. Supreme Court, October Term 1997).

¹⁴² See Lim, note 120 *supra*, at 81; Schimmel, note 52 *supra*, at 278.

¹⁴³ Cf., Gardner v. Florida, 430 U.S. 349 (1977) (defense counsel must be provided access to presentencing report considered in capital case, in order to help ensure reliability in capital sentencing decisions).

allegedly was a crooked New York City Police Lieutenant, as a springboard to election as New York's Governor. While serving as Governor, Whitman considered and rejected Becker's appeal for clemency.¹⁴⁴ Becker was executed in Sing Sing's electric chair in 1915. Scholars since have suggested that Becker was innocent.¹⁴⁵ The obvious conflict of interest confronting Whitman in Becker's case at a *minimum* undermines the appearance of justice. Similar problems are presented when state attorneys general participate in clemency decisions by making recommendations in cases where other prosecutors, and perhaps even assistant attorneys general, have helped secure or defend the death sentence under review.¹⁴⁶

Deciding who ought to make clemency decisions is considerably more complicated than identifying actors who should not be a part of that process. None of the three basic models presently used—entrusting clemency authority exclusively to the governor, allowing the governor to grant (or decline) clemency only after a reviewing board has made an affirmative recommendation, or giving clemency power to a board (of which the governor may or may not be a member)¹⁴⁷—is inherently superior to the others. The paramount concern should be to secure a decision-maker who will grant or deny clemency based on the merits of a case; who will not be constrained from doing what is right because of potential political fallout or other extrinsic considerations unrelated to mercy, justice, or another meritorious objective.

The contemporary wisdom is that governors who deign to commute death sentences are at considerable political risk.¹⁴⁸ At the same time, governors frequently face difficult political decisions; that is the job they have been elected to perform by the people. There is considerable merit in Alexander Hamilton's argument for vesting clemency powers in a single official: "[T]he sense of responsibility is always strongest in proportion as it is undivided"¹⁴⁹

Perhaps the best solution resembles the model employed in South Carolina, where the probation, parole and pardons services board considers commutation applications in death-penalty cases, investigates them, and makes a recommendation to the governor. The governor is not bound by the board's recommendation. However, if the recommendation is not followed the governor must explain his or her departure from it to the legislature.¹⁵⁰ A

¹⁴⁴ See Henry H. Klein, *Sacrificed: The Story of Police Lieut. Charles Becker* 342–360, 394–399 (1927).

¹⁴⁵ *Id.*; Hugo Adam Bedau & Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases," 40 *Stan. L. Rev.* 21, 73, 95–96 (1987); Andy Logan, *Against the Evidence: The Becker-Rosenthal Affair* (1970).

¹⁴⁶ See note 102 and accompanying text, *supra*.

¹⁴⁷ See notes 94–102 and accompanying text, *supra*.

¹⁴⁸ See notes 53–55 and accompanying text, *supra*.

¹⁴⁹ The *Federalist* No. 74, note 92 *supra*, at 447.

¹⁵⁰ The governor is not required under South Carolina law to solicit the board's review and recommendation. The relevant statute provides: "The Probation, Parole,

system that relies on an experienced, and somewhat autonomous board for an initial investigation, and whose recommendation to the governor can be rejected but only if accompanied by a public explanation of reasons, combines political insulation and accountability, yet still remains true to Hamilton's vision of a lone decision-maker on whose shoulders clemency responsibility ultimately rests.

An explanation of clemency decisions should be provided in all cases, to help clarify what factors were considered to be important and relevant, and to help ensure that a reasoned and principled decision was made. It is unlikely that any of the procedures suggested above would be unduly burdensome. The clemency authority, the applicant, and the state all have an interest in a decision being made on complete and accurate information. The substantive authority of the person or board that exercises clemency authority in no way is constrained by procedures designed to enhance the informed exercise of discretion. Procedural regularity only can help avoid the risk associated with clemency decisions, again identified by Hamilton, that "justice would wear a countenance too sanguinary and cruel."¹⁵¹

Methods of Execution Under Contemporary Death-Penalty Laws

When appeals courts deny relief, when clemency is denied, or when prisoners volunteer to walk freely to the death chamber,¹⁵² the condemned faces execution. Although numerous changes have occurred in death penalty

and Pardon Services Board shall consider all petitions for reprieves or the commutation of a sentence of death to life imprisonment which may be referred by it to the Governor regarding the petitions. The Governor may or may not adopt the recommendations but in case he does not he shall submit his reasons for not doing so to the General Assembly. The Governor may act on any petition without reference to the board." S.C. Code Ann. § 24-21-910 (Law Co-op. Supp. 1998).

¹⁵¹ The Federalist No. 74, note 92 *supra*, at 447.

¹⁵² After Gary Gilmore volunteered to be shot to death by a Utah firing squad on January 17, 1977, 63 of the 530 persons put to death through March 30, 1999 were volunteers. NAACP Legal Defense and Education Fund Inc., "Death Row U.S.A.: Spring 1999," pp. 6-16 (1999). Thus about 12 percent of the prisoners put to death in the United States between January 17, 1977 and March 30, 1999, cooperated with the State in ending their lives. An additional six prisoners have voluntarily ended their appeals and subsequently have been executed in the period between March 30, 1999 and July 6, 1999; Alvaro Calambro, April 6 (NV); Aaron Foust, April 28 (TX); Eric Christopher Payne, April 28 (VA); Edward Lee Harper, May 25 (KY); Charles Daniel Tuttle, July 1 (TX); Gary Heidnick, July 6 (PA). Death Penalty Information Center [online]. Available: <http://www.essential.org/dpic/recentexecutions.html>.

With the recent court ruling in New Jersey (*State v. Martini*,—A.2d—(1999)) paving the way for John Martini Sr. to forgo further appeals, the troubling issue of prisoners volunteering to be executed by the State gained new significance, especially in the Northeast. The only post-Gilmore executions in the Northeastern United States occurred in 1995, where two "volunteers" gave up their appeals, and were

laws and practices in recent years, few trends have been as rapid and widespread as the states' abandonment of traditional methods of execution, including hanging, the firing squad, the gas chamber, and the electric chair, in favor of lethal injection.¹⁵³ Oklahoma was the first state to authorize lethal injection by statute in 1977,¹⁵⁴ and Texas conducted the first execution using that method in 1982.¹⁵⁵ Over 70 percent of executions (395 of 553) during the post-*Furman* era (beginning with Gary Gilmore's 1977 execution through June 30, 1999) have been carried out by lethal injection.¹⁵⁶

At present, 32 of the 38 death-penalty states rely on lethal injection as their exclusive¹⁵⁷ or primary¹⁵⁸ method of execution. Legislation in Missouri

executed by the State of Pennsylvania (see Charles S. Lanier "The Death Penalty in the Northeast,"—Criminal Justice Policy Review—(forthcoming). A third Pennsylvania prisoner, Gary Heidnick, as noted above, also refused all appeals and was put to death on July 6, 1999. Thus, through July 22, 1999, only 3 of the 559 executions nationwide (<http://www.essential.org/dpic/dpicexec.html>) have been conducted in the Northeast—and all three were volunteers. Martini subsequently changed his mind, and now is pursuing a review of his death sentence.

See generally Christy Chandler, Note, "Voluntary Executions," 50 *Stan. L. Rev.* 1897 (1998); Richard C. Dieter "Ethical Choices for Attorneys Whose Clients Elect Execution," 3 *Geo. J. Legal Ethics*, 799 (1990); Jane L. McClellan, "Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases," 26 *Ariz. St. L.J.* 201 (1994).

¹⁵³ Professor Deborah Denno has carefully chronicled the changing execution methods employed by the states from the late 1800s through 1996 in her comprehensive article, "Getting to Death: Are Executions Constitutional?," 82 *Iowa L. Rev.* 319, 404–408 (1997).

¹⁵⁴ Zimring & Hawkins, note 12 *supra*, at 110 (citing *Okla. Stat. Ann.* tit. 22, § 1014 (West 1977)).

¹⁵⁵ Charles Brooks Jr. was the first person to be executed by lethal injection when Texas used that procedure on December 7, 1982. Denno, note 152 *supra*, at 375, 428.

¹⁵⁶ Death Penalty Information Center, "Executions Since 1976 by Method Used," Internet website, <http://www.essential.org/dpic/dpicexec.html>.

¹⁵⁷ *Ark. Stat. Ann.* § 5-4-617(a) (Michie 1997); *Colo. Rev. Stat.* § 16-11-401 (1998); *Conn. Gen. Stat. Ann.* § 54-100(a) (West Supp. 1999); *Del. Code Ann.* tit. 11, § 4209(f) (1995); *Ill. Ann. Stat.* ch. 725, § 5/119-5(a)(1) (West/Smith-Hurd Supp. 1999); *Ind. Code Ann.* § 35-38-6-1(a) (Michie 1998); *Kan. Stat. Ann.* § 22-4001(a) (1995); *La. Rev. Stat. Ann.* § 15:569(B) (West 1995); *Md. Ann. Code art.* 27, §§ 71(a), 627 (1996); *Miss. Code Ann.* § 99-19-51 (Supp. 1998); *Mont. Code Ann.* § 46-19-103(3) (1997); *Nev. Rev. Stat. Ann.* § 176.355(1) (Michie 1997); *N.J. Stat. Ann.* § 2C:49-2 (West 1995); *N.M. Stat. Ann.* § 31-14-11 (1992); *N.Y. Correc. Law* § 658 (McKinney Supp. 1999); *N.C. Gen. Stat.* §§ 15-187, 15-188 (Supp. 1998); *Okla. Stat. Ann.* tit. 22, § 1014(A) (West 1986); *Or. Rev. Stat.* § 137.473(1) (1997); *Pa. Stat. Ann.* tit. 61, § 3004(a) (West Supp. 1999); *S.D. Codified Laws Ann.* § 23A-27A-32 (1998); *Tex. Code Crim. Pro. Ann.* art. 43.14 (West 1979); *Wyo. Stat.* § 7-13-904(a) (Lexis Law Pub. 1999).

¹⁵⁸ *Ariz. Rev. Stat. Ann.* § 13-704(A), (B) (West Supp. 1998) (offenders sentenced to death for crimes committed before Nov. 23, 1992 must choose lethal injection or

requires condemned offenders to choose between death by lethal injection or lethal gas, without indicating which is the primary or "default" option if an election is not made.¹⁵⁹ In practice, lethal injection generally has been employed in Missouri.¹⁶⁰ Several other states allow or require some measure of choice regarding execution methods. In all of those states except Ohio, where the electric chair is the primary legislative option and lethal injection is available if affirmatively selected,¹⁶¹ death ensues by lethal injection unless the offender chooses otherwise.¹⁶² Alabama,¹⁶³ Florida,¹⁶⁴ Georgia,¹⁶⁵ and Nebraska¹⁶⁶ are the only states that continue to rely on the electric chair for executions. Nowhere does the gas chamber, the firing squad, or hanging remain the regular mode of execution, although those methods occasionally are available either by choice or as alternative options in the event lethal injection is determined to be unconstitutional.¹⁶⁷

The federal death penalty can be implemented by different methods. Of-

lethal gas; failure to choose results in lethal injection); Cal. Penal Code § 3604(a), (b) (West Supp. 1999) (lethal injection or gas; if no election is made, lethal injection); Idaho Code § 19-2716 (1997) (lethal injection, but if it is "impractical to carry out the punishment of death [by lethal injection] . . . for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure that infliction of death by administration of such substance or substances can be carried out in a manner which causes death without unnecessary suffering, the sentence of death may be carried out by firing squad"); Ky. Rev. Stat. Ann. § 431.220(1)(a), (b) (Michie Supp. 1998) (death by lethal injection, however, offenders who committed crime prior to effective date of act, March 31, 1998, may select lethal injection or electrocution; failure to choose results in lethal injection); N.H. Rev. Stat. Ann. §§ 630:5 (XIII), (XIV) (1996) (lethal injection, but hanging "if for any reason the commissioner [of corrections] finds it to be impractical to carry out" the execution by lethal injection); S.C. Code Ann. § 24-3-530(A) (Law Co-op. Supp. 1998) (electrocution or lethal injection; if right of election is waived, lethal injection); Tenn. Code Ann. § 40-23-114 (Supp. 1998) (lethal injection for offenses committed on or after Jan. 1, 1999; offender committing crime before Jan. 1, 1999 may waive "right" to be executed by method then in effect and opt for lethal injection); Utah Code Ann. § 77-18-5.5 (1995) (lethal injection or firing squad; if offender does not choose, lethal injection); Va. Code Ann. § 53.1-234 (Michie 1998) (electrocution or lethal injection; if offender does not choose, lethal injection); Wash. Rev. Code Ann. § 10.95.180(1) (West Supp. 1999) (lethal injection or, at offender's election, hanging).

¹⁵⁹ Mo. Ann. Stat. § 546.720 (West Supp. 1999).

¹⁶⁰ Denno, note 152 supra, at 451 & n. 844.

¹⁶¹ Ohio Rev. Code Ann. § 2949.22(A), (B)(1) (Anderson 1996).

¹⁶² See statutes cited in note 158 supra.

¹⁶³ Ala. Code § 15-18-82(a) (1995).

¹⁶⁴ Fla. Stat. Ann. § 922.10 (West Supp. 1999).

¹⁶⁵ Ga. Code Ann. § 17-10-38(a) (1997).

¹⁶⁶ Neb. Rev. Stat. Ann. § 29-2532 (Michie 1995).

¹⁶⁷ Cal. Penal Code § 3604(d) (West Supp. 1999) (if either lethal injection or lethal gas is determined to be unconstitutional, alternate surviving method shall be used); Del. Code Ann. tit. 11, § 4209(f) (1995) (if lethal injection unconstitutional,

fenders sentenced under the wide-ranging 1994 federal death-penalty legislation are executed in accordance with the practice followed in the state in which sentence was imposed. If that state has no death-penalty law, the sentencing judge must designate another state that practices capital punishment to carry out the execution.¹⁶⁸ The 1988 federal death-penalty law for drug-related killings neglected to specify a method for conducting executions.¹⁶⁹ Pursuant to federal regulations, offenders convicted and sentenced to death under that act are to be executed by lethal injection in a federal penitentiary.¹⁷⁰

Lethal injection has emerged as the execution method of choice in this country at least in part because it is perceived as being more humane than other forms of execution. For similar reasons, the New York Legislature considered adopting lethal injection as long ago as 1888.¹⁷¹ It opted instead for another innovation, the electric chair.¹⁷² When California still relied on San Quentin's gas chamber to carry out death sentences, then-Governor Ronald Reagan advocated a "more humane method . . . the simple shot or tranquilizer." He compared lethal injection to euthanizing a horse: "Now you call the veterinarian and the vet gives it a shot and the horse goes to

hanging); Idaho Code § 19-2716 (1997) (if lethal injection "impractical," see note 158 supra, then firing squad); N.H. Rev. Stat. Ann. § 630:5 (XIV) (1996) (if lethal injection "impractical," see note 158 supra, then hanging); Okla. Stat. Ann. tit. 22, § 1014(C) (West 1986) (if both lethal injection and the first alternate form of execution, electrocution, are declared unconstitutional, then firing squad); Utah Code Ann. § 77-18-5.5 (1995) (offender may choose firing squad); Wash. Rev. Code Ann. § 10.95.180(1) (West Supp. 1999) (offender may choose hanging).

¹⁶⁸ 18 U.S.C.A. § 3596(a) (West Supp. 1999):

A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

See generally Charles K. Eldred, Recent Development, "The New Federal Death Penalties," 22 *Am. J. Crim. Law* 293, 301 (1994); Edward D. Tolley & Ronald E. Houser, "Federal Death Penalty Act of 1994," *The Champion* 24, 28 (June 1995).

¹⁶⁹ 21 U.S.C.A. § 848 (West Supp. 1999). See generally Sandra D. Jordan, "Death for Drug Related Killings: Revival of the Federal Death Penalty," 67 *Chicago-Kent L. Rev.* 79, 91 (1991).

¹⁷⁰ 28 C.F.R. § 26.2(a) (1998).

¹⁷¹ Opposition from the medical profession, who feared the public would associate the practice of medicine with capital punishment, contributed to the rejection of lethal injection as an execution method. Denno, note 152 supra, at 373.

¹⁷² Acker, note 57 supra, at 517 & n. 13; Deborah W. Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century," 35 *Wm. & Mary L. Rev.* 551, 571-573 (1994).

sleep—that's it."¹⁷³ Kansas has even legislated in this spirit, specifying that lethal injection must "cause death in a swift and humane manner."¹⁷⁴ There is no shortage of gruesome accounts of executions conducted by lethal gas,¹⁷⁵ electrocution,¹⁷⁶ and hanging.¹⁷⁷ Court challenges to those practices have been premised on the argument that they involve the "unnecessary and wanton infliction of pain,"¹⁷⁸ or violate "'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment,'"¹⁷⁹ or that they involve "the purposeless and needless imposition of pain and suffering."¹⁸⁰ The Ninth Circuit Court of Appeals recently agreed that the gas chamber represents an unconstitutionally cruel punishment in light of the risk of pain associated with that method of execution, only to have the Supreme Court vacate that judgment in light of a change in California's statute that rendered the case moot.¹⁸¹ Attacks on other forms of capital punishment almost

¹⁷³ Zimring & Hawkins, note 12 supra, at 110, quoting Henry Schwarzschild, "Homicide by Injection," *New York Times*, Dec. 23, 1982, at A15.

¹⁷⁴ Kan. Stat. Ann. § 22-4001(a) (1995).

¹⁷⁵ See *Gray v. Lucas*, 463 U.S. 1237 (1983) (Marshall, J., dissenting from denial of certiorari); *Fierro v. Gomez*, 77 F.3d 301 (9th Cir.), vacated and remanded on other grounds, 519 U.S. 918 (1996). See generally Peter S. Adolf, "Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, 'Cruel and Unusual Punishment'?", 22 *Hastings Const. L.Q.* 1 (1995).

¹⁷⁶ See *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari); *Jones v. State*, 701 So.2d 76 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998) (describing numerous problems and malfunction with Florida's electric chair). The recent "bloody" execution of Florida prisoner Allen Lee Davis, on July 8, 1999, precipitated another court challenge to Florida's use of its new and improved electric chair. Lawyers for death-row prisoner Thomas Provenzano argued, during a four-day hearing before Florida Circuit Court Judge Clarence Johnson, that execution in Florida's electric chair was unconstitutional. On August 2, 1999, Judge Johnson declared otherwise, in a 33-page decision. His findings currently are being reviewed after a court hearing conducted before the Florida Supreme Court, on August 24, 1999. Roger Roy, "Chair Gets Clean Bill of Health," *The Orlando Sentinel*, August 3, 1999 [online] Available: http://www.orlandosentinel.com/news/080399__chair03__19.htm.

¹⁷⁷ See *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), vacated on other grounds, 93 F.3d 1434 (9th Cir. 1996) (significant risk that obese defendant, who weighed in excess of 400 pounds, would be decapitated by hanging makes hanging a cruel and unusual punishment under these unique case facts); compare *Campbell v. Wood*, 18 F.3d 662 (9th Cir.) (en banc), cert. denied, 511 U.S. 1119 (1994) (execution by hanging as practiced in Washington is not constitutionally impermissible).

¹⁷⁸ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).

¹⁷⁹ *Id.* (citation omitted).

¹⁸⁰ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

¹⁸¹ *Fierro v. Gomez*, 77 F.3d 301 (9th Cir.), vacated and remanded on other grounds, 519 U.S. 918 (1996).

universally have been unsuccessful,¹⁸² including challenges to death by lethal injection.¹⁸³

Although lethal injection rapidly has emerged as the favored means of execution in this country, the technique is neither foolproof nor uncontroversial. A surprisingly large number of executions conducted by lethal injection have been "botched."¹⁸⁴ Problems have included lengthy delays and often difficulties in locating a vein suitable to accommodate the needle used to transmit the toxic chemicals, needles popping out of veins after the combination of fatal drugs has begun flowing, and using chemicals that have been mixed or administered incorrectly, which has led to agonizing deaths.¹⁸⁵

Some problems may stem from the relative inexperience or lack of proficiency of the "execution technicians" who carry out lethal injections. Physicians and nurses generally are loath to assist with executions. The American Medical Association considers it unethical for doctors to do so: "A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."¹⁸⁶ Intravenous injections of the death-causing agents are neces-

¹⁸² See *Wilkerson v. Utah*, 99 U.S. 130 (1878) (firing squad); *In re Kemmler*, 136 U.S. 436 (1890) (electric chair); *Jones v. State*, 701 So.2d 76 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998) (4-3 ruling approving of continued use of Florida's electric chair); *DeShields v. State*, 534 A.2d 630, 640 (Del. 1987), cert. denied, 486 U.S. 1017 (1988) (hanging); *Campbell v. Wood*, 18 F.3d 662 (9th Cir.) (en banc), cert. denied, 511 U.S. 1119 (1994) (hanging). But see *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), vacated on other grounds, 93 F.3d 1434 (9th Cir. 1996) (see note 177, supra). See generally Denno, note 152 supra, at 344 ("Fierro [*v. Gomez*, 77 F.3d 301 (9th Cir.), vacated and remanded on other grounds, 519 U.S. 918 (1996)] is the first federal appeals court case holding unconstitutional any method of execution") (footnote omitted).

¹⁸³ In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court rejected an unorthodox challenge to lethal injection based on the contention that the Food and Drug Administration had not approved the drugs involved in human executions as being "safe and effective" for that purpose, and that the agency had abused its discretion in failing to halt their use. Other courts have rejected the argument that lethal injection is a form of cruel and unusual punishment. See *State v. Hinchey*, 890 P.2d 602 (Ariz.), cert. denied, 516 U.S. 993 (1995); *State v. Deputy*, 644 A.2d 411 (Del. Super.), appeal denied, 648 A.2d 423 (Del. 1994); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978); *Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997), cert. denied, 118 S. Ct. 1533 (1998).

¹⁸⁴ Denno, note 153 supra, at 428-438 (identifying 23 executions by lethal injection between 1982 and 1996 as encountering significant problems in administration); Michael L. Radelet, "Post-*Furman* Botched Executions," Internet site, <http://www.essential.org/dpic/botched.html> (identifying 15 instances of executions by lethal injection between 1983 and 1998 in which significant problems arose).

¹⁸⁵ *Id.*; Denno, note 153 supra, at 428-438; Marquart, Eklund-Olson & Sorensen, note 45 supra, at 147.

¹⁸⁶ The American College of Physicians, Human Rights Watch, the National Coalition to Abolish the Death Penalty, & Physicians for Human Rights, *Breach of Trust: Physician Participation in Executions in the United States* ix (1994), quoting

sary because intramuscular injections produce significantly more pain and take longer to cause death.¹⁸⁷ Difficulties frequently are encountered when condemned offenders have abused drugs, causing their veins to collapse or be unreceptive to the insertion of a needle.¹⁸⁸

Some critics argue that because executions by lethal injection give “the appearance of quick, bloodless, and even painless deaths,” they have helped Americans “distance ourselves from the reality of the death penalty.”¹⁸⁹

Lethal injection . . . offers a paradoxical execution scene. A supine inmate, seemingly at rest, appears to drift off into a sleep that merges imperceptibly with death The reality may well be completely different. The interval on the gurney, reminiscent of rest but actually a case of forced restraint, can certainly be considered a kind of torture of its own; and once the drugs are introduced, what follows may well be a death by slow suffocation—likewise, a kind of torture. All of this unfolds before us as we congratulate ourselves on our humaneness [The condemned offender] may endure a final insult to his dignity in the form of an experience of complete and utter helplessness while others smile benignly, as if all is well with a world that kills heinous murderers with such kindness.¹⁹⁰

Despite its actual and potential drawbacks, lethal injection almost certainly is the “best” method presently available to carry out death sentences. That fact alone is sufficient to cause introspection about the capital punishment enterprise. In the final analysis, there simply may not be a good way to kill another human being.

code of Medical Ethics, Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association, art. 2.06 (1992). See James R. Acker, “When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation,” 17 *Pace L. Rev.* 41, 221–222 (1996); Charles P. Ewing, “‘Above All, Do No Harm’: The Role of Health and Mental Health Professionals in the Capital Punishment Process,” in James R. Acker, Robert M. Bohm & Charles S. Lanier (eds.), *America’s Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 461, 472–474 (1998).

¹⁸⁷ Stephen Trombley, *The Execution Protocol: Inside America’s Capital Punishment Industry* 72 (1992).

¹⁸⁸ See, e.g., Denno, note 153 *supra* at 430 (describing execution of Stephen Peter Morin, in Texas); *id.* at 431 (execution of Randy Wools, in Texas); *id.* at 435–436 (execution of Billy Wayne White, in Texas); *id.* at 437 (execution of Emmitt Foster, in Missouri).

¹⁸⁹ Robert Johnson, *Death Work: A Study of the Modern Execution Process* 44 (2d ed. 1998).

¹⁹⁰ *Id.* at 46–47 (footnote omitted). See also Trombley, note 187 *supra*, at 71–72. Charles S. Lanier, “Review of ‘The Execution Protocol’” *Journal of Criminal Justice and Popular Culture*, 2(2):17–21 (1995) [online] Available: <http://www.albany.edu/scj/jcipc/vol2is2/execut.html> (where Potosi Correctional Center Warden Paul Delo, who oversees Missouri’s death row as well as executions, pronounces his view in this documentary that lethal injection is “very similar to getting an anesthetic prior to an operation, and it’s about the same amount of drama”).

Conclusion

The accelerating rate of death sentences and executions in this country has not been accompanied by a corresponding increase in death penalty commutations. To the contrary, execution and commutation trends have spiraled in dramatically opposite directions during the post-*Furman* years. Executive clemency decisions historically have been used to temper the administration of capital punishment, giving due regard to considerations of both justice and mercy. Today, the rare commutation of a capital sentence almost inevitably evokes a political backlash fueled by opportunists eager to supplant the traditional role of clemency with the notion that sparing the life of a condemned offender bespeaks of a mawkish sympathy for criminals and a weak constitution.

Acts of clemency were not always so construed. Instead, they were accepted as an important, and not ignoble mechanism for ameliorating the harshness of a severe and irreversible penalty imposed by an imperfect system on imperfect people. Reductions of capital sentences frequently were considered to be both necessary and proper.

Executive clemency powers universally are recognized constitutionally. If the important functions of clemency are to be fulfilled, it is vital that the conferring authority—the chief executive officer, a pardon board, or some combination thereof—has reliable and complete information before it makes the fateful decision about whether an execution should go forward. Legislation can and should be used to help ensure that an informed decision is rendered when the clemency authority exercises its discretion. Most jurisdictions are sorely in need of procedural reforms to help promote the reasoned exercise of executive clemency, including notice and the essentials of a meaningful hearing.

America's condemned offenders now overwhelmingly face death by lethal injection. Only four states retain the electric chair as their exclusive method of execution. The gas chamber, firing squad, and hanging have all but vanished from the death-penalty landscape. It is telling, and sadly ironic, that causing death by lethal injection has swept over the country so completely during the last two decades, when so many other badly needed capital-punishment reforms have largely gone unattended.

For example, providing defendants with competent and adequately funded counsel,¹⁹¹ devising means of effectively regulating prosecutorial charging discretion,¹⁹² improving measures for selecting capital juries,¹⁹³ implementing fairer and more reliable sentencing procedures,¹⁹⁴ and ensuring more rigorous and effective appellate review¹⁹⁵ would invest America's current system of capital punishment, at a minimum, with a more balanced,

¹⁹¹ See James R. Acker & Charles S. Lanier, "Ready for the Defense? Legislative Proposals Governing the Appointment of Counsel in Capital Cases," 35 *Crim. Law Bull.* 429 (1999).

¹⁹² See James R. Acker & Charles S. Lanier, "Statutory Measures for More Effective Appellate Review of Capital Cases," 31 *Crim. Law Bull.* 211, 214–218 (1995).

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equitable approach to attaining justice in response to homicide. Rather than these types of substantive, meaningful reforms, though, most jurisdictions have tinkered with their statutes in a superficial manner, elevating expediency and appearance over fairness. Until reforms other than the way by which the condemned are put to death are confronted and enacted, the promise of a fair and impartial criminal justice system, where executive clemency genuinely acts as a "fail safe," will remain a cruel fantasy for both the American people and their justices.

¹⁹³ See James R. Acker & Charles S. Lanier, "Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform," 32 *Crim. Law Bull.* 134 (1996).

¹⁹⁴ See James R. Acker & Charles S. Lanier, "Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes," 31 *Crim. Law Bull.* 19 (1995).

¹⁹⁵ See Acker & Lanier, note 192 *supra*.