

*Clemency "is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."*<sup>†</sup>

## “THE GOVERNOR’S COURT OF LAST RESORT:”<sup>††</sup> AN INTRODUCTION TO EXECUTIVE CLEMENCY IN ALASKA

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### ABSTRACT

*This Article details the history of clemency and examines its use in Alaska. It begins by broadly describing the various forms of clemency and traces their evolution from ancient times to the present. After tracing the development of clemency in the United States and the Alaska Territory, the Article shifts its focus to clemency’s use during Alaska’s statehood. During most of this period, the clemency process has been exclusively within the governor’s discretionary powers and has taken place largely behind closed doors. However, in the aftermath of a controversial pardon by Governor Murkowski, Alaska’s historical model of clemency has been transformed into a process that makes the exercise of gubernatorial clemency power much more visible. The Article explains these policy changes, now embodied in section 33.20.80 of the Alaska Statutes. Finally, it concludes that while the new procedures correct some of the problems associated with*

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<sup>†</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Holmes, J.).

<sup>††</sup> See *Minutes of the 53rd Day of the Alaska Constitutional Convention* (Jan. 14, 1956) (statement of Del. Hugh Douglas Gray), available at <http://www.law.state.ak.us/doclibrary/conconv/53.html> (explaining the nature of clemency).

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*the earlier clemency process, they leave unresolved one of the most critical issues for those seeking pardons – relief from the ongoing stigma resulting from a criminal conviction – and recommends that Alaska policy makers examine additional measures to afford former offenders a better chance for successful reentry into society.*

## INTRODUCTION

Clemency, the act of mitigating the consequences of a criminal conviction, has been a fundamental feature of criminal justice systems throughout recorded history. The Code of Hammurabi specifically references clemency,<sup>1</sup> as does the Old Testament.<sup>2</sup>

The term refers to a broad range of post-conviction remedies including full or conditional pardons, remissions of fines, reprieves, and commutations of sentences.<sup>3</sup> A full pardon allows the offender to walk away from his or her sentence; a partial pardon relieves the offender of some, but not all of the consequences of conviction. A conditional pardon hinges on the performance or nonperformance of specified acts.<sup>4</sup> Pardons may be individual (issued to a specific person) or general (issued to a class of persons). Although pardons are typically sought after conviction and sentencing, a pardon may be issued at any time, even before arrest and prosecution.<sup>5</sup> In contrast to the pardon, a reprieve

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1. THE CODE OF HAMMURABI, § 129, <http://avalon.law.yale.edu/ancient/hamframe.asp>.

2. See, e.g., *Jeremiah* 52:31–34.

3. *Herrera v. Collins*, 506 U.S. 390, 411 n.12 (1993). The legal effect of each of these remedies differs from jurisdiction to jurisdiction, reflecting variations in state criminal codes and decisional law. However, each term had a generally accepted meaning in early Anglo-American law that has largely carried over into contemporary usage.

4. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 5 (1989). As Blackstone explained, “the King may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, either precedent or subsequent, on the performance whereof the validity of the pardon will depend.” WILLIAM C. SPRAGUE, *ABRIDGMENT OF BLACKSTONE’S COMMENTARIES*, 493 (3d ed. 1895). See discussion *infra* at n.22–27 and accompanying text.

5. President Lincoln, for example, used a conditional pardon in advance of prosecution to encourage at least one Civil War deserter to return to his regiment. On December 23, 1863, Lincoln issued the following letter of pardon:

The bearer, William Henry Craft, a corporal in Co. C. in the 82<sup>nd</sup> N.Y. Volunteers, comes to me voluntarily, under apprehension that he may be arrested, convicted, and punished as a deserter; and I hereby direct him to report forthwith to his regiment for duty, and, upon condition that he does this, and faithfully serves out his term, or until he shall be

will not allow an offender to escape punishment; it merely postpones it. Commutation of sentence reduces the severity of a sentence; in death penalty states, commutation is typically used to substitute a life sentence for a death sentence.<sup>6</sup>

In the Alaska Territory, the history of clemency is the history of frontier development, replete with the kinds of storied characters that have long captured the imagination of armchair travelers. With statehood, executive clemency was written into the Alaska Constitution. Over the ensuing fifty years, clemency developed into an institutionalized, though largely unnoted, part of Alaska's criminal justice system, with each of Alaska's first ten governors awarding grants of clemency. Five years ago that changed dramatically. A controversial pardon by an unpopular governor triggered legislative changes to Alaska's clemency process designed to transform clemency from a private act of executive mercy, largely concealed from public view, into an open government process subject to media and public scrutiny, requiring notice to certain crime victims, and incorporating mandatory investigation of all clemency applications by the state Board of Parole.<sup>7</sup> No grant of clemency has been awarded in Alaska since. An informal moratorium on clemency has existed for the last five years as the executive branch seeks to formalize revised procedures that will accord with the statutory changes.

This Article begins with an overview of the history of clemency and how its development and use in Alaska compares to national developments in criminal justice. It then examines the process by which clemency in Alaska has been granted historically and the recent statutory and administrative changes to that process. Finally, it concludes by briefly highlighting a critical question not resolved by Alaska's new legislation—the employability and reintegration of former offenders.<sup>8</sup>

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honorably discharged for any cause, he is fully pardoned for any supposed desertion heretofore committed.

*Lincoln's Christmas Pardon*, LINCOLN EDITOR (Ill. Historic Pres. Agency, Springfield, Ill.), Oct.-Dec. 2001, at 2, available at [http://www.papersofabrahamlincoln.org/Lincoln\\_Editor.htm](http://www.papersofabrahamlincoln.org/Lincoln_Editor.htm).

6. MOORE, *supra* note 4, at 5. Commutation is thus a form of partial pardon. *Id.*

7. See ALASKA STAT. § 33.20.080 (2010).

8. This Article is the first of two reviewing the history and use of clemency in Alaska. This first is essentially a primer on history and procedure; the second will analyze the historical record of clemency awards in the state and make recommendations on how clemency procedures might be used to mitigate

## I. OVERVIEW OF CLEMENCY USE AND POLICY IN THE UNITED STATES

### A. Foundations of Early American Clemency Law

“Clemency is deeply rooted in our Anglo-American tradition of law” as “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”<sup>9</sup> The oldest recorded code of laws in existence,<sup>10</sup> the Babylonian Code of Hammurabi, makes specific reference to principles of clemency, forgiveness, and pardon. Section 129, for example, provided, “If a man’s wife be surprised (in flagrante delicto) with another man, both shall be tied and thrown into the water, but the husband may pardon his wife and the king his slaves.”<sup>11</sup> So, too, does the Old Testament speak of lifting the penalties imposed on a transgressor and welcoming him back into society. Thus, the Book of Jeremiah tells of the King of Babylon releasing the King of Judah from prison and speaking kindly to him, whereupon the King of Judah “put off his prison garments. And every day of his life he dined regularly at the King’s table.”<sup>12</sup>

In English law, the practice of pardon dates back at least as far as the reign of Edmund II in the tenth century, a period in which there is evidence of grants of royal pardon in “substantial numbers.”<sup>13</sup> By the Middle Ages, well-defined rules of procedure controlled the clemency process.<sup>14</sup> The statutes of 1390 and 1404, for example, outlined distinct administrative stages in the pardon process:

The petition for pardon, having been acceded to by the king and the name of any interceder [surety] endorsed on it by the chamberlain, was sent normally to the keeper of the privy seal whose warrant took it to the chancery where, if it was an individual pardon, it was engrossed by one of the two crown clerks there. . . . On occasion the king gave instructions for the

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problems associated with disproportionate incarceration of minorities and to facilitate offender reentry.

9. *Herrera*, 506 U.S. at 411 n.12.

10. JOHN MAXCY ZANE, *THE STORY OF LAW* 73 (1927). The Code of Hammurabi is believed to date from between 2250 and 2000 B.C. *Id.*

11. *THE CODE OF HAMMURABI*, *supra* note 1, § 129.

12. *Jeremiah* 52:31–34 (NRSV).

13. J.G. BELLAMY, *THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND* 138 (1998).

14. *Id.*

drafting of a pardon to the chancellor by word of mouth. The grantee paid a standard fee into the hanaper [treasury], pleaded the pardon before the justices and gave the clerk of the court a pair of gloves or the value thereof as payment for its enrolment in the record. The pardon was then proclaimed.<sup>15</sup>

The early English law also recognized benefit of clergy, a means of avoiding execution of sentence not dependent on exercise of the king's prerogative.<sup>16</sup> In general terms, benefit of clergy relieved an offender of the consequences of conviction when he or she was able to recite a particular passage of the Bible calling upon God's mercy.<sup>17</sup> Originally available only to clerics,<sup>18</sup> the practice over time was extended to offenders sufficiently literate to read the verse (at the time an elite and limited class of offenders) and gradually to any offender able to memorize and recite it.<sup>19</sup> The standard text was Psalm 51, which begins "Have mercy on me, O God."<sup>20</sup> Eventually, this became known as the "neck verse," in that it could be used to avoid hanging.<sup>21</sup> The offenses for which benefit of clergy could be claimed varied over time but at common law generally excluded high treason, petit larceny, and misdemeanors. Non-clerics were allowed benefit of clergy only once. Accordingly, these offenders, once admitted to the benefit of clergy, were typically branded on the left thumb "with a hot iron" in order to prevent a subsequent claim of the privilege.<sup>22</sup>

By the time Blackstone wrote his great *Commentaries on the Laws of England*,<sup>23</sup> English clemency practices had devolved into the distinct categories recognized today—chapter thirty-one of the *Commentaries* described the distinction between reprieve and pardon and detailed the

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15. *Id.* at 139.

16. During the Middle Ages, it was common for clerics to "plead their clergy" at the outset of trial before secular authorities and demand to be handed over to the authority of the church. *Id.* at 135.

17. By judicial practice and by statute, the crimes for which benefit of clergy could be claimed, the class of offenders who could claim it, and the procedures for invoking the practice varied considerably. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358–67 (1st ed. 1765), available at [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk4ch28.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk4ch28.asp).

18. The practice was founded on the scripture, "touch not mine anointed, and do my prophets no harm." *Id.* at 359 n.a (citation omitted).

19. *Id.* at 360; see also BELLAMY, *supra* note 13, at 135–39.

20. *Psalms* 51:1 (NRSV).

21. See BLACK'S LAW DICTIONARY 1131 (9th ed. 2009).

22. 4 BLACKSTONE, *supra* note 17, at 360.

23. Blackstone's *Commentaries on the Laws of England* were published between 1765 and 1769. KERMIT HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 52 (1989).

grounds for each.<sup>24</sup> Then, as now, a reprieve was a way of avoiding execution of a judgment temporarily; the pardon was permanent.<sup>25</sup>

In Blackstone's day, reprieve was available in a variety of circumstances. These circumstances included when an offender became *non compo* (incompetent or insane) between conviction and execution of the judgment, or in the case of a woman sentenced to death, pregnant.<sup>26</sup> A reprieve may be "*ex necessitate legis*: as where a woman is capitally convicted and pleads her pregnancy: though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered."<sup>27</sup>

The pardon was within the discretion of the king; such grants were "the most amiable prerogative of the crown."<sup>28</sup> By statute, however, Parliament removed certain offenses from the king's power to pardon. Offenses in the nature of private injuries rather than public wrongs were outside the king's pardon power, as the suits were deemed "not of the [K]ing but of the party injured."<sup>29</sup> Nor could the king pardon a common nuisance so long as the nuisance remained "unredressed."<sup>30</sup>

The pardon procedure and the legal effect of a pardon were similarly well-established by this period. A complete pardon had legal effect only if granted under the "great seal."<sup>31</sup> Any falsehood or suppression of truth made in the petition voided the charter of pardon. Certain crimes were deemed outside the scope of a pardon issued in general words (a pardon of "all felonies") unless specifically identified in the grant. These included piracy (not a felony punishable at common law), treason, murder, and rape.<sup>32</sup> With respect to murder, the law of pardons further mandated that the charter specify whether it "was committed by lying in wait, assault, or malice prepense [aforethought]."<sup>33</sup> Beyond these limitations, questions regarding the scope of a particular grant were to be construed in favor of the offender and against the crown.<sup>34</sup>

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24. See 4 BLACKSTONE, *supra* note 17, at 387-95.

25. SPRAGUE, *supra* note 4, at 490-91.

26. See *id.* at 491.

27. *Id.*

28. *Id.*

29. *Id.* at 492.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

## B. Development of Clemency Law in the United States

British colonists carried with them their understanding of clemency under the English monarchy. Hence, clemency has been available to criminal defendants in America since the earliest days of American criminal law.<sup>35</sup> Blackstone's understanding of the role of clemency in criminal justice was particularly important in the development of colonial and early American law; almost as many copies of his *Commentaries* were sold in America as in England.<sup>36</sup>

As criminal law and procedure evolved in the nineteenth and twentieth centuries, a wide range of additional influences shaped the use of clemency. Developments within the criminal justice system, such as amendments to criminal codes, shifting punishment goals, and changes in sentencing theory, have resulted in observable changes in the use of clemency powers. At the same time, external events, such as wars and major social, economic, and political changes, have influenced the extent to which executives have exercised their clemency power.<sup>37</sup>

Despite these changes, one central aspect of clemency has largely remained constant—clemency has remained an exercise of executive power with little structure or accountability. This “legacy of arbitrary exercise of the clemency power, an atavistic remnant of the royal prerogative, is today firmly established in our jurisprudence.”<sup>38</sup>

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35. *Herrera*, 506 U.S. at 412.

36. HALL & KARSTEN, *supra* note 23, at 52; *see also* ZANE, *supra* note 10, at 359 (“[I]n the Colonies, where there were no schools of law, the *Commentaries* were hailed as absolutely essential to any legal education and as the only book in which extended legal knowledge could be easily acquired. . . . [M]ost students felt that the mastery of Blackstone was an entirely adequate preparation for the bar. . . . Every word of it was taken as legal gospel.”).

37. The changing uses of clemency in a given jurisdiction reveal much about the uses and goals of criminal punishment in that jurisdiction. Historical records typically describe the process by which clemency is granted or provide an inventory of the recipients of clemency. Often the records also include some form of critique or assessment on the uses of clemency; this discussion illuminates the theories of punishment prevalent in the time or place at issue. Unfortunately, there was limited systematic analysis of clemency decision-making until the late 1900s. Thus, there is little accumulated data available for study. Contemporary research has investigated the use of clemency in the context of the death penalty almost exclusively; relatively little data exists outside this context.

38. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 572–73 (1991).

### 1. *Colonial America*

Although the law of England was the single greatest influence on the development of law in most of the colonies, colonial lawmakers began to repudiate what they viewed as overly harsh or repressive aspects of the English criminal law as the spirit of revolution grew more widespread.<sup>39</sup> Reform of the criminal law developed as an important goal during the revolutionary period.<sup>40</sup> A fundamental part of this change was a great reduction in the use of capital punishment and various forms of corporal punishments.<sup>41</sup> This change reflected the colonists' changed relationship with their government, from subjects of a monarchy to citizens in a free republic.

Reduction in the severity of punishment, however, did not correlate with an expanded use of the clemency power. In fact, the opposite was generally true. For much of the colonial period, colonists "opposed what they viewed as the excessive use of executive pardons and other mechanisms like the 'benefit of clergy' that gave the guilty a reprieve from their death sentences."<sup>42</sup> Because clemency was seen as the king's royal prerogative that had been exercised capriciously, its restriction was advocated to ensure the effectiveness of less severe punishments meted out by the new criminal justice system.<sup>43</sup>

### 2. *Early American Law*

Despite growing resistance to the executive power of clemency during the colonial period, it was ultimately considered an integral part of the powers of the executive. Thus, the power to grant "reprieves and pardons" was one of the enumerated powers accorded the President in Article II of the Constitution.<sup>44</sup> Chief Justice Marshall, in one of the earliest recorded interpretations of the executive clemency power, described it thus:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the

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39. See MARIE GOTTSHCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 44 (2006).

40. *See id.*

41. *See id.*

42. *Id.* at 45.

43. *See id.*

44. U.S. CONST. art. II, § 2, cl. 1.

individual for whose benefit it is intended, and not communicated officially to the court.<sup>45</sup>

In the new republic, the opposition to clemency of the colonial era soon dissipated. By the early 1800s, clamor for clemency was widespread. "In Massachusetts between 1828 and 1866, pardons were granted to 12.5 percent of all prisoners . . ." <sup>46</sup> During this period pardons again served multiple purposes. Most obviously, they reduced sentence length and indirectly relieved prison overcrowding while maintaining an ancient practice found in virtually all systems of justice.<sup>47</sup>

As in earlier periods of history, the rewards of clemency for both the executive authority and recipient remained substantial. The problems created by clemency were substantial too, and similar to those of earlier periods. As the use of clemency grew, the numbers of applications could be overwhelming and the grants, in practice, were often arbitrary and capricious. One investigation of period records "found that pardon requests were the largest single category of correspondence for some southern governors."<sup>48</sup>

Alexis de Tocqueville<sup>49</sup> and Gustave de Beaumont spent considerable time observing and commenting on the operation of democracy in the new United States, leading to the 1835 publication of the first volume of their classic work, *Democracy in America*. Although often overlooked, this study included a separate and detailed examination of the development and operation of the new penitentiary system. While not the primary focus of the investigation, the issue of clemency is identified in the preface to Beaumont and Tocqueville's report as perhaps the most critical flaw in the new American system of criminal justice:

Two things seem very certain:

1. That as long as the pardoning power shall be abused in the way that now but too frequently happens, the effect of penitentiaries, as well as of criminal justice, can be but limited.

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45. *United States v. Wilson*, 32 U.S. 150, 160–61 (1833).

46. SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 101–02 (1998).

47. HARRY E. BARNES, *THE STORY OF PUNISHMENT* 133 (2d ed. 1972).

48. WALKER, *supra* note 46, at 102.

49. Alexis de Tocqueville was a French sociologist and historian who toured the new United States from 1831 to 1832 with his friend Gustave de Beaumont, officially to study the American prison system.

2. That as long as one individual in a state is invested with the pardoning power, it will be often abused to the injury of society.<sup>50</sup>

In one of their final commentaries, the observers from the Old World reviewed several documents listing a sample of prisoners from Auburn and Sing Sing penitentiaries<sup>51</sup> who had been pardoned between 1822 and 1831, and offered “some observations on the use of the prerogative of pardon in the United States.”<sup>52</sup> These observations, and their suggestions for reform of the pardon power, are relevant to contemporary discussions. They concluded that the “less this authority is elevated above the rest of society, and the less independent it is, the greater will be the abuse of pardoning.”<sup>53</sup> Their report cited the results of an earlier study of the pardoning process that found a thriving trade in New York built on the securing of pardons for profit.<sup>54</sup> The report stated “there are men who make a regular trade of procuring pardons for convicts, by which they support themselves. They exert themselves to obtain signatures to recommendations to the executive authority to extend pardon to those by whom they are employed.”<sup>55</sup>

Beumont and Tocqueville’s conclusions echoed the findings of an earlier investigation, which stated:

It is obvious that the grant of pardon does not depend on the degree of guilt, but on the pecuniary means of the convict to hire the members of this corps. A person convicted of murder in the second degree, attended with the most aggravating circumstances, who has powerful friends, or is plentifully supplied with money, has tenfold more chance of pardon, than

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50. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE xxix (Francis Lieber trans., 1833).

51. Auburn Penitentiary in Auburn, New York symbolized the emerging theory of rehabilitation in the early 19th century. Its construction was authorized in 1816; and it was completed soon after. The specific architectural style eventually included the tiered cell block and congregate work areas that came to represent what was known as the Auburn system or “silent system” of correctional philosophy. The Auburn system required strict silence enforced through corporal punishments along with hard work, social isolation, and strict regimentation. In 1826 an Auburn-style prison was opened in Ossining, New York. This prison is more commonly known as Sing Sing prison. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 77-82 (1993).

52. BEAUMONT & TOCQUEVILLE, *supra* note 50, at 233.

53. *Id.* at 235.

54. *Id.* at 236.

55. *Id.*

a poor wretch found guilty of petty larceny.<sup>56</sup>

Throughout this period, awards of clemency resulted from acts of grace rather than systematic decision-making. By this time, all governors had the power to pardon and dispensed their prerogative with limited or, in most instances, no rules or guidelines. "All in all, the process disfavored the 'poor and friendless,' or the 'miserable foreigner.' The executive ear never heard their 'groans'; instead, he pardoned 'the rich, the intelligent, the powerful villains.'"<sup>57</sup>

3. *Civil War, Reconstruction, and Jim Crow*

Heah comes yo' woman, a pardon in her han'  
Gonna say to de boss, I want mah man,  
Let the Midnight Special shine its light on me<sup>58</sup>

Immediately after the Civil War and during reconstruction, first President Lincoln and then President Johnson dispensed clemency liberally to restore peace and reintegrate those who had fought against the Union. The one condition was that they must take an oath to uphold the Constitution.<sup>59</sup>

Through the end of the nineteenth century, the clemency process was less well defined in most southern states than it was in the North. This was true for two reasons. First, the use of corporal punishments persisted and remained more common in southern states well into the early twentieth century. As a result, the penitentiary, and later the prison, were used to a lesser extent and developed more slowly when compared to the North, particularly the Northeast. Second, starting in the antebellum years and continuing through Reconstruction and beyond, the South resisted the penitentiary movement "because, among other things, advocates of the penitentiary were identified with the abolitionist cause . . . . The association in the South of crime with race made it impossible to embrace rehabilitation, the purported *raison d'être* for the penitentiary."<sup>60</sup>

Nonetheless, almost all southern states eventually built penitentiaries, though they did not embrace them as enthusiastically as

56. *Id.* at 237.

57. FRIEDMAN, *supra* note 51, at 162.

58. DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 179 (1996). In this freedom song, the Midnight Special referred to a train that left Jackson, Mississippi at midnight every fifth Saturday night and was used by the wives and girlfriends of African-American inmates held at the notorious Parchman State Penitentiary. *Id.*

59. Kobil, *supra* note 38, at 593.

60. GOTTSCHALK, *supra* note 39, at 48.

their northern counterparts, nor did they use them to their fullest capacity. After the Civil War and the destruction of most of the penitentiaries in the South, the convict-lease system<sup>61</sup> developed as a less costly alternative that did not require capital investment and provided needed labor to rebuild the agricultural economy. The convict laborers were predominantly African-American, most of whom were almost certainly former slaves. "Several studies of the convict-lease system demonstrate that it was integral to the political and economic life of the South for decades after the Civil War."<sup>62</sup> Nearly all southern states finally banned the convict-lease system by the middle of the 1920s.<sup>63</sup>

In those southern states with no system of parole, the pardon process was the convict's only source of hope. Its importance is underscored in this poignant quote from one inmate's letter home: "You know the one star in the night of our sorrow is the hope of a pardon . . . . No matter how desperate our chances, no matter how frequent or bitter our disappointments have been in the past, we cling to this hope as to life itself."<sup>64</sup>

It was in this context that a distinct pardoning system developed in the South, with many southern states having no laws governing the process. To most convicts, particularly African-Americans, the standards for clemency seemed capricious and the process corrupt. Both the demands for pardons and the prison population itself were directly connected in a positive correlation with the vitality of the economy and demand for labor. Nevertheless, even absent specific procedures or laws to govern pardoning "[t]here was a distinct ritual to the pardon process that everyone understood."<sup>65</sup> Perhaps the best documented accounts of the southern pardon ritual are from Parchman Prison in Mississippi.

To win an early release, an inmate had to have the backing of his camp sergeant and the Parchman superintendent. Their recommendations were essential. Next, the inmate published a

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61. The convict-lease system was organized around the leasing of convicts by prison authorities to private contractors, who were able to exploit the convict labor with little oversight. In the South after the Civil War, the convict-lease system was a critical development in the transition from an agricultural system based on slavery. It was not the rebirth of slavery, but it was in some respects worse. Unlike slave-owners, with a vested financial interest in their slaves, "[t]he private contractors had no incentive to invest in the well-being of the leased convicts. After all, if a convict died, the state supplied another one for the same bargain price. Mortality rates were extraordinarily high." *Id.* at 49.

62. *Id.*

63. *Id.* at 51.

64. OSHINSKY, *supra* note 58, at 180.

65. *Id.* at 181.

petition for pardon in his local newspaper, stating the reasons for his request. The petition alerted his community, which then lobbied the governor by mail. A typical pardon file contained the letters of dozens of interested parties – sheriffs, judges, attorneys, planters, and ministers – comprising the ‘best’ white opinion of the town.<sup>66</sup>

4. *The Era of Rehabilitation (1900 – mid-1970s)*

In the early twentieth century, the development of indeterminate sentencing and the underlying philosophy of rehabilitation became a more dominant influence on the punishment process, particularly in the North. This changed the role and uses of clemency. Clemency has historically served diverse purposes. One of the most recognized purposes has been the mitigation of severe punishments, including commutation of death sentences. However, clemency has also served to reduce prison overcrowding, and the promise of a pardon or commutation of sentence was used by prison officials to encourage good behavior and gain the cooperation of inmates.

During this era of rehabilitation, as the indeterminate sentence coupled with parole became more common, the need for and purposes of the pardon changed. In fact, “[t]he desire to free governors from the burden of pardon-seekers contributed to the development of parole.”<sup>67</sup> Parole could be used to mitigate sentences and address prison crowding, functions previously served by the pardon process. Parole was also viewed as correcting problems of fairness and bias that were endemic to the granting of clemency, by substituting the structured, visible process of parole for the more capricious grant of clemency. “Parole . . . was, in theory, controlled by professionals, using rational criteria. No doubt in practice it, too, worked against the poor and friendless, but more subtly.”<sup>68</sup>

By mid-century, these reforms were an established feature of the criminal justice process, intended to enhance the fairness and humanity of the system. However, in practice the indeterminate sentence and parole process was rife with bias, resulting in ineffective punishments. As evidence of these problems mounted, the age of rights reform rapidly transitioned into a period of punitive backlash – a transformation clearly evident by the 1970s.

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66. *Id.* at 180.

67. WALKER, *supra* note 46, at 102.

68. FRIEDMAN, *supra* note 51, at 162.

Historically, and over the course of the period, clemency was usually a routine part of criminal justice that went unnoticed or at least uncommented upon by the general public.<sup>69</sup> Presidential pardons at the end of administrations and pardons of sensational or celebrated cases have been the exception, but even in these cases attention dissipated quickly. The exception to this was the death penalty – it is in this context that clemency has been most visible to the public.

During this era of rehabilitation, several investigators noted that the use of clemency to commute death sentences to life in prison consistently declined.<sup>70</sup> The decline was particularly marked following the backlash of the 1970s. “Fewer and fewer people were actually put to death: 199 in 1933; 82 in 1950; only 2 in 1967 . . . . From 1967 to *Furman* [in 1972]<sup>71</sup> when the issue was finally adjudicated in the Supreme Court, no one was executed at all.”<sup>72</sup>

[There] is a marked decrease from the number of clemencies granted prior to the Court’s 1972 moratorium on capital punishment. For instance, from 1960 to 1971 – only an eleven-year period, as opposed to the twenty-five years from *Gregg*<sup>73</sup> to the present – 204 death sentences were commuted. Before the Supreme Court’s moratorium, one out of every four or five death sentences was commuted to life imprisonment. By 1990 that ratio had dwindled to one commutation for every forty death-sentences.<sup>74</sup>

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69. Unremarkable routine decision-making seems to characterize the granting of most clemencies in Alaska until the middle 1970s. See discussion in Part II.B *infra*.

70. See, e.g., Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 675–77 (2001); Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 LAW & SOC’Y REV. 183, 186 (2008).

71. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). *Furman* struck down the death penalty and temporarily halted executions nationwide. *Id.*

72. FRIEDMAN, *supra* note 51, at 316.

73. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). In *Gregg*, the majority reaffirmed the constitutionality of the death penalty. *Id.*

74. Gershowitz, *supra* note 70, at 675–76.

5. *The War on Crime*<sup>75</sup> Era (Mid-1970s to Present)

The war on crime during the past thirty years has produced numerous changes in the criminal justice system. One of the most obvious and detectable changes is the increasingly punitive focus of the system<sup>76</sup> and its increasingly disproportionate impact on minorities.<sup>77</sup> This change can also be detected in reductions in actions that require discretionary decision-making. For example, many jurisdictions have either eliminated traditional parole or significantly reduced its use.<sup>78</sup> Sentencing guidelines and forms of determinate sentencing have reduced judicial discretion to sentence.<sup>79</sup> Further, mandatory minimum sentences punish categories of offenses rather than individual offenders.

Taken together, all of these changes led to a significant reduction in the use of executive clemency.<sup>80</sup> Most investigators attribute the decline to political decision-making by executives and a decline in the humanitarian motivations of the earlier reform era. Get-tough criminal justice politics and the overall war on crime and drugs beginning in the late 1970s created a political climate wherein few elected officials wanted to risk appearing to be soft on crime.<sup>81</sup>

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75. The “war on crime” is a metaphor used to describe a general shift in criminal justice and other social policies toward punitive “get-tough” approaches. The politicization of crime and law and order rhetoric became increasingly noticeable in the statements of Barry Goldwater during the 1964 presidential election. Subsequently these views were amplified by President Richard Nixon to include a war on drugs, and institutionalized in national criminal justice and social welfare policies by President Reagan. See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE* 48–72 (2d ed. 2004); CHRISTIAN PARENTI, *LOCKDOWN AMERICA* 3–28 (1999); JONATHAN SIMON, *POOR DISCIPLINE* 259–83 (1993).

76. See generally BECKETT & SASSON, *supra* note 75, at 1–11.

77. See generally BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 34–51 (2007).

78. See, e.g., MICHAEL TONRY, *THINKING ABOUT CRIME* 183 (2004) (“In our time, sixteen states have abolished parole release altogether . . .”); SIMON, *supra* note 75, at 114–37 (discussing 1970s changes in the California parole system that reduced discretion).

79. KATE SMITH AND JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 78–85 (1998).

80. Grants of clemency by Alaska governors during this period followed a similar pattern. From 1959 to 2011 there have been 188 acts of clemency officially recorded. However, 118 of those acts of clemency (61%) occurred in the decade between 1959 and 1969. See discussion and Table *infra* Part II.B.

81. See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME* 13–31 (2007). There are other reasonable explanations for this decline in clemencies related to the death penalty. The criminal justice system improved in all respects during this time period, reducing the need to correct mistakes or incompetence, and overt racism became much less evident. Although these assessments are doubtless true, most evidence suggests that the politicization of criminal justice

It is within the context of these broad national trends in criminal justice policy that the law of clemency in Alaska developed.

## II. CLEMENCY IN ALASKA

### A. Territorial Alaska

For a generation following the purchase of Alaska from Russia in 1867, the Alaska Territory was operated by the Federal Government as a military district, subject to divided rule by the U.S. Army, Navy, and Treasury Department.<sup>82</sup> Alaska's first civil government was not established until 1884, when the Forty-Eighth Congress denominated the area a "civil and judicial district."<sup>83</sup> This first Organic Act provided for a governor and a district judge, but expressly prohibited a legislative assembly.<sup>84</sup>

Congress spent little time establishing a system of laws specifically applicable to Alaska, using just four and one-half pages of the session laws to create the government. Rather than directly addressing Alaska's legal system, Congress declared the laws of Oregon to be the law of the district to the extent not in conflict with federal law.<sup>85</sup> The system of government thus created was largely ineffectual. Thomas Carter, editor of Alaska's first compilation of laws, noted in his introduction that doubts and confusion over the effect of the Organic Act "embarrassed the courts and the bar and sorely perplexed the people."<sup>86</sup>

The office of governor was similarly weak. One federal judge, construing the early law of the territory, observed that although the governor was charged with overseeing the territorial interests of the United States Government, he was "completely without actual power except such as can be exercised by example or precept or moral suasion."<sup>87</sup>

Given the paucity of issues directly addressed by Congress in the Organic Act, and the absence of real power granted the governor, it is

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policy during this period was the greatest influence on discretionary decision-making.

82. See VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION 4 (1975); ERNEST GRUENING, THE STATE OF ALASKA 33 (1954).

83. GRUENING, *supra* note 82, at 49.

84. *Id.*

85. *Id.*

86. THOMAS H. CARTER, THE LAWS OF ALASKA xvii (1900).

87. *Reherd v. Manders*, 66 F. Supp. 520, 525 (D. Alaska 1946) (construing gubernatorial power prior to 1933).

interesting that the governor's power of clemency was deemed sufficiently important to warrant specific mention. Among the first territorial governor's few powers was the authority "to grant reprieves for offenses against the laws of the district or of the United States."<sup>88</sup> This authority was, however, subject to the President's "power to review and to confirm or annul any reprieves granted or other acts done by him."<sup>89</sup>

In 1900 Congress passed "An Act Making Further Provision for a Civil Government for Alaska, and for Other Purposes."<sup>90</sup> This legislation provided the district "a system of statutory law more elaborate than ha[d] heretofore been enacted."<sup>91</sup> Section 2 of the new "Political Code" reiterated the Governor's power to issue temporary reprieves pending action by the President.<sup>92</sup>

Twelve years later, Congress passed a second Organic Act, restructuring Alaska's government and authorizing the territory's first legislature; the first territorial legislature convened in 1913-1914.<sup>93</sup> This legislature retained the governor's limited authority over the clemency process. He still had no pardon authority, but could grant temporary reprieves for territorial and federal offenses. As under the prior Act, these reprieves were effective only until the President's decision on the matter was made known.<sup>94</sup>

It was not until 1919 that the territorial legislature statutorily empowered the governor to grant pardons, and this power was limited to misdemeanors against the laws of the territory. However, the editorial notes to the Compiled Laws of Alaska 1933 indicate that the section was deemed "inoperative on the ground that its provisions transcend the powers of the Legislature."<sup>95</sup> The governor continued to lack authority to issue pardons for more serious territorial crimes and for crimes against the United States.

Thus, under both Organic Acts and for much of the early territorial period, clemency was primarily within the purview of the nation's president rather than the territorial governor. But, the governor's clemency power was increased significantly under the revised code of

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88. Organic Act of May 17, 1884, ch. 53, § 2, 23 Stat. 24, 24.

89. *Id.*

90. Ch. 786, § 98, 31 Stat. 321, 493 (1900).

91. CARTER, *supra* note 86, at xviii.

92. *Id.* at 131-32; Act of June 6, 1900, tit. I, ch. 1, § 2, 31 Stat. 321, 321-22.

93. FISCHER, *supra* note 82, at 5.

94. See ALASKA COMP. LAWS ANN. § 1651 (1933) (noting this section was derived from section 350 of the Compiled Laws of Alaska 1913).

95. ALASKA COMP. LAWS ANN. § 1655 note, at 359.

1949. The new code authorized the governor to “grant pardons and reprieves and remit fines and forfeitures” for all territorial offenses, and retained his authority to grant reprieves for offenses against the United States.<sup>96</sup> This statutory authority did not change over the remainder of the territorial period.

One of the most colorful clemency cases ever to reach the United States Supreme Court began as a criminal prosecution in the Alaska Territory, and eventually demonstrated the governor’s power of reprieve under the Political Code of 1900.<sup>97</sup> Vuco Perovich was a Montenegrin immigrant who made his way north to the Alaska Territory sometime around the turn of the century.<sup>98</sup> He was convicted of murder in the first degree and sentenced to be hanged on September 15, 1905.<sup>99</sup>

The United States Supreme Court opinion affirming the conviction notes that the evidence against Perovich was entirely circumstantial.<sup>100</sup> There was, in fact, some question whether a homicide had occurred.<sup>101</sup> The alleged victim in the case was a fisherman who lived alone in a log cabin covered by a tent about halfway between Fairbanks and Chena.<sup>102</sup> He was last seen alive in the early afternoon of October 28, 1904, at a Fairbanks bank.<sup>103</sup> He was observed to have in his possession several gold nuggets, a Yukon gold ring, and a gold chain watch charm.<sup>104</sup> The next morning a witness heard his dogs barking and two gun shots coming from the direction of the cabin.<sup>105</sup> About noon that day, the victim’s partner found the cabin partially consumed by fire, and the ground near the bunk area saturated with oil;<sup>106</sup> evidence was presented that the victim had one and one-half gallons of olive oil in the cabin at the time of his death.<sup>107</sup>

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96. ALASKA COMP. LAWS ANN. § 5-1-2 at 106 (1949).

97. The case is also noteworthy for being one of the few in which the U.S. Supreme Court issued two separate opinions. In *Perovich v. United States*, the Court affirmed the conviction. 205 U.S. 86, 92 (1907). In *Biddle v. Perovich*, the Court ruled on whether the president had authority to commute the death sentence in the absence of the convicted’s consent. 274 U.S. 480, 486 (1927).

98. *Fight for Liberty Lasts 22 Years*, N.Y. TIMES, May 3, 1926, at 10.

99. *Biddle*, 274 U.S. at 485.

100. *Perovich*, 205 U.S. at 89.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

The victim's partner also testified that he saw in the bunk area of the cabin the back part of a head, a leg bone, and the trunk of a man.<sup>108</sup> Another witness testified that he had been with Perovich at the deceased's cabin, and Perovich told him "the deceased had a roll of money, and that he would lick him with an ax some day and throw him in the water, or that he would make a fire and burn everything up."<sup>109</sup> The day after the fire, a witness observed Perovich with a Yukon ring and a gold watch and chain in his possession.<sup>110</sup> Perovich gave conflicting statements about the watch and was arrested the next day.<sup>111</sup>

At trial in Fairbanks, the defense moved for a directed verdict on grounds "the *corpus delicti* had not been proved."<sup>112</sup> The trial court declined to take the case from the jury, which thereafter convicted Perovich. In 1907, the United States Supreme Court affirmed the conviction, finding that although no one observed a homicide and the body in the cabin was never identified owing to its condition after the fire, all circumstances together were sufficient to support the jury's verdict.<sup>113</sup>

Upon losing his appeal, Perovich applied to President Theodore Roosevelt for commutation of sentence. Pending Roosevelt's decision, he applied to the governor of the territory for a reprieve pursuant to the clemency provisions of the Political Code of 1900.<sup>114</sup> The governor granted the reprieve, and the execution was stayed until February 1, 1908.<sup>115</sup> President Roosevelt subsequently denied the request for commutation and the U.S. Marshal set the date for execution.<sup>116</sup>

It was at this point that an interesting case became a fascinating one. Vuco Perovich was not hanged in 1908; he applied a second time for clemency, benefitting this time from a change in administration. Approximately two months after taking office, President Taft commuted Perovich's sentence to life in prison.<sup>117</sup> Perovich was transferred to McNeil Island Penitentiary in Washington State, as was then standard for territorial prisoners, and later transferred to Leavenworth

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108. *Id.*

109. *Id.* at 90.

110. *Id.*

111. *Id.*

112. *Id.* at 90-91.

113. *Id.*

114. *Perovich v. Perry*, 167 F. 789, 790-91 (9th Cir. 1909).

115. *Id.* at 790.

116. *Id.* at 791 (affirming the U.S. District Court's dismissal of Perovich's writ of habeas corpus); see also *Fight for Liberty*, *supra* note 98.

117. *Fight for Liberty*, *supra* note 98.

Penitentiary in Kansas.<sup>118</sup> He served sixteen years there.<sup>119</sup> In 1925, after being denied parole multiple times,<sup>120</sup> and after having at least two more requests for pardon denied,<sup>121</sup> Perovich filed a petition for writ of habeas corpus in the U.S. District Court for Kansas.<sup>122</sup> He argued that Taft's grant of clemency was void in that the commutation of sentence from death to life imprisonment did not merely decrease the extent of punishment, but rather entirely changed the nature of his punishment, an act for which the President lacked authority.<sup>123</sup>

The U.S. District Court agreed. First, the court confirmed that the power of clemency extends only to the power to reduce a sentence, not to change its character.<sup>124</sup> It then considered the character of a life sentence versus a death sentence:

No one would question that a change of sentence from life imprisonment to 20 years would be a reduction in a sentence, and hence a commutation, for the punishment in both cases would be identical in kind, the only difference being in the length of the sentence; but who would say that a sentence of imprisonment for one year is a less[er] punishment than that of exile for two years? The two punishments are so different in kind that they cannot be compared. Again, is life imprisonment preferable to death? To some, it might be; to others, it might not be. The two punishments differ in their very nature and character. To an innocent man, imprisonment for life might well be a life of torture, a living hell, compared to which death might be a kindness.

The facts surrounding the murder of which [Perovich] was found guilty were more or less circumstantial, and [he] has at all times insisted that he was absolutely innocent. He now stands before this court, protesting his innocence, although realizing that, if his contention that the order of the President was void is upheld by this court, the result will be that he will then be facing the original sentence of death. Knowing this, and protesting his innocence, he prefers the sentence of the court (death) to the substituted punishment which the President ordered. This court is convinced that what President Taft

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118. *Id.*

119. *Id.*

120. *Id.*

121. *See* Biddle v. Perovich, 274 U.S. 480, 485 (1927).

122. *Ex Parte* Perovich, 9 F.2d 124, 124 (D. Kan. 1925).

123. *Id.*

124. *Id.* at 125.

actually did was to entirely change the nature and grade of [the punishment].<sup>125</sup>

The court then noted that federal law does not authorize the President to “invade the province of the jury” and determine the nature of the sentence to be inflicted “simply because to his mind it might appear preferable.”<sup>126</sup> The district court concluded that President Taft, by changing the nature of the punishment, had imposed a conditional pardon rather than grant a commutation of Perovich’s sentence.<sup>127</sup> Citing Chief Justice Marshall, the court noted that a pardon is effective only upon consent and acceptance by the defendant.<sup>128</sup> Because Perovich had “never accepted the change of sentence ordered by the President,”<sup>129</sup> the order was void and “[did] not authorize the warden of the United States penitentiary to restrain [Perovich] of his liberty.”<sup>130</sup> The court ordered the writ of habeas corpus to issue<sup>131</sup> and Perovich “to be set at large.”<sup>132</sup>

On the Government’s appeal, the Eighth Circuit Court of Appeals certified to the United States Supreme Court the question of the President’s legal authority to commute a death sentence to life imprisonment.<sup>133</sup> Justice Holmes, writing for court, rejected the conclusions of the District Court, holding that the President has such authority.<sup>134</sup> Holmes wrote that English law had never required the defendant’s consent to anything but a conditional pardon, which required for its execution some affirmative act by the defendant.<sup>135</sup> Setting precedent aside, Holmes held that in the twentieth century, pardons had ceased to function as acts of private grace and had instead become an institutionalized part of the justice system, with the interests of the public, and not those of the prisoner,<sup>136</sup> of paramount concern:

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 125–26. “Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, preferring to be the victim of the law rather than its acknowledged transgressor, preferring death even to such certain infamy.” *Id.* at 125 (quoting *Burdick v. United States*, 236 U.S. 79, 90 (1915)).

129. *Id.* at 125.

130. *Id.* at 126.

131. *Id.*

132. *Biddle v. Perovich*, 274 U.S. 480, 485 (1927).

133. *Id.* at 485–86.

134. *Id.* at 487.

135. *Id.*

136. The district court’s holding, Holmes reasoned, would require the executive to permit an execution he had decided “ought not to take place unless

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.<sup>137</sup>

Justice Holmes went on to note the practical difficulties associated with the District Court's ruling:

When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order.<sup>138</sup>

Ultimately, the court observed that the Constitution gives the President power to grant reprieves and pardons, and that "[b]y common understanding imprisonment for life is a less[er] penalty than death"; the commutation from death to life imprisonment did not require Perovich's consent.<sup>139</sup>

The Supreme Court's decision was issued at the end of May 1927,<sup>140</sup> about eighteen months after the District Court issued the writ of habeas corpus.<sup>141</sup> The *New York Times* reported that pursuant to the writ, Perovich had been released on his own recognizance during the interim. He promptly left Kansas and moved to Rochester, New York where he

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the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole." *Id.* at 487.

137. *Id.* at 486.

138. *Id.* at 487.

139. *Id.* Chief Justice Taft, who as president had commuted Perovich's sentence, recused himself from the case. *See id.* at 488. The June 13, 1927 issue of *Time* magazine summarized the holding, noting: "As Associate Justice Holmes read the decision upholding [the commutation of sentence], despatches reported that 'Chief Justice Taft smiled broadly.'" *The Judiciary: Supreme Court's Week*, *TIME*, June 13, 1927, available at <http://www.time.com/time/printout/0,8816,730680,00.html#>.

140. *Biddle*, 274 U.S. at 480.

141. *Ex Parte Perovich*, 9 F.2d 124, 124, 126 (D. Kan. 1925).

opened a barber shop.<sup>142</sup> A month after the Supreme Court's ruling that he must serve out his term, Perovich filed another application for complete pardon.<sup>143</sup> President Coolidge granted his request that same summer.<sup>144</sup> *Time Magazine's* August 15, 1927 issue reported that Mr. Perovich hoped to make a switch from his "prosperous barbering business" to acting, and "dramatize his own life as a cinemactor."<sup>145</sup>

Another turn of the century territorial case, that of Lottie Burns, decided just a few years after commutation of Vuco Perovich's death sentence, illustrates perhaps a more mundane, but equally important use of the clemency power—to adjust individual sentences where guilt is not at issue but circumstances render the original sentence unjust or overly harsh. In Lottie Burns's case, this meant adjusting her sentence to accommodate the challenges of everyday life in territorial Alaska.<sup>146</sup> She was convicted in Nome of selling liquor without a license.<sup>147</sup> Her one-year sentence was to expire in February 1912.<sup>148</sup> In the fall of 1911, she sought clemency.<sup>149</sup> Her petition asked for relief in the alternative: either "immediate release or the privilege of remaining in jail several months after her sentence [expired] in order to escape the hardships which surely would follow the termination of her imprisonment in the dead of Winter in Alaska."<sup>150</sup> The October 5, 1911 *New York Times* reported that President Taft granted her release at once, to provide her "the opportunity to gather food and fuel for the Winter."<sup>151</sup>

Finally, a 1906 clemency case out of New York, though it reveals nothing about operation of the territorial law, provides a glimpse into the immense discretion held by governors of the era in their use of the clemency power. Thomas P. Wickes was a "prominent" New York lawyer of "about 50 years of age" sentenced to a year's imprisonment on

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142. *Fight for Liberty*, *supra* note 98; see also *The Judiciary: Supreme Court's Week*, *supra* note 139 ("At large, Mr. Perovich opened a barber shop [where he] has spent the last two years law-abidingly wielding shears and razor.").

143. *Perovich Seeks a Pardon*, N.Y. TIMES, June 30, 1927, at 29.

144. *The Presidency: The Coolidge Week: Aug. 15, 1927*, TIME, Aug. 15, 1927, available at <http://www.time.com/time/magazine/article/0,9171,730900,00.html?artId=730900?contType=article?chn=us>.

145. *Id.*

146. See *Taft Pardons Nome Woman*, N.Y. TIMES, Oct. 5, 1911, at 10.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

Blackwell's Island<sup>152</sup> for an attempted blackmail conviction.<sup>153</sup> In an article headlined, "Pardon for Wickes Exiles Him to Alaska," the *New York Times* reported that Wickes's crime caused "a widespread sensation."<sup>154</sup> Wickes "counted among his friends many Supreme Court Justices and Federal Judges, and had a large and remunerative practice."<sup>155</sup> After Wickes had served seven months of his sentence, Governor Higgins, allegedly on the recommendation of "men prominent in New York legal circles" commuted his sentence, effecting Wickes's immediate release.<sup>156</sup> The *Times* reported that the release was conditioned upon Wickes going to Alaska and never returning to New York City.<sup>157</sup>

## B. Clemency from Statehood to the Palin Administration

The rich history of clemency in the United States was not lost on the delegates to Alaska's Constitutional Convention. Describing the governor's right to grant a pardon as "the individual's . . . chance of last resort,"<sup>158</sup> the delegates approved a provision that became Section 21 of Article III of the Alaska Constitution. It reads: "Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures."<sup>159</sup> In 1961, at the request of Alaska's first governor,<sup>160</sup> William Egan, the Second Alaska Legislature added executive clemency to the state's legislative code.<sup>161</sup> The legislative grant of authority extended the governor's

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152. The famous penitentiary at New York's Blackwell's Island (now Roosevelt Island) was the subject of a 1914 report from the Commissioner of Corrections to the mayor "in which the treatment of prisoners was described as 'vile and inhuman' and the prison cells as 'wet, slimy, dark, foul smelling, and unfit for pigs to wallow in.'" *Blackwell's Island a Prison Terrible*, N.Y. TIMES, March 27, 1914, at 20.

153. *Pardon for Wickes Exiles Him to Alaska*, N.Y. TIMES, July 10, 1906, at 14.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See id.*

158. *See Minutes of the 53rd Day of the Alaska Constitutional Convention* (Jan. 14, 1956) (statement of Del. Hugh Douglas Gray), available at <http://www.law.state.ak.us/doclibrary/conconv/53.html> (explaining the nature of clemency).

159. ALASKA CONST. art. III, § 21. Section 21 further provides that the clemency power does not extend to impeachment and mandates establishment of a parole system. *Id.*

160. Legislative Reporting Serv., Inc., H. 2, 1st Sess., at 29 (1961).

161. *See* Act of March 7, 1961, ch. 16, 1961 Alaska Sess. Laws 10.

clemency power to crimes against the state as well as crimes against the territory.<sup>162</sup>

Although the Alaska Constitution expressly subjects the governor's clemency power to "procedure[s] prescribed by law," the effectuating statute was notably silent on any process the governor was required to follow in exercising the power.<sup>163</sup> The statute did charge the state Board of Parole with investigating any case the governor chose to refer to the board, and with providing the governor with a report of its investigation together with any other information the Board might have regarding the applicant.<sup>164</sup> However, the governor had no affirmative obligation to seek information from the Board or any other entity. Both the process for evaluating petitions for clemency and the grants themselves were entirely within the governor's discretion.

The clemency legislation was codified at sections 33.20.070 through 080 of the Alaska Statutes; it remained unchanged until 1989, when section 33.20.080 of the Alaska Statutes was amended as part of the Alaska Crime Victim's Rights Act.<sup>165</sup> The changes authorized victims of a crime against a person or arson in the first degree to request notification from the Board of Parole of any application for executive clemency submitted by a state prisoner convicted of the crime against the victim, and allowing the victim to comment in writing to the Board regarding the application.<sup>166</sup> In 1996, increasing public awareness of the problem of domestic violence in Alaska led to a second amendment to the clemency statute. In the Domestic Violence Prevention and Victim Protection Act of 1996,<sup>167</sup> domestic violence victims received the rights to request notice of clemency applications filed by their assailants, and to comment on those applications.<sup>168</sup>

Although both amendments addressed how the Board should handle clemency requests referred to it by the governor, like the original statute, neither amendment actually required the governor to submit the applications to the Board, or to anyone else. In practice, therefore, while many administrations routinely submitted clemency applications to the Board for investigation, and many applicants petitioned the Board

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162. *Id.*

163. *Id.*

164. *Id.* § 2.

165. 1989 Alaska Sess. Laws ch. 59, 12.

166. *Id.* § 19.

167. *Id.* § 1.

168. *Id.* § 56.

directly pursuant to the Board's own guidelines,<sup>169</sup> some clemency applications were handled internally and exclusively by the governor's office. In such cases, the Board of Parole might never learn of it,<sup>170</sup> or learn of it only belatedly through media reports.<sup>171</sup> This remained true for nearly half a century.<sup>172</sup> Not until 2007, in the wake of public outcry over a controversial pardon and widespread calls for ethics reform in Juneau,<sup>173</sup> did the Alaska legislature exercise its Constitutional authority to restrict the process by which the governor may grant clemency.<sup>174</sup>

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169. See ALASKA BD. OF PAROLE, EXECUTIVE CLEMENCY IN ALASKA: AN INFORMATIONAL BOOKLET FOR PROSPECTIVE APPLICANTS (2006), available at [http://www.cjpf.org/clemency/AK\\_clemencyhandbook.pdf](http://www.cjpf.org/clemency/AK_clemencyhandbook.pdf).

170. Because the statutes have never specified the form in which awards of clemency should be issued, the normal mechanisms for recording executive acts are not triggered when a governor exercises the clemency power. Alaska's record of executive proclamations and orders do not include grants of clemency, nor are they recorded in the *Alaska Administrative Journal*. Alaska's governors have used informal memoranda or letters issued from their office to grant clemency. Hence, although the prosecutions and convictions of the applicants are matters of public record (absent statutorily-mandated or court-ordered sealing of records to protect the privacy of certain victims), there is no public record of grants of executive clemency.

171. See *Notify Crime Victim of Executive Clemency: Hearing on H.B. 69 Before the H. Judiciary Standing Comm.*, 25th Leg. (Alaska 2007) (hereinafter "Hearing on H.B. 69") (testimony of Lawrence Jones, Exec. Dir., Alaska Board of Parole, on Jan. 22, 2007, at 1:15:43 p.m.).

172. For most of this period Alaska had no regulatory structure for tracking or maintaining a documentary record of applications for, and grants of, clemency. In 1997, however, the Department of Public Safety promulgated a new regulation requiring that within one month after an act of executive clemency, the Board of Parole's executive director report to the state's Central Repository of Criminal Justice Information a description of the grant of clemency, including the type of relief granted, the date of the grant, the charges for which clemency was granted, and various case tracking information. ALASKA ADMIN CODE tit. 13, § 68.145 (2010). The flaw in this procedure was that nothing required the governor's office to submit information on grants of clemency to the Board.

173. Juneau, Alaska's capital and a city inaccessible except by air or sea, was viewed by many as a seat of cronyism and insider corruption practiced by an insular group of politicians serving an oil company and other corporate interests. In recent years the name "Corrupt Bastards Club" has been widely used to designate Alaska legislators implicated in a massive ongoing federal corruption investigation. This group included legislators linked to taking substantial campaign contributions from the oil field services company VECO Corp. Several legislators associated with the Club were eventually convicted on various corruption charges and sentenced to prison. See generally Matt Volz, *From Barroom Joke to Federal Warrants*, ANCHORAGE DAILY NEWS, July 30, 2008, <http://www.adn.com/2006/09/05/479599/from-barroom-joke-to-federal-warrants.html>; *Alaska's Corrupt Bastards Club*, ALASKA REPORT, [http://www.alaskareport.com/news/z49999\\_corrupt\\_bastards.htm](http://www.alaskareport.com/news/z49999_corrupt_bastards.htm) (last visited Jan. 27, 2011).

174. See *infra* Part II.C.1.

Over the nearly 50 years spanning the beginning of the Egan Administration in January 1959 and the end of the Murkowski Administration in December 2006, Alaska's governors granted approximately 188 awards of clemency. The accompanying table sets out a summary of clemency applications and grants by administration, along with the political affiliation of each governor.<sup>175</sup>

Table 1. Applications for Clemency Granted by Alaska Governors, 1959–Present

<i>Governor</i>	<i>Party</i>	<i>Term Begin</i>	<i>Term End</i>	<i>Number of Applications</i>	<i>Applications Granted</i>	<i>Percent Granted</i>
Egan	(D)	Jan 1959	Dec 1966	472	96	20.33
Hickel	(R)	Dec 1966	Jan 1969	93	22	23.65
Miller	(R)	Jan 1969	Dec 1970	46	4	8.70
Egan	(D)	Dec 1970	Dec 1974	142	13	9.15
Hammond	(R)	Dec 1974	Dec 1982	101	13	12.87
Sheffield	(D)	Dec 1982	Dec 1986	127	13	10.23
Cowper	(D)	Dec 1986	Dec 1990	161	13	8.07
Hickel	(R)	Dec 1990	Dec 1994	88	5	5.68
Knowles	(D)	Dec 1994	Dec 2002	102	2	1.96
Murkowski	(R)	Dec 2002	Dec 2006	Unknown*	7	0
Palin	(R)	Dec 2006	July 2009	Unknown	0	0
Parnell	(R)	July 2009	Present	Unknown	0	0

In accord with national trends,<sup>176</sup> Alaska's early governors were generally freer in their exercise of the clemency power than were later governors.<sup>177</sup> This trend is most notable in the first years of statehood.

175. These numbers reflect records maintained by the Alaska Board of Parole. It is an approximation only, in that the state has not maintained a comprehensive record of clemency applications and grants since statehood; clemency awards handled entirely within the governor's office may not have been reported to the Board of Parole. *See supra* note 170.

\* Board of Parole records aggregating clemency applications and grants do not include application numbers for the Murkowski, Palin, and Parnell administrations.

176. *See* discussion *supra* Parts I.B.4, I.B.5.

177. Alaska's third governor, Keith Miller, granted just four requests for clemency, nine fewer than the four governors who followed him. What appears to be an exception to the generally liberal approach to clemency in the early years of statehood, however, is more likely a product of the length of the Miller administration than of a more conservative attitude toward clemency on the part of Governor Miller. Miller took office when Governor Walter Hickel resigned the

Over the course of his first two terms in office,<sup>178</sup> from 1959 to 1966, Governor Egan issued ninety-six awards of clemency. Sixty-six of these were total pardons; the remainder, according to Board of Parole statistics, were commutations of sentence. Governor Egan's record stands in marked contrast to that of Governor Knowles, who held office from 1994 to 2002. Governor Knowles issued just two awards of clemency, both of them pardons.<sup>179</sup>

Although Alaska's governors during this period were statutorily authorized to exercise sole discretion in awarding clemency, as a matter of institutional practice that began with the territorial governors, every administration appointed or continued from a prior administration some type of advisory panel to assist the governor in evaluating clemency requests. Typically called Executive Clemency Commissions or Clemency Advisory Committees, these panels have comprised varying numbers of members over the years. Recent administrations have used three-person panels, the members of which have been appointed by the governor. Members of these panels served entirely at the governor's pleasure; the extent to which individual governors made use of the panels was similarly discretionary.<sup>180</sup> The panels have never been constitutionally or statutorily mandated.<sup>181</sup>

Board of Parole records reveal substantial variation from administration to administration in the number of times these panels met.<sup>182</sup> Not surprisingly in light of the historical record of petitions

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governorship to become Secretary of the Interior. Thus, his term lasted slightly less than two years.

178. Governor Egan was elected to a third term, which he served from 1970 to 1974. During this term he issued thirteen awards of clemency, substantially fewer than he awarded during his previous terms. Interestingly, as best the Board of Parole can determine from the records available to it, the three governors immediately following Egan's third term, Hammond, Sheffield, and Cowper, respectively, also issued thirteen awards of clemency each. Hammond, however, did so over two terms; Sheffield and Cowper held single terms.

179. See *supra* Table 1.

180. See *Boards & Commissions Factsheets: Clemency Advisory Committee*, OFFICE OF GOVERNOR SEAN PARNELL, <http://gov.alaska.gov/parnell/services/boards-commissions/boardfactsheets.html?i=017> (last visited Jan. 29, 2011) [hereinafter *Factsheets*].

181. See *e.g.*, ALASKA CONST. art. III, § 21; ALASKA STAT. §§ 33.20.070–80 (2010). See also Alaska Attorney General Op. 663-87-0436 (April 20, 1987) ("The governor's executive clemency advisory committee is one of long standing in Alaska, although it is not a body created by statute."); *cf. Factsheets, supra* note 180.

182. The following figures are taken from records maintained internally by the Board of Parole. Their accuracy depends on the extent to which each

granted,<sup>183</sup> the panel serving Governor Egan met most frequently, holding its first meeting in December of 1959, and meeting a total of thirty-two times before Egan left office in 1966.<sup>184</sup> In contrast, Walter Hickel, whose first administration followed Egan's and lasted for just over two years, convened meetings of his clemency advisory panel just seven times. The first meeting, on December 22, 1966, demonstrates one of the most pervasive and well-known types of clemency—the Christmas pardon. The Hickel Administration reported this as a meeting to consider "Special Christmas Clemency Actions."<sup>185</sup>

Governor Knowles, with the lowest number of pardons (two) of any governor prior to the 2007 statutory changes,<sup>186</sup> convened his clemency advisory panel six times. A press release issued by Knowles's

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administration accurately recorded and reported to the Board all advisory panel meetings.

183. As noted, Egan granted ninety-six petitions for clemency during his first two terms in office. *See supra* text accompanying notes 175–79.

184. During his third term as governor from 1970 to 1974, Egan convened sixteen meetings of his clemency advisory commission.

185. The Christmas, or holiday pardon, has become a political tradition in most states and at the federal level. Many administrations over the years have used the Christmas pardon to make a public expression of thanks to those who have served in the military. In the immediate aftermath of World War II, for example, President Truman announced a full presidential pardon was "the Christmas present" to several thousand former federal convicts who served with merit in the armed forces during the war. *Truman Pardons Ex-Convicts Who Served with Merit in War*, N.Y. TIMES, Dec. 25, 1945, at 1. The *New York Times* reported that those pardoned included more than 2,000 who were paroled directly from federal prisons for induction into the Army. *Id.*; *see also supra* note 5 (discussing Lincoln's Christmas pardon).

A number of Alaskans over the years have benefitted from presidential Christmas pardons. On Christmas Eve, 1923, President Coolidge excused the unpaid part of a fine owed by Louis Grimstad, convicted at Unga, Alaska of assault and battery. Grimstad was sentenced to six months imprisonment and fined \$500. At the time of his pardon, he had served out his sentence but was still incarcerated for nonpayment of the fine. *Coolidge Frees Eleven Prisoners*, N.Y. TIMES, Dec. 25, 1923, at 1. Generations later, President Clinton granted Christmas Eve clemency to thirty-three individuals. Among them was a forty-two-year-old state worker, Michael Krukar, from Anchorage, who was convicted of a single felony count of distributing marijuana. Krukar had paid his fine and completed his community service, but like many, wanted a pardon to reduce the stigma of his conviction. *See Anchorage Man Receives Pardon from President Clinton*, ASSOCIATED PRESS STATE & LOCAL WIRE, Dec. 26, 1998. The tradition of the Christmas pardon continues—New York Governor David Paterson announced twenty-four pardons on Christmas Eve 2010. Press Release, N.Y. Governor's Office, Governor Paterson Announces Pardons (Dec. 24, 2010), available at <http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html>.

186. *See discussion infra* Part II.C.1.

press secretary provides a clear example of the advisory panel's role in this administration. The release notified the media of a pardon granted to a seventy-two-year-old retired bank clerk convicted of manslaughter in 1946.<sup>187</sup> James Willis, an African-American, claimed he acted in self-defense when he stabbed a shipmate during the course of a melee that broke out among the crew of a Coast Guard vessel docked in Wrangell.<sup>188</sup> Willis and his shipmates were on shore leave to celebrate the end of World War II.<sup>189</sup> Trial records and the ship's log suggest that Willis was the victim of a racially motivated attack and racially charged trial—witnesses reported that several southern soldiers took offense when Willis danced with a white or Native American woman in a Wrangell nightclub.<sup>190</sup> The case was reopened in the mid-1990s when evidence supporting Willis's innocence was reported to the Juneau Public Defender's office.<sup>191</sup>

Knowles' press release specifically states that the governor decided to pardon Willis on the recommendation of the state Executive Clemency Advisory Board:

The Clemency Board made its recommendation based on the fact that Willis has lived an exemplary life since his release and that he is in poor health, partially as a result of injuries suffered aboard the Sellstrom [the vessel on which he served]. In her report to the governor, Lt. Gov. Fran Ulmer, a Clemency Board member, wrote, "some sentiment was also expressed regarding the racial prejudice of the times and circumstances surrounding the incident and the trial, which may very well have influenced the outcome."<sup>192</sup>

The Clemency Advisory Committee under current governor Sean Parnell comprises the Lieutenant Governor, one public member, and one Department of Law (state attorney general's office) representative. The Committee Factsheet posted on the Administration's web site notes that this typically has been the composition of the committee. The

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187. E-News Release, Office of the Governor, Press Office, *Knowles Pardons Man Convicted of Manslaughter in 1946* (Nov. 26, 1997), at 1.

188. *Id.* at 2.

189. *Id.*

190. *Id.* at 3.

191. *Id.* Hofstra University law students located old Navy and FBI records related to the case and interviewed shipmates. *Id.* One eyewitness affidavit reported: "My feeling in this matter . . . was that Mr. Willis was not the instigator and was merely defending himself." *Id.*

192. *Id.*; see also *After 50 Years, a Pardon*, JUNEAU EMPIRE, Nov. 26, 1997, available at <http://www.juneauempire.com/stories/112697/pardon.html>.

Committee's stated function reflects the practice described in the Willis pardon, a practice not required by law but formalized over the years—to review clemency applications “and make recommendations to the Governor.”<sup>193</sup>

Governor Parnell's *Clemency Committee Factsheet* also notes that rather than appoint or continue the committee, the Governor may grant advisory authority to the Board of Parole.<sup>194</sup> Interestingly, the Board of Parole's only statutory role in the clemency process during this period was to investigate cases referred to it by the governor, and in such cases to provide notice to certain victims, maintain victim contact information, and convey comments and investigative results to the governor.<sup>195</sup> Nevertheless, over time the Board has become the most visible point of public access to the clemency process. At least one governor directed his staff that all clemency petitions should be forwarded to the Board of Parole.<sup>196</sup> As the Board's role in the clemency process became institutionalized, it developed formal procedures for handling requests coming directly from offenders; the only formal (though not statutorily mandated) process for applying for executive clemency in Alaska requires application to the Board of Parole, rather than to the governor's office.<sup>197</sup>

There has been relatively little judicial development of clemency law in Alaska in the years since statehood, and none of the cases that do address clemency issues have directly addressed the scope of the legislative power to establish clemency procedures.<sup>198</sup> The Alaska Supreme Court, however, has addressed the due process rights of applicants, adopting essentially the same standard as that used by the

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193. *Factsheets*, *supra* note 180.

194. *Id.*

195. *See, e.g.*, ALASKA STAT. § 33.20.080 (2010). As noted in note 172, *supra*, from 1997 on, the Board was also responsible for referring certain information related to clemency awards to the Central Repository of Criminal Justice Information.

196. *See Lewis v. State, Dep't of Corr.*, 139 P.3d 1266, 1272 (Alaska 2006).

197. *See* ALASKA BD. OF PAROLE, EXECUTIVE CLEMENCY IN ALASKA, *supra* note 169; ALASKA BD. OF PAROLE, EXECUTIVE CLEMENCY ELIGIBILITY DETERMINATION FORM (2006), available at <http://www.correct.state.ak.us/corrections/Parole/documents/Clemency%20Eligibility%20Determination%20Form.doc> (“This is the initial form that must be read, completed, and provided to the Alaska Board of Parole to Determine Your Eligibility for Executive Clemency Consideration.”).

198. *Cf. Dancer v. State*, 715 P.2d 1174, 1182–83 (Alaska 1986) (defining the phrase “[s]ubject to the procedure prescribed by law” as meaning that the governor's power to grant pardons, commutations and reprieves is solely the province of the executive, “subject to procedures established by the legislature”).

federal courts.<sup>199</sup> Thus in Alaska, as elsewhere, due process protections apply to the clemency process, but the level of protection afforded is minimal. Where the state authorizes clemency upon the showing of certain circumstances, applicants must have “a fair opportunity to make a factual showing” that the circumstances exist.<sup>200</sup> To measure whether this standard has been met, the Alaska Supreme Court has applied the test outlined by the U.S. Supreme Court in *Mathews v. Eldridge*.<sup>201</sup> The *Eldridge* test takes the following factors into account:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>202</sup>

Finally, before shifting attention from the prior clemency process to the new one, a last point should be considered—it is the critical importance of clemency to the individuals involved. James Willis, the African-American sailor who received a pardon from Governor Knowles for a conviction occurring more than half a century before, spoke movingly in an affidavit for the court about his experience. Willis said:

I have suffered for over fifty years. To this day I cannot understand how all of these terrible things have happened to me because I danced with a woman whose skin was a different color than mine. I would like to live my last days with dignity, my good name and die as a soldier that served his country proudly.<sup>203</sup>

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199. *Lewis*, 139 P.3d at 1269–70.

200. *Lewis*, 139 P.3d at 1270.

201. *Id.*; see 424 U.S. 319 (1976).

202. *Id.* (quoting *Mathews*, 424 U.S. at 335).

203. Svend Holst, *After 50 Years a Pardon*, JUNEAU EMPIRE, Nov. 26, 1997, <http://www.juneauempire.com/stories/112697/pardon.html>.

### C. Making Clemency Visible—Alaska’s New Clemency Process

#### 1. *The Impetus for Change: Governor Murkowski and Alaska’s Whitewater Case*

In the spring of 1999, Gary Stone, a 46 year-old heavy equipment operator and father of five was killed in an avalanche while working on construction of a hydroelectric project in Cordova, Alaska.<sup>204</sup> His employer, Whitewater Engineering Corporation, was subsequently convicted of criminally negligent homicide amid allegations the company’s principals were aware of the extreme avalanche danger but took insufficient precautions to protect employees.<sup>205</sup> The conviction followed a plea agreement pursuant to which the state agreed to drop its criminal charges against the company’s president and sole owner,<sup>206</sup> and the company agreed to pay restitution to Mr. Stone’s family.<sup>207</sup> Whitewater was sentenced to a fine of \$275,000, with \$125,000 suspended, and ordered to pay restitution in the amount of \$17,431.60.<sup>208</sup>

In 2005, Alaska Governor Frank Murkowski pardoned Whitewater. The pardon process was entirely internal to the Governor’s office with no input from the Board of Parole<sup>209</sup> and no notice to the family of the deceased employee.<sup>210</sup> The pardon, and the concomitant distress experienced by Mr. Stone’s family, were widely reported by the Alaska media.<sup>211</sup> Upon hearing of the pardon from a newspaper reporter, a daughter was quoted to have said, “I was in shock and totally in the

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204. *Governor Signs Bill Restricting Pardon Power*, JUNEAU EMPIRE, Feb. 21, 2007, available at [http://www.juneauempire.com/stories/022107/loc\\_20070221002.shtml](http://www.juneauempire.com/stories/022107/loc_20070221002.shtml); see also Defendant’s Sentencing Memorandum (Cole brief) at 1, *Alaska v. Whitewater Eng’g Corp.*, No. 3AN-S00-5235 CR (Alaska Super. Ct. Oct. 29, 2001).

205. State’s Sentencing Memorandum at 10, *Alaska v. Whitewater Eng’g Corp.*, No. 3AN-S00-5235 CR (Nov. 2, 2001).

206. See Defendant’s Sentencing Memorandum (Orlansky brief) at 14, *Alaska v. Whitewater Eng’g Corp.*, No. 3AN-S00-5235 CR (Alaska Super. Ct. Oct. 29, 2001) (setting out corporate ownership and control).

207. State’s Sentencing Memorandum at 9, *supra* note 205.

208. Judgment and Order of Commitment/Probation at 1, *Alaska v. Whitewater Eng’g Corp.*, No. 3AN-S00-5235 CR (Nov. 14, 2001).

209. See *Hearing on H.B. 69*, *supra* note 171.

210. Pat Forgey, *Legislators Rush to Rein in Pardons*, JUNEAU EMPIRE, Jan. 31, 2007, available at [http://www.juneauempire.com/stories/013107/sta\\_20070131017.shtml](http://www.juneauempire.com/stories/013107/sta_20070131017.shtml).

211. See *id.*; Ashby Jones, *Pardons Received in Whitewater (No, Not That Whitewater)*, WALL ST. J., Jan. 26, 2007, <http://blogs.wsj.com/law/2007/01/26/pardons-received-in-whitewater-no-not-that-whitewater/>; Steve Quinn, *Bills Would Alter the Pardon Process*, JUNEAU EMPIRE, Jan. 25, 2007, available at [http://www.juneauempire.com/stories/012507/sta\\_20070125010.shtml](http://www.juneauempire.com/stories/012507/sta_20070125010.shtml).

dark”; “to not be blindsided would have been really nice . . . . If we would have been told this is something being considered and this might happen, then at least we would have had a chance to digest what might happen.”<sup>212</sup>

According to the *Juneau Empire*, at the time of the pardon Whitewater continued to owe the state \$150,000 in unpaid fines; with approximately six years of accrued interest the total debt was estimated at \$250,000.<sup>213</sup> A former state legislator who urged Murkowski to grant the pardon was reported to have warned the governor “that allowing the conviction to stand would ‘send a chilling message’ to construction companies and other companies in the state.”<sup>214</sup> As a result of the pardon, the media reported, the state was barred from collecting the unpaid fine and accrued interest.<sup>215</sup>

The Whitewater pardon was issued just days before Murkowski, who lost his bid for reelection in the Republican primary to Sarah Palin, left office.<sup>216</sup> At the time, pollsters reported him to be the most unpopular governor in the nation, save one.<sup>217</sup>

The confluence of public outrage over the circumstances and effect of the Whitewater pardon, Governor Murkowski’s notable unpopularity, and the call for ethics reform that swept Sarah Palin into office established a political climate ripe for legislation amending Alaska’s clemency process. And thus it was, that the first bill Governor Palin signed into law from the legislative session immediately following the Murkowski administration<sup>218</sup> was a bill written to limit gubernatorial discretion in the process by which clemency is granted.<sup>219</sup>

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212. Quinn, *supra* note 211.

213. Pat Forgey, *How Controversial Pardon Made it Through*, JUNEAU EMPIRE, Feb. 21, 2007, available at [http://www.juneauempire.com/stories/022107/loc\\_20070221003.shtml](http://www.juneauempire.com/stories/022107/loc_20070221003.shtml). Whitewater paid the required restitution to the deceased’s family, and a federal Occupational Safety and Health Administration fine. *Id.*

214. *Id.*

215. *Id.*

216. See Pat Forgey, *Governor Signs Bill Restricting Pardon Power*, JUNEAU EMPIRE, Feb. 21, 2007, available at [http://www.juneauempire.com/stories/022107/loc\\_20070221002.shtml](http://www.juneauempire.com/stories/022107/loc_20070221002.shtml).

217. Andrew Petty, *Murkowski’s Approval Rating Sinks to 20 Percent*, JUNEAU EMPIRE, June 20, 2006, available at [http://www.juneauempire.com/stories/062006/sta\\_20060620001.shtml](http://www.juneauempire.com/stories/062006/sta_20060620001.shtml). The only governor reported to be less popular—and by just one percentage point—was Ohio’s governor Bob Taft, said to have been the only Ohio governor ever charged with a crime while in office. *Id.*

218. ARCHIVES ALASKA STATE LEGISLATURE, 25th Legislative Session, Session Laws 2007, [http://www.legis.state.ak.us/basis/passed\\_leg.asp?session=25&sel=13](http://www.legis.state.ak.us/basis/passed_leg.asp?session=25&sel=13) (last visited Jan. 30, 2011); Forgey, *supra* note 216.

219. *Hearing on H.B. 69*, *supra* note 171.

In essence, the sponsors of House Bill 69 sought to prohibit governors from granting clemency without first referring the clemency application to the Board of Parole for investigation, and providing notice to victims of the offender.<sup>220</sup> Representative Ralph Samuels wrote in his Sponsor Statement:

This amendment will not only ensure that victims of crimes are notified of the governor's intent to grant clemency but also allow them to become part of the process. By notifying the victims in advance, all parties involved can provide information that may or may not impact the final decision to grant clemency.<sup>221</sup>

On February 20, 2007, fewer than ninety days after Governor Murkowski pardoned Whitewater Engineering, Governor Palin signed into law Chapter 1 of the Session Laws of Alaska 2007, an Act Relating to Executive Clemency.<sup>222</sup>

2. *The New Clemency Law: Mandated Procedures and Effect*

The revisions to Alaska's clemency law took effect on May 21, 2007.<sup>223</sup> The new session law amended section 33.20.080 of the Alaska Statutes. It now specifies that the governor may not grant clemency without first providing 120 days notice of the proposed action to the state Board of Parole.<sup>224</sup> During this 120 day waiting period, the board is required to investigate the case and submit a report of the investigation to the governor.<sup>225</sup> The board must also send notice of the proposed act of clemency to the Department of Law, the Office of Victims' Rights, and any victims in the case who suffered domestic violence, a crime against the person, or arson in the first degree.<sup>226</sup> These victims may comment on the proposed clemency, and the victims' comments must be forwarded to the governor.<sup>227</sup> However, the governor is under no

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220. *See id.*

221. *Sponsor Statement: House Bill 69*, THE HOUSE MAJORITY (Jan. 22, 2007), <http://housemajority.org/spon.php?id=25hb69-12>.

222. *See H. Journal*, 25th Leg., at 0320 (Alaska 2007), available at [http://www.legis.state.ak.us/basis/get\\_jrn\\_page.asp?session=25&bill=HB69&jrn=0320&hse=H](http://www.legis.state.ak.us/basis/get_jrn_page.asp?session=25&bill=HB69&jrn=0320&hse=H).

223. *Id.* at 0321.

224. ALASKA STAT. § 33.20.080(a) (2010).

225. *Id.*

226. *Id.* § 33.20.080(b).

227. *Id.*

statutory obligation to consider the comments or to follow any recommendations made by the board.<sup>228</sup>

The investigatory and notice requirements imposed on the governor's office are consistent with national trends. The movement toward fairness, predictability, transparency, and accountability that have guided changes in sentencing over the past thirty years have also led to changes in clemency legislation. As one commentator noted, "A pardon is an act of executive grace, but to be seen as legitimate it needs to be handled openly and fairly."<sup>229</sup>

The 2007 legislation necessitated a restructuring of the way in which the Office of the Governor and the Board of Parole managed clemency applications. Thus, as of this writing, the Board of Parole is working to formalize a new regulatory process that will ensure compliance with the revised statute. During this interim period (formally, since the passage of the new statute, but in practice since the end of the Murkowski administration), all clemency petitions have been held in abeyance.

A draft procedure is currently under review by the Office of the Governor. It has four distinct phases (and ten different steps) before clemency may be granted. The four phases include: (1) the application; (2) investigation by the Board of Parole staff, which includes notice to victim(s) or other entities specified by statute and collection and transmittal of victim comments; (3) review and recommendation by the Executive Clemency Advisory Committee and the Board of Parole; and (4) the executive clemency decision by the governor and notification to applicant and to victims/other entities specified by statute.<sup>230</sup>

The proposed system makes several minor changes to the prior process, and more clearly specifies each step in the investigation and review procedures. The traditional composition of the Executive Clemency Advisory Committee (a three-member panel comprising the Lieutenant Governor, a designee from the Attorney General's Office, and a representative of the general public appointed by the governor) is retained. The Committee will continue to operate as a non-regulated body.

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228. *See id.* § 33.20.080.

229. TONRY, *supra* note 78, at 213.

230. Interview with Ronald Taylor, Executive Director, Alaska Board of Parole, and Carrie Belden, Parole Officer III, Alaska Board of Parole (Dec. 28, 2010). The new process is intended to integrate the new statutory requirements with best practices identified in other states and in the research literature. *Id.*

The most significant alteration in the overall process, apart from the mandatory notice to victims, is the elimination of the direct request to the governor that completely bypassed investigation by the parole board and review by the Executive Clemency Advisory Board. In other words, it is no longer possible for a clemency application to be handled solely within the governor's office.

### III. AN UNRESOLVED ISSUE

Blackstone wrote that the effect of the King's pardon "is to make the offender a new man; to acquit him of all corporeal penalties and forfeitures . . . and not so much to restore his former, as to give him a new, credit and capacity."<sup>231</sup> However, as to the former credit, he continued, "nothing can restore or purify the blood when once corrupted."<sup>232</sup> The problem noted by Blackstone, that offenders retain the stigma of conviction even once pardoned, is a critical problem not addressed under Alaska's clemency system. Even a full pardon will not restore an offender's clean record.<sup>233</sup>

The stigma of a criminal conviction can pose a nearly insurmountable barrier to former offenders seeking to reintegrate into the community and find employment. While testifying before the Alaska legislature in 2007, Lawrence Jones, then executive director of the Board of Parole, noted that "the vast majority" of individuals contacting the Board regarding clemency had already served their sentences and were simply seeking to clear their name for employment purposes.<sup>234</sup>

Although the Whitewater pardon discussed above is the most notorious of the Murkowski administration pardons, another pardon issued that same day—the pardon of Ryan Angelo Sargento—provoked a second, much later, wave of criticism. Sargento's mother was a state employee appointed by Governor Murkowski.<sup>235</sup> She was the one who requested the pardon on her son's behalf, first in a letter to the governor,

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231. SPRAGUE, *supra* note 4, at 493.

232. *See id.* (noting that only "the high and transcendent power of parliament" could restore the corrupted blood of the convicted).

233. *See, e.g.,* Gabrielle v. State, 158 P.3d 813, 813 (Alaska 2007) (per curiam) (holding convicted felon who received full gubernatorial pardon not eligible for concealed handgun permit).

234. *Hearing on H.B. 69, supra* note 171.

235. James Halpin, *Anchorage Murder Suspect Won Governor's Pardon in 2006*, ANCHORAGE DAILY NEWS (June 11, 2010), available at <http://www.adn.com/2010/06/10/1317755/murder-suspect-was-pardoned-in.html>.

and then in a note to the governor's wife.<sup>236</sup> In June 2010, three and a half years after receiving Murkowski's pardon, Sargento was charged with first-degree murder in the shooting death of an acquaintance.<sup>237</sup>

As one would predict, the murder charges prompted renewed discussion and criticism of the Murkowski pardons. From a policy perspective, however, it is not the murder charge that makes the Sargento pardon interesting. What should make the Sargento pardon interesting for policymakers is the narrative in his mother's application to Murkowski. She wrote: "Every time he seeks for employment he's denied because of this conviction on his record. Please Governor, help my son better his life and grant him absolute pardon."<sup>238</sup> Thus, Sargento's pardon was one of hundreds, perhaps thousands, filed in Alaska over the years by those who have fully served their sentence, as had Sargento,<sup>239</sup> but who are unable to find work as a result of the continuing stigma of a criminal conviction.

The difficulties experienced by Alaskans convicted of criminal offenses as they transition back into the community is emblematic of a national crisis. In the early twenty-first century, approximately one in every 143 Americans is behind bars. In comparison, the rate in many Western European countries is approximately one in 1,000 persons.<sup>240</sup>

More troubling than the sheer numbers of imprisoned is the disproportionate impact U.S. sentencing policies have had on minority communities. In 2003, Justice Anthony Kennedy addressed the American Bar Association regarding the justice system's failure to concern itself with the post-incarceration fate of offenders. He noted that nationwide, "more than forty percent of the prison population consist[ed] of African-American inmates. About ten percent of African-American men in their mid-to-late 20s [were] behind bars. In some cities more than fifty percent of young African-American men [were] under the supervision of the criminal justice system."<sup>241</sup> In Alaska, it is the state's indigenous populations that are disproportionately suffering the collateral consequences of criminal convictions. At the end of 2009, about thirty percent of Alaska's offender population were Alaska Native

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236. *Id.*

237. *Id.*

238. *Id.*

239. *Hearing on H.B. 69, supra* note 171.

240. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting 3 (Aug. 9, 2003), *available at* [http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice\\_Kennedy\\_ABA\\_Speech\\_Final.pdf](http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf).

241. *Id.*

and just over ten percent were Black, percentages notably disproportionate to their percentages in the general population—sixteen percent and four percent, respectively.<sup>242</sup>

Justice Kennedy called upon the Bar to “start a new public discussion” about America’s prison system and rehabilitation of the incarcerated.<sup>243</sup> He noted that “[t]he pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent.”<sup>244</sup> He encouraged the Bar to “consider a recommendation to reinvigorate the pardon process at the state and federal levels.”<sup>245</sup>

Justice Kennedy also highlighted the critical importance of employment for former offenders:

The most important predictive factor as to whether an offender will become a recidivist appears to be employment. Those who find work are less likely to re-offend. Those who cannot find legitimate work are more likely to engage in criminal acts. To the extent that legal and attitudinal barriers to employing people with convictions can be removed, the chances of work increase and the likelihood of recidivism decreases.<sup>246</sup>

Alaska Supreme Court Justice Walter Carpeneti has spoken of the magnitude of the problem in Alaska’s criminal justice system:

Probably no problem is of greater concern to us at this time than the alarmingly high rates of recidivism in our state. Fully sixty-six percent of offenders — two-thirds of those incarcerated — will reoffend and return to jail at some point in their lives. This is an astounding number, and one that must motivate all of us to examine what causes so many Alaskans to spend their lives cycling in and out of the criminal justice system.<sup>247</sup>

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242. *Alaska Offender Profile 2009*, 26 ALASKA JUST. F., 4, 2 Winter 2010, (citing Alaska Department of Corrections 2009 offender profile).

243. KENNEDY, *supra* note 231, at 7.

244. *Id.*

245. *Id.* Although Justice Kennedy spoke in the context of pardons as an important measure for alleviating excessive sentences under then extant mandatory sentencing laws, pardons, as indicated by the Jones testimony above, are equally important to those who have been released but continue to suffer the stigma of their convictions.

246. JUSTICE KENNEDY COMM’N, REPORT TO THE HOUSE OF DELEGATES (2004), reprinted in AM. BAR ASS’N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM 61 (2007).

247. Justice Walter L. Carpeneti, State of the Judiciary (Feb. 10, 2010), available at <http://www.courts.alaska.gov/state10.htm>. Justice Carpeneti, too, noted that

Access to the pardon process is an important first step in promoting the reentry and rehabilitation of offenders who have completed their sentences. A pardon, however, will not erase the fact of the conviction or eradicate the bias those who have been incarcerated face as they attempt to reenter society and the workforce. In recognition of this simple truth, a number of jurisdictions have enacted laws providing a mechanism through which former offenders may have their records expunged.<sup>248</sup> Alaska is not one of those states.<sup>249</sup>

### CONCLUSION

“A people confident in its laws and institutions should not be ashamed of mercy.”<sup>250</sup> As Alaska moves into a new era of clemency under the 2007 statutory changes, both the legislative and executive branches should consider extending the principles of mercy and forgiveness embodied in the state’s vibrant history of pardons and commutations, and should explore developing a means by which deserving offenders may expunge their conviction and reenter society and the workforce with a clean record.

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those offenders without resources for things like housing and employment may fall “quickly into the criminal behaviors that caused them to be jailed in the first place.” *Id.*

248. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION, 155–57 (2007).

249. *Hearing on H.B. 69, supra* note 171.

250. KENNEDY, *supra* note 240, at 6.