The Politics of Forgiveness: Reconceptualizing Clemency

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Executive clemency is no longer a robust feature of American government. In recent decades, only a small handful of state governors have exercised their clemency power with any kind of regularity. Most governors, like recent presidents, have rarely used their power to commute sentences and have issued pardons sporadically and erratically.

In an era with more than seven million people either serving time in prison or under some form of supervised release,[1] the question of how to reinvigorate clemency has become an urgent one. Commutation through executive clemency is often the only hope for correcting a sentence after it has been imposed by a judge because parole has been abolished or dramatically curtailed in many jurisdictions, and judicial sentencing reduction power after a sentence has been handed down is weak or nonexistent in most places.[2] Even after an offender has served his or her sentence in full, clemency is important because the collateral consequences of conviction do not end with release from prison. The executive's power to pardon is often the only means by which offenders can remove or limit legal restrictions to enable them to reenter and reintegrate into society.[3]

The dilemma is that the pressing need for robust clemency is equaled by the difficulty of achieving it. Politicians remain afraid of soft-on-crime accusations or facing a Willie Horton–style advertisement[4] should an individual on the receiving end of a pardon or commutation go on to commit another crime. And in a legal era that calls for transparency and regularity of process, an unfettered and undisclosed clemency power has been under attack by legal reformers and scholars.[5]

This essay considers possible approaches for reenergizing clemency in this hostile political and jurisprudential climate. It draws inspiration from two main sources. Part I begins by analyzing more closely clemency practice in recent years, with a specific focus on those relatively few governors in recent times who have made or proposed greater use of their clemency power. Part II broadens the inquiry by looking to sentencing reform in general. Because the decision to grant clemency shares many traits in common with judicial sentencing discretion, it is valuable to look to changes in sentencing law and policy to identify how successful reform efforts have taken hold in that context and how the lessons of sentencing reform could be applied to clemency reform.

No magical formula will rejuvenate clemency. But the experience in some states with particular governors and the sentencing reform movement generally hold promise for structural changes and framing techniques to produce modest increases in clemency grants. And if clemency rates increase without a political backlash, that experience might pave the way for more dramatic improvements.

I. The Practice of Clemency Today

Recent decades have seen a precipitous drop in the number of clemency requests being granted by state executives and the president.[6] The number of pardons has decreased, and commutations are particularly rare, with the president and the vast majority of states governors granting only a handful of commutations in the past decade—all while the number of people being sentenced escalates at a rapid rate.[7]

But the general pattern masks some notable exceptions. First, individual governors have bucked this trend, granting a high number of clemency requests in a variety of cases even when facing reelection or with the goal of seeking a higher office. Former Arkansas Governor Mike Huckabee, for example, stands out for having granted clemency (pardons and commutations) to more than 1,000 individuals in his time as governor, many of which occurred in his first term in office.[8] Former Maryland Governor Robert Erlich similarly granted a high number of pardons and commutations.[9] Virginia Governor Timothy Kaine is also granting clemency requests at a rapid clip. In only his first fourteen months in office, he granted nine commutations and restored the rights of 768 individuals.[10] Huckabee and Kaine's approach to clemency seems to have been driven in part by their religious faith and moral convictions.[11] Ehrlich's view was that he had a constitutional duty to take pardon seriously.[12] Notably, none of them have appeared to have suffered politically for their clemency decisions.[13]

Second, some governors have targeted specific populations for relief or granted only a narrow form of relief. In Colorado, Governor Bill Ritter established a new board to

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review clemency applications of juveniles who were tried as adults and imprisoned in adult facilities.[14] This may or may not signal a greater willingness to grant clemency, but it does show the governor's interest in giving these cases greater scrutiny. Other governors have also been willing to give relief on a more targeted basis. In particular, some governors have focused on restoring voting rights for offenders who have served their sentences. In Florida, for example, Governor Charlie Crist urged the state's parole commission to reinstate the voting rights of 600,000 offenders who had completed their sentences.[15] Governor Tom Vilsack of Iowa, before leaving office, issued an executive order reinstating rights to those felons who had completed their sentences.[16] Governor Beshear of Kentucky has pushed for legislation to restore rights to felons.[17]

In fact, there are nine states in which pardons have been regularly available to ordinary citizens to restore their rights.[18] Of these states, four vest the pardon power in an independent board,[19] four require the governor and a pardon board to agree on pardon decisions,[20] and one vests the pardon decision in a board of high officials that includes the governor.[21] Thus, in each of these states, an agency possesses significant, if not exclusive, power to make the pardoning decision, thereby taking some or all of the political heat off the governor.[22]

Although none of these categories represents a seismic shift in clemency practice, each provides a window to how clemency grants could be increased even in a political climate that is otherwise hostile to their issuance.

The experience of Governors Huckabee, Ehrlich, and Kaine shows two things. First, it demonstrates that some executives have an incentive to pardon, out of a sense of either faith or duty. Second, using the themes of redemption and forgiveness as tenets of religious faith or constitutional duty can, in turn, offer a competing political narrative that may shield governors who exercise their pardon power from attack. Governors Huckabee and Kaine were explicit in the role that religion played in their executive decisions, and their decisions to forgive offenders and give them a second chance fit well within a faith-based narrative. For his part, Ehrlich relied on his constitutional duty to ensure that errors were corrected in criminal cases and that just sentences were meted out.

Of course these approaches are not going to translate to all governors or all voters. Some executives will not be comfortable employing a rationale based in religion because they do not believe it, either because it is not the message of their religion or because religion does not play a role in their approach to governance. And although there is an argument to be made that executives have a duty to pardon,[23] as Ehrlich emphasized, some executives may disagree, particularly if they are concerned that a duty-based explanation will seem too abstract and legalistic to appeal to voters. But while the value of giving a second chance may not work for all executives or for all populations, it should appeal to some. And the faith-based approach in particular is likely to resonate with many voters. Religion is a key force in politics, and it has emerged as an important catalyst of criminal justice reforms in recent years. Faith-based interests have been one of the leading forces driving the reentry movement and legislation like the Second Chance Act.[24] The experience of these governors shows that these same political forces could be marshaled to support a more generous clemency approach as well.

Another lesson from the aforementioned examples is that governors could increase clemency grants with less political risk if they were to approach clemency in a more surgical fashion, focusing on forms of relief that are not as vulnerable to political attack. Pardons issued after an offender has served a sentence in full and has lived in society for some number of years without reoffending are certainly less risky than commutations that set someone free before the end of the judicially imposed sentence.[25] To take the sliding scale concept further, it is also less risky to grant a former felon only a modest form of relief by reinstating his or her right to vote but granting no other relief. Most states already grant offenders the right to vote once a sentence has been served in full.[26] This fact shows that voters, in the main, are comfortable with giving offenders who have served their time the right to participate in elections. A governor like Charlie Crist who wishes to grant this right as a matter of the clemency power is therefore not going against a strong political current in opposition to these rights.[27] And it is hard to imagine a successful attack ad along the lines of the Willie Horton technique that would highlight a link between giving an offender the right to vote and the commission of another crime.

Taking this lesson a bit further, governors can narrow not simply the forms of relief they make available, but the types of offenders whom they deem eligible. It is less politically risky to show mercy on first-time offenders and/or those who have committed nonviolent offenses. In this regard, drug cases may be particularly good candidates for more clemency grants because narcotics laws frequently impose mandatory sentences that are harsher than the specific facts of a case warrant. A more generous approach to clemency for those who were very young when they committed their offense might also be feasible, as Governor Ritter's efforts seem to indicate, because these offenders can be very sympathetic figures whose claims of rehabilitation may be seen as more believable than most because of the maturation that comes with getting older.[28] At the opposite end of the spectrum, clemency for elderly inmates is viable for similar reasons. These offenders can plausibly argue that age has given them the wisdom to see how wrong their crimes were. Moreover, these claims can be bolstered by data; ex-convicts over the age of fifty-five have a much lower recidivism rate than eighteen- to forty-nine-year-olds.[29]

Of course, the narrower the approach, the less valuable clemency is at checking legislative and prosecutorial overreaching and ensuring individualized justice. Moreover,

most of the narrower approaches to clemency still come with risks. It takes just one offender who benefited from a pardon or commutation to reoffend to call into question an executive's judgment. Nonviolent or elderly offenders may be less likely to commit additional crimes, but some of them undoubtedly will. And while voters might respect governors who pardon as part of their religious faith, that may not be a sufficient defense if someone pardoned goes on to commit a particularly heinous crime.

It is this risk of the one bad apple that serves as the greatest deterrent for an executive deciding whether to use his pardon or commutation powers. While some governors will take the risk because their faith or a sense of duty is sufficiently strong, others—from the empirical evidence, most—will resist. For these governors, the risk either needs to approach zero or be eliminated, or it needs to be seen as worth taking because of the benefit it brings.

The use of independent commissions is a possible strategy for helping to reduce the risk. In the nine states with a more robust clemency practice, the governor can shift the blame to the clemency board if someone pardoned reoffends. The problem with the independent agency model as a cure-all is that not every state with a pardon board as part of the process has seen an increase in clemency grants. Indeed, many of the states with low grants of clemency have such a board.[30] These boards might be necessary for increased clemency power, but they are not sufficient. And getting these boards formed in the first instance in states that do not have them requires political will.

Thus, to make clemency a more robust practice in more than a handful of jurisdictions requires looking beyond the practice of clemency itself.

II. Clemency as Sentencing Reform

If one must search elsewhere for clues on how clemency can be reinvigorated, the most logical place to look is to sentencing reform more generally. A decision to grant clemency is, after all, a sentencing determination, albeit one made at the back-end of the process, after a judge or jury has already set a punishment. Commutations are decisions to reduce or modify a judicial sentence. Pardons also alter a sentence, either by erasing one or more of a defendant's convictions and thereby reducing a sentence as a result, or by negating what would otherwise be the consequences of a criminal conviction, such as voter ineligibility or disqualification for government benefits.

Like other sentencing determinations, clemency decisions must negotiate the modern politics of crime in order to be exercised with any frequency. While that political landscape presents formidable obstacles for those seeking to reform sentencing in any matter that benefits criminal defendants, the politics of sentencing in recent years reveals that modest improvements in that direction are possible, and the lessons translate well to clemency. Part A begins by discussing the sentencing commission movement and the lessons it offers for using an agency model in clemency. Part B turns to the many sentencing reforms in various states that have been driven by fiscal conservatism and highlights how the push for those reforms could be channeled into clemency determinations.

A. The Agency Model

Grants of clemency, as already noted, have been more frequent in those states that use independent pardon boards. But it is not enough simply to call for all jurisdictions to use these boards. There are political hurdles to establishing them in the first instance, and even when they do exist, they are not always effective in influencing gubernatorial decisions. Only a portion of the states with these boards have seen appreciable grants of clemency applications.

Here the sentencing reform movement may offer valuable lessons on how to maximize the effectiveness of such a board and, in turn, how to get jurisdictions that do not already have one interested in establishing one in the first place. The use of an expert agency to help set sentencing policy has been the defining feature of sentencing reform in the last three decades. Reformers looked to an agency model to help insulate sentencing decisions from the immediate pressures of the political process and achieve greater uniformity in sentencing.[31] Roughly one-third of the states and the federal government now use an agency to help set sentencing policy within their respective jurisdictions.[32] These agencies vary in their powers and structure, but they all possess some influence in establishing a jurisdiction's sentencing laws, and many of these commissions have been quite successful.[33]

What does the sentencing commission experience teach us about how these clemency boards can be made most effective in our political climate? The first lesson is that the composition of these boards has been critically important to their success. The most influential state sentencing commissions include representatives from all the interest groups. They include representatives from the defense bar as well as prosecutors, judges, members of the community, and often legislators themselves.[34] Thus, the successful commissions include not only those groups that typically get muted in the legislative process, such as defense interests, but also those powerful groups who are readily heard. Both groups are important so that all points of view are aired and so that the final proposal of the commission is more likely to have political influence.

In the context of clemency boards, it is likewise important to have a diverse membership and to include groups most likely to oppose such grants to become part of the process. Thus, pardon boards should include not only experts who can evaluate future risks of offending but also prosecutors and representatives of victims' rights groups. Having these individuals on board with the executive's decision is a critical means of muting any subsequent criticism that the governor's deference to the board or decision to grant clemency was ill-placed. Consider in this regard Governor Ehrlich's active pardon practice. One of his strategies was to seek input from victims before granting a clemency application.[35] This tactic probably helped to

neutralize political opposition and may partially explain why Ehrlich's clemency record did not figure heavily when he stood for reelection. A more recent example comes from Nevada, where the placement of the attorney general on the state's pardon board could provide cover for the governor if he wishes to adopt the board's recent proposal for early release of nonviolent offenders. Having a prosecutor provide a stamp of approval for such a proposal provides a strong defense against any criticism that the decision was made without a concern for law enforcement.

Ensuring that potential opponents are part of the process is arguably even more important in clemency than in other sentencing decisions because of the point at which a clemency decision is made. Sentencing commissions set policies in the abstract, without an eye toward how a particular, identifiable offender should be treated. Clemency, in contrast, is a decision about a particular person, and it takes place after some other actor has already determined how that individual should be sentenced. Thus, the decision to relieve that person from his or her sentence is not merely an abstract policy judgment or an act of mercy. Unless the grant is based on an unforeseen change of circumstance, the decision to grant clemency is implicitly a judgment that some other actor in the system—the judge, the jury, the prosecutor, or the legislator—made a mistake. The people who are having their decisions second-guessed therefore stand as potential voices in opposition to the grant—unless they have been made part of the decision-making process. That does not mean that the same prosecutor who brought the case must agree to a clemency decision, though it is probably valuable to get that person's input. Nor does it mean that the judge who issued a sentence must agree, though here, too, his or her perspective is valuable. What it does mean is that the interests of these groups—prosecutors and judicial actors—should get an airing in the board's process so that the ultimate decision can be seen as sensitive to law enforcement concerns and respectful of the sentencing process.[36]

This need for diversity means that clemency boards should not be mere arms of law enforcement interests, for that could skew them too far in the opposite direction, against issuing any grants at all.[37] The pardon process at the Department of Justice, for instance, has become dominated by prosecutors, which helps explain the anemic role pardons play at the federal level. Instead, clemency boards should mimic the most successful state sentencing commissions, which are careful to mix law enforcement interests with those of defense lawyers and former offenders so that each side can learn from the other and increase the likelihood that sound conclusions will be reached and be less subject to political attack later.

B. Data- and Cost-Driven Decision Making

The most successful sentencing commissions share in common not only a diverse membership but also a focus on reducing the costs of incarceration. In particular, those commissions that produce prison capacity impact statements—statements that show what a proposed sentencing increase will cost the state—have been the most successful at pushing back tough-on-crime posturing.[38] When confronted with the real dollar costs of a sentence increase, politicians take a closer look at whether the proposed increase actually makes sense. It is therefore not surprising that states with prison capacity impact requirements have experienced slower prison growth than states without such requirements[39] and that a concern with lowering incarceration costs is a key predictor of whether a jurisdiction establishes a commission in the first place.[40]

While commissions are well placed to reduce costs because of the systematic data analysis they can perform, jurisdictions have adopted sentencing reforms to save money even without the help of a commission. In the beginning of the twenty-first century, many states have repealed mandatory minimum sentencing laws, reduced sentence lengths for some offenses, or provided opportunities for alternatives to incarceration.[41] And almost all of these efforts have focused on the need to stop the burgeoning costs of incarceration.[42]

This same focus on cost savings could be used in clemency decisions. Indeed, there is emerging evidence that governors are starting to look at the cost-savings rationale for clemency. Take, for example, some recent proposals from California and Nevada, states which face extreme prison overcrowding. Governor Schwarzenegger recently proposed granting early release to approximately 22,000 inmates to address the crisis in prison overcrowding in California.[43] In Nevada, the Pardon Board recently proposed releasing those inmates who are first-time offenders with no history of violence who are within two years of finishing their sentence.[44]

Pardon boards can not only highlight the cost savings associated with more robust clemency but also serve as repositories of data on what benefits clemency decisions actually bring. These boards can maintain a record of who has received a pardon or commutation and what they have done since that time. They can keep track of the good things people do after receiving a second chance—the jobs they take, the families they support, the communities they serve. This information can tap into a politics of redemption and hope to counteract the usual politics of fear. Narratives are powerful in criminal law, and a governor facing an attack based on a grant of clemency-gone-wrong can employ examples of clemency decisions that have yielded positive results as a counterattack. More systematically, these boards should be able to quantify the fiscal benefits of clemency decisions, including the savings in incarcerations costs (including medical costs for elderly inmates who have been released), the economic benefits of getting former offenders reemployed, and the crime reduction that may result from successfully reintegrating offenders into a community.

There are, of course, fundamental differences between using cost savings as a justification for sentencing reforms

and for clemency determinations. Clemency has traditionally been seen as an act of individualized mercy, not as a means of cost-cutting or an economic stimulus. Cost considerations have not typically been part of the pardoning or commutation process, and certainly other mechanisms—like front-end sentencing reform or even parole on the back-end—offer more systematic and rational means of confronting the ballooning costs of rising incarceration rates.

But considering fiscal concerns as part of a clemency decision would not necessarily conflict with the vision of clemency as the power to dispense mercy. In an era of widespread cost-benefit analysis throughout the executive branch, it is far from irrational to put clemency determinations within the same general framework. If an elderly prisoner is unlikely to commit more crimes because of his or her advanced age and the cost of keeping him or her in prison is expensive, particularly in light of large medical costs, it is reasonable for an executive to take that into account as part of the determination of whether that prisoner should have a sentence commuted. Similarly, if particular restrictions on ex-offenders, such as the loss of license eligibility or the right to vote, are causing harm not just to the ex-offender but to society generally because those restrictions prevent offenders from reentering society as productive members of the economy, that should factor into a pardon determination. These factors need not replace traditional inquiries made at the pardon stage. Rather, they can serve as supplemental data points that can highlight for executives and the voting public that the risk associated with a commutation or pardon is worth taking because of the benefits it can bring.

The broader point is that cost-benefit analysis as a mechanism for decision making can improve all kinds of decisions, including clemency. A governor or president who seeks to make rational decisions about the dispensation of government benefits and the trimming of government costs should embrace this means of analysis. If clemency is a sentencing decision, it should be as reasonable as any other.

That does not mean that mercy has no place in the equation. Forgiveness, rehabilitation, and reformation can and should be considered. But in the current political climate, considering *only* those factors has meant that individuals rarely, if ever, get relief. The reason is that executives are weighing the benefits of forgiveness against the obvious costs of pardons. Indeed, it is hard to explain their rapid decline on any basis other than executives' preoccupation with the risk of having a pardoned offender commit another crime and being blamed for it because the pardon or commutation diminished deterrence or let a previously incapacitated offender go free. Executives are well aware of the costs of commuting a sentence or granting a pardon. So, encouraging executives to do a cost-benefit analysis as part of the clemency determination would not change how executives are already analyzing the cost side of the equation.

Instead, focusing on the costs and benefits of a grant of clemency would highlight that clemency brings societal benefits, and not simply benefits to the individual. Clemency can correct a sentence that has proven itself to be too long—either by a comparison to other cases, a closer look at the facts of an individual case that might have been ignored because of a mandatory sentencing law, or because circumstances have changed. Correcting an excessive sentence can save the state money, free up a prison bed, and give the individual serving the sentence the opportunity to reenter society earlier and become a productive member. And to the extent boards can help achieve these cost-savings benefits, that is an argument for forming them in the first place. Indeed, it is the cost-savings potential of a sentencing commission that has led so many states in recent years to turn to an agency model, and that same concern might push toward an independent agency model for clemency as well.

To be sure, even this expanded notion of the benefits of clemency might not be enough to outweigh the main cost, which is the increased risk of an additional crime by the individual who receives the pardon or commutation. But putting these benefits at the fore helps to improve the decision-making process and makes it more likely that the public and the executives they elect will see that clemency is a risk worth taking.

III. Conclusion

Reinvigorating clemency is no easy task. The costs of getting a clemency decision wrong—resulting in an individual whose application for clemency was granted then going on to commit another crime, particularly a violent one—are high in this political climate of thirty-second ads and sound bites. Executives will run that risk only if there are corresponding benefits that are greater.

Looking to the actual practice of clemency today as well as sentencing reform more generally, this essay suggested a two-prong strategy for strengthening clemency in a tough-on-crime environment. The first part of the strategy aims to reduce the risk associated with clemency. This means creating boards that can take the heat for decisions that turn out badly. It may also mean focusing on specific categories of offenders and forms of relief that pose less risk for clemency.

The second part of the strategy involves highlighting the benefits of clemency beyond individual justice. Of course individual justice remains central to clemency determinations, but a more robust clemency scheme in today's political landscape will require a broader vision of what second chances mean to society. Commutations are about cost savings as well as individual justice. Pardons are not just about forgiving an individual but about making offenders productive members of communities and lowering the risk that they will reoffend.

While these changes may yield only modest improvements initially, each successful clemency grant makes the case for additional grants. That is, as the practice of

clemency once again becomes a regular one, bearing societal benefits, the risk of any one decision going wrong is not as great.[45] The result should be, over time, a return to an era in which clemency is a key part of a functioning system of justice. For it is as true today as it was at the Framing that "the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[46]

Notes

* I am grateful to Margy Love for comments and to Ross Cuff and Mark Samburg for excellent research assistance.

1 Bureau of Justice Statistics, U.S. Dep't of Justice, Prison Statistics (Dec. 16, 2007), http://www.ojp.usdoj.gov/bjs/prisons.htm (at year-end 2006, there were 2,258,983 prisoners in the U.S.); Bureau of Justice Statistics, U.S. Dep't of Justice, Probation and Parole Statistics (Dec. 5, 2007), http://www.ojp.usdoj.gov/bjs/pandp.htm (at year-end 2006, 4,237,000 people were on probation and 798,200 were on parole).

2 Where back-end sentencing reform is available through these other means, clemency may be less important. For example, Connecticut governors rarely grant commutations, but the courts have authority to modify sentences without input from either the governor or the state board of pardons. Connecticut General Statutes Annotated sec 53a-39. Illinois, in contrast, has non-parole-eligible determinate sentencing, making clemency the only option for early release for many of its inmates.

3 Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction, A State-By-State Resource Guide 7 (July 2005) ("[I]n 42 states, and for federal offenders, pardon provides the only system-wide relief from collateral sanctions and disqualifications based on conviction.").

4 *See, e.g., A 30-Second Ad on Crime*, N.Y. Times, Nov. 3, 1988, at B20; http://www.youtube.com/watch?v=EC9j6Wfdq3o&feature=related

5 *See* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332 (2008).

6 Barkow, *supra* note 5, at 1349 n.78 (describing decline in federal clemency grants since the 1970s); Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions? in* Forgiveness, Mercy, and Clemency at 36, 37 (Austin Sarat & Nasser Hussain eds., 2007) (citing a survey of commutations from 1995 to 2003 showing a decline at the state level).

7 Kobil, *supra* note 6, at 36, 37 (noting that 34 states granted 20 or fewer commutations from 1995 to 2003); Barkow, *supra* note 5, at 1349 n.78 (noting that as of 2007, President George W. Bush had granted only 5 commutations).

8 Adam Nossiter & David Barstow, *Charming and Aloof, Huckabee Changed State*, N.Y. Times, Dec. 22, 2007, at A1. Huckabee's successor, Mark Beebe, has also granted clemency applications at a relatively high rate, though most of his grants have been pardons for individuals who have already completed the terms of their sentences instead of commutations. For a catalog of Beebe's grants, *see* Pardon Power Blog, at http://pardonpower.com/labels/Arkansas.html.

9 *See* Love, *supra* note 3, Maryland section (noting that between August 2003 and March 2006, Ehrlich granted 150 pardons and 15 commutations); *see also Ehrlich Grants Clemency to 18; 249 Commutations and Pardons Issued During 4-Year Term*, Baltimore Sun, Jan. 13, 2007, at 5B; Editorial, *Mr. Ehrlich and Clemency*, Wash Post, Aug. 27, 2006, at B6; Matthew Mosk, *Ehrlich Prolific in Granting Clemency*, Wash Post, Aug. 25. 2006, at A1.

10 Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction* (2008 ed.), *available at* http://www.sentencingproject.org/tmp/File/Virginia08.pdf. Although Kaine is barred by Virginia law from seeking reelection, he has been mentioned as a candidate for other offices, including the vice presidency. Kate Zernike, *Charismatic Governor Rises to the Short-List*, N.Y. Times, Aug, 13, 2008, available at http://www.nytimes.com/2008/08/14/us/politics/14kaine.html?ref=politics

11 Adam Nossiter & David Barstow, *Charming and Aloof, Huckabee Changed State*, N.Y. Times, Dec. 22, 2008 ("By every account, Mr. Huckabee's approach to clemency was heavily influenced by his religious beliefs."); Caryle Murphy, *Catholicism, Politics a Careful Mix for Kaine*, Wash. Post, Oct. 31, 2005 (describing the influence of religion on Kaine's politics).

12 Mosk, *supra* note 9 (quoting Ehrlich as stating that his law school training and his marriage to a public defender instilled in him a sense of duty).

13 While Ehrlich was a one-term governor who failed to win reelection, there is little evidence that his record on clemency played a major role in his defeat. *See* Mosk, *supra* note 9.

14 Office of Governor Bill Ritter, *Gov. Ritter Establishes Juvenile Clemency Board* (Aug. 29, 2007), *available at* https://www.advancecolorado.com/governor/press/august07/juvenile-clemency-board.html

15 Florida excepted murderers, violent sex offenders, and certain career criminals. *See* Abby Goodnough, *In a Break from the Past, Florida Will Felons Vote*, N.Y. Times, April 6, 2007, *available at* http://www.nytimes.com/2007/04/06/us/06florida.html.

16 Todd Dorman, *Former Governor Criticizes Vilsack's Voting Rights for Felons Decision*, Quad-City Times, June 21, 2005, *available at* http://www.qctimes.com/articles/2005/06/21/news/state/doc42b79d842d833543812069.txt; Kate Zernicke, *Iowa Governor Will Give Felons the Right to Vote*, N.Y. Times, June 18, 2005.

17 Beshear removed obstacles to restoration, *see Beshear simplifies process to restore voting rights for felons*, Herald-Dispatch, March 4, 2008, available at http://www.herald-dispatch.com/homepage/x1657944652, and he praised legislation aimed at automatic restoration, *Beshear to help more felons vote*, March 4, 2008, available at http://polwatchers.typepad.com/pol_watchers/2008/03/beshear-to-help.html.

18 Love, *supra* note 3, at 8 (listing Alabama, Arkansas, Connecticut, Delaware, Georgia, Nebraska, Oklahoma, Pennsylvania, and South Carolina).

19 *Id*. at App. A tbl. 1 (Alabama, Connecticut, Georgia, and South Carolina).

20 *Id*. (Arkansas, Delaware, Oklahoma, and Pennsylvania).

21 *Id*. (Nebraska).

22 Scholars such as Michael Heise have found that clemency in capital cases is also more likely with a board. See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 Va. L. Rev. 239, 297-302 (2003).

23 *See* Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 Fordham Urb. L.J. 1483, 1506-09 (2000).

24 *See* Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. Times Magazine, Dec. 24, 2006.

25 Thus, in the nine states with a robust pardon practice, commutations are far less frequent. *See also* President William J. Clinton, Remarks at the ceremony appointing Roger Gregory to an interim seat on the Fourth Circuit Court of Appeals

(Dec. 27, 2000), *reprinted in* 13 Fed. Sent'g Rep. 228 ("Presidents and governors should be quite conservative on commutations . . . but more broad-minded about pardons.")

[26] Love, *supra* note 3, at 11.

[27] Only Florida, Kentucky, and Virginia disenfranchise all felony offenders for life until they receive a pardon or judicial restoration of rights. Love, *supra* note 3, at 12.

[28] See, e.g., Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 2, 2005, at A1 (describing convincing claims of rehabilitation made by a Pennsylvania man convicted of a murder committed when he was 15); *see also* Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children To Die in Prison, *available at* http://eji.org/eji/ (cataloging cases of 13 and 14-year-olds serving life sentences).

[29] Mark Martin, *Governor to Consider Early Inmate Release; Giving Nonviolent Convicts a Break Could Ease Crowding, Stave off Judges*, S.F. Chronicle, Feb. 23, 2007, at A1 (citing a federal study finding a 3% recidivism rate among ex-convicts over 55 compared to a 45% recidivism rate among 18-49 year-old ex convicts).

[30] In states like Illinois, Kansas, Missouri, New Hampshire, and Ohio, to name just a few examples, there are boards that have to be consulted, but low clemency rates. *See* Love, *supra* note 3. Former California Governor Gray Davis, for example, vetoed parole for 278 of the 284 convicted murderers for whom the state parole board recommended release. Editorial, *Models for Mr. Bush*, Wash. Post, Dec. 28, 2004, at A18.

[31] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715 (2005).

[32] Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 Tex. L. Rev. 1973, 1974 and tbl. 1 (2006).

[33] Barkow, *supra* note 31.

[34] In the case of sentencing commissions, either having legislators on the commission or otherwise in a close relationship with the commission is critical because of the role that legislators can play in overruling the commission. *See* Barkow, *supra* note 31, at 800-04. Legislators should not serve on clemency boards because of separation of powers concerns, so in the context of clemency, the key is to get the political interests who would oppose clemency grants (namely prosecutors and victims groups) to participate.

[35] Mosk, *supra* note 9.

[36] Here it is noteworthy that in the early days of the republic, the prosecutor or the sentencing judge often recommended an executive pardon or commutation. Margaret Colgate Love, Reinventing the President's Pardon Power 4 (Oct. 2007), *available at* http://www.acslaw.org/files/Presidential%20Pardons%20Issue%20Brief%20-%20October%202007.pdf

[37] *See* Barkow, *supra* note 31, at 803 (cautioning against imbalance on sentencing commissions).

[38] Barkow, *supra* note 31, at 804-05.

[39] Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. Crim. L. & Criminology 696, 703-04 (1995); Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the U.S., in* Penal Reform in Overcrowded Times 31 (Michael Tonry ed., 2001).

[40] Barkow & O'Neill, *supra* note 32, at 1976 (finding among other things that "corrections as a large percentage of state expenditures and a high incarceration rate are positively correlated with the presence of sentencing commissions").

[41] *See generally* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1285-90 (2005) (describing state sentencing reforms based in cost concerns).

[42] *Id*.

[43] Keith B. Richburg & Ashley Surdin, *Fiscal Pressures Lead Some States to Free Inmates Early*, Wash. Post, May 5, 2008, at A1.

[44] Geoff Dornan, *Pardons board to look at reducing prison overcrowding*, Nevada Appeal, Oct. 30, 2008, *available at* http://www.nevadaappeal.com/article/20081030/NEWS/810299954/1070&ParentProfile=1058&title=Pardons%20board%20to%20look%20at%20reducing%20prison%20overcrowding.

[45] Love, *supra* note 36, at 14.

[46] The Federalist No. 74, at 422 (Alexander Hamilton) (Penguin Books ed. 1987).