Notes

CORRECTING MANDATORY INJUSTICE: JUDICIAL RECOMMENDATION OF EXECUTIVE CLEMENCY

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ABSTRACT

In 1987, the United States political and social systems lost trust in the judiciary and severely limited its authority by enacting the mandatory Federal Sentencing Guidelines. During this period, many judges were forced to impose sentences they viewed as unjust. Trust in the judiciary was restored in 2005, when United States v. Booker *made the Sentencing Guidelines advisory. Despite the increase in judicial discretion, however, judges are still unable to correct sentences imposed during the intervening eighteen years because* Booker *does not apply retroactively. Unfortunately, the executive and legislative branches are similarly unable to provide adequate remedies. Congressional action is insufficient because it is inflexible, time consuming, and generally nonretroactive. Executive clemency appears more promising due to a flexible and broad nature that allows the president and state governors to pardon or commute sentences at will. But executives have become unwilling to use their clemency power, making it an inadequate remedy. This Note proposes a solution that overcomes the limitations of the current system: judicial recommendation of executive clemency. This solution produces three benefits. First, it provides judges with a discretionary tool to reduce disproportionate mandatory sentences. Second, it revitalizes the exercise of clemency by giving it additional legitimacy. Finally, it refocuses clemency grants on the defendant and the facts of the case rather than on political influences. This Note provides eight*

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illustrative criteria for judicial recommendation of executive clemency that, together, combine the characteristics of three modern cases in which the sentencing judges recommended clemency. This Note seeks to explain how and why each criterion might be important, taking into consideration the goals of judicial discretion, executive clemency, and the criminal justice system overall.

INTRODUCTION

As a society, we trust the judiciary to be a fair and objective arbiter of justice. Article III of the U.S. Constitution contains the clause "[t]he judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," which establishes the federal judicial system.[1] This vesting of power was unanimously approved at the Constitutional Convention in 1787.[2] Not only is the judiciary independent from the other branches of government,[3] but it is also entrusted with the authority to review congressional and presidential actions.[4] Yet, for eighteen years prior to the Supreme Court's 2005 decision in *United States v. Booker*,[5] the United States' political and social systems lost trust in the judiciary and severely limited its authority by enacting the mandatory Federal Sentencing Guidelines (Sentencing Guidelines).[6] During this period of "mandatory injustice,"[7] many judges were forced to impose sentences they viewed

1. U.S. CONST. art III, § 1.

2. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) (resolving in 1787 to establish a national judiciary).

3. To achieve independence of judgment, Article III of the Constitution gives federal judges life tenure, allowing them to "hold their Offices during good Behaviour" and warrants that their compensation "not be diminished during their Continuance in Office." U.S. CONST. art III, § 1.

4. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

5. United States v. Booker, 543 U.S. 220 (2005).

6. The authority to establish the Federal Sentencing Guidelines was provided by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

7. While the eighteen years between the enactment of the mandatory Sentencing Guidelines and the *Booker* decision may seem too narrow a focus to warrant serious consideration, a sample of federal justice statistics proves otherwise. In just the eleven years from 1993 to 2004, an estimated 502,228 individuals were sentenced to prison. *See* BUREAU OF JUSTICE STATISTICS, *Publications and Products: Compendium of Federal Justice Statistics*, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=4 (last revised May 5, 2010) (providing links to annual reports containing sentencing statistics).

as unjust: some were disproportionate to the severity of the crimes, and others were unequal as between codefendants. They found still others inconsistent as between defendants sentenced before and after the Guidelines became discretionary.[8]

The restoration of trust in the judiciary began in 2005, when *Booker* made the Sentencing Guidelines advisory.[9] Despite the increase in judicial discretion, however, judges are still unable to correct sentences imposed during the period of mandatory injustice because *Booker* does not apply retroactively.[10] Furthermore, some state judges remain similarly bound by state-imposed mandatory minimum sentences or other inflexible statutes, which create the same mandatory-injustice situation as on the federal level.[11] This Note therefore also addresses mandatory injustice at the state level.

It may seem that the executive or legislative branches could remedy mandatory injustice. Congressional action, however, is insufficient because it is inflexible, time consuming, and generally nonretroactive.[12] Executive clemency appears more promising on cursory examination: its flexible and broad nature allows the president and state governors to pardon or commute sentences at will, including those sentenced during the mandatory-injustice period.[13] Indeed, prior to the Nixon era, executives regularly granted clemency. In recent years, however, clemency grants have declined rapidly at both the federal and state levels, coming nearly to a halt. This is a result of a combination of factors, including the unreviewable nature of clemency grants, the prevailing public belief that they represent abuses of power, the increasing popularity of retributivist theory as a justification for punishment, and the "tough on crime" political trend.[14] Consequently, executives have become unwilling to use their clemency power, making it an inadequate

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8. *See infra* Part I.

9. Booker, 543 U.S. at 245. Current sentencing-reform efforts continue the restoration process. *See, e.g.*, THE 2009 CRIMINAL JUSTICE TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 30–73 (2008) (recommending a variety of sentencing reform policies); *see also id.* at 113–17 (recommending reforms to revitalize the executive pardon power).

10. *See infra* note 38 and accompanying text.

11. *See, e.g.*, GA. CODE ANN. § 16-13-31 (2000) (requiring mandatory minimum sentences for drug offenses); MICH. COMP. LAWS ANN. §333.7403 (2000 & West Supp. 2001) (same); N.Y. PENAL LAW § 60.04 (McKinney 2009) (same).

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part II.B.2.

solution to the problem of mandatory injustice. In the current state of the United States' social, legal, and political systems, none of the three branches of government can alone correct the results of the period of mandatory injustice.

This Note proposes a solution that overcomes the limitations of the current system to correct mandatory injustice: judicial recommendation of executive clemency. This solution produces three benefits. First, it provides judges with a discretionary tool to reduce disproportionate mandatory sentences. Second, it helps revitalize the exercise of clemency by giving it additional legitimacy. Finally, it helps to refocus clemency grants on the defendant and the facts of the case rather than on political influences. In essence, judicial recommendation of clemency advances the goals of judicial discretion, executive clemency, and the criminal justice system.[15] When mandatory sentencing schemes result in injustice that judges cannot correct acting alone, judicial recommendation of executive clemency is an effective discretionary tool that should be used readily.

Part I lays out the nature of the problem. It describes the decline in judges' discretion to formulate and modify sentences. In the early 1800s, judges recommended pardons by writing directly to the president. Prior to the enactment of the Sentencing Guidelines, judges could modify sentences by invoking Rule 35 of the Federal Rules of Criminal Procedure.[16] But in the eighteen years between the Guidelines' enactment and *Booker*, judges lost their discretion in formulating or modifying sentences. In particular, Part I evaluates the opposition to mandatory Sentencing Guidelines expressed by judges in three cases,[17] namely, *United States v. Angelos*,[18] *United States v. Harvey*,[19] and *United States v. McDade*.[20] Part I argues that because

15. *See infra* Part III.

16. FED. R. CRIM. P. 35.

17. *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *United States v. Harvey*, 946 F.2d 1375 (8th Cir. 1991), and *United States v. McDade*, 639 F. Supp. 2d 77 (D.D.C. 2009) are three of a very few cases, both within federal and state case law, in which judges recommended clemency. Other examples include *United States v. Naples*, 192 F. Supp. 23, 45–46 (D.D.C. 1961), *rev'd on other grounds*, 307 F.2d 618 (D.C. Cir. 1962) (en banc), and *People v. White*, 128 N.Y.S.2d 370, 375 (Ct. Gen. Sess. 1953). Because of the lack of literature and study on judicial recommendation of executive clemency, one can only speculate about the reasons for such limited case law. Considering the declining exercise of clemency, it is not far-fetched to impute such a deficiency to the judiciary's belief, and rightly so, that such recommendations would yield few results.

18. United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004).

19. United States v. Harvey, 946 F.2d 1375 (8th Cir. 1991).

judges were required by law to impose disproportionate sentences during the mandatory-injustice period, defendants who were so sentenced have a genuine need for sentence reduction through a nonjudicial remedy.

Part II points out the deficiencies of other solutions. Part II.A describes the practical obstacles of exclusive dependence on legislative reform, namely its lengthy process and adverseness to retroactivity. Part II.B first outlines the legal foundation and procedures of executive clemency and discusses the benefits of executive clemency to the criminal justice system. Part II.C then argues that, despite such benefits, waiting for executive action as a sole means of alleviating the effects of unjust sentences is inadequate because of clemency's current stigma.

Part III ties together the discussions in Parts I and II to argue that more frequent use of executive clemency recommendations by the judiciary will provide the remedy to mandatory injustice. Part III then argues that judicial contribution to clemency will counteract at least some of clemency's current stigma and will play a role in its revitalization. As part of this revitalization, judicial recommendation will also deemphasize political considerations and will refocus the decision to grant clemency on the particular facts of a defendant's case.

Finally, Part IV provides eight illustrative criteria for clemency recommendation. They are a combination of the characteristics of the three modern cases cited above[21] in which the sentencing judges recommended clemency. Part IV explains how and why each criterion might be important, taking into consideration the goals of judicial discretion, executive clemency, and the criminal justice system overall.

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20. United States v. McDade, 639 F. Supp. 2d 77 (D.D.C. 2009).
21. *See supra* notes 18–20.

I. DEFINING THE PROBLEM: THE EXISTENCE OF MANDATORY INJUSTICE

The eighteen years from 1987 to 2005[22] witnessed an increase in the number of criminal defendants who received surprisingly harsh sentences, especially those who had committed nonviolent, victimless crimes. Consider this: Weldon Angelos was arrested for distribution of marijuana at age twenty-four without any prior criminal history.[23] Upon Angelos's refusal of a plea offer, the prosecutor pushed for three additional charges for guns found in his possession, even though the guns were never used.[24] As a result, the judge reluctantly sentenced him to sixty-one and a half years,[25] making his expected age of release from prison eighty-five.

Consider another case: Kenneth Harvey was condemned to spend the rest of his life in prison for possession of crack cocaine at age twenty-four.[26] Harvey had two prior criminal offenses, both of which were nonviolent.[27]

And consider yet another example: Byron McDade, a father of four young children with two jobs and no criminal history, was convicted of possession with intent to distribute cocaine, as well as conspiracy to distribute, and was sentenced to twenty-seven years in prison after refusing to testify against a friend. His four codefendants, all with prior serious drug convictions, pled guilty, testified against him, and each received less than seven and a half years.[28]

The judges in all three cases lamented the injustice of the sentences they were required to impose pursuant to the then-

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22. The mandatory Federal Sentencing Guidelines were enacted in 1984. *See supra* note 6. The U.S. Sentencing Commission first published a Federal Sentencing Guidelines Manual in 1987, U.S. SENTENCING COMM'N, GUIDELINES MANUAL (1987), and has published one annually since, *e.g.*, U.S. SENTENCING COMM'N, GUIDELINES MANUAL (2009) [hereinafter 2009 GUIDELINES MANUAL]. *Booker*, making the Guidelines advisory, was decided in 2005. *See supra* notes 5–6 and accompanying text.

23. *Angelos*, 345 F. Supp. 2d at 1231–32.

24. *Id.*

25. *Id.* at 1230.

26. United States v. Harvey, 946 F.2d 1375, 1377–78 (8th Cir. 1991).

27. *Id.*

28. United States v. McDade, 639 F. Supp. 2d 77, 79, 86 (D.D.C. 2009). McDade was sentenced by Judge Friedman on May 29, 2002. *Id.* at 79. This opinion, ruling on McDade's ineffective assistance of counsel claim, came after an evidentiary hearing on January 15, 2008. *Id.* at 78.

mandatory Sentencing Guidelines.[29] What could the judiciary do, if anything, to correct this "malfunction[]"[30] in the system?

Historically, if a judge found himself bound by law to issue an unjust sentence, he would write directly to the president to pray for "an act of grace."[31] The exercise of the president's executive-clemency power was a "regular practice."[32] For example, between 1801 and 1829, of the 596 defendants sentenced in federal court, 148 were pardoned.[33] Prior to the enactment of the mandatory Sentencing Guidelines in 1987, judges could reduce terms of imprisonment post-sentencing after a "sober second look,"[34] pursuant to Rule 35.[35] Although Rule 35 was still available to judges during the mandatory-injustice period, it was inapplicable if the "sober second look" took them to below either the Guidelines' sentencing range or the statutory minimum.[36]

The Supreme Court made the Sentencing Guidelines advisory in its 2005 *Booker* decision, holding that "the provision of the federal sentencing statute that makes the Guidelines mandatory . . . [is] incompatible with today's constitutional holding."[37] Following *Booker*, judges regained discretionary power in sentencing to avoid

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29. *See Harvey*, 946 F.2d at 1378 (noting that the sentencing judge was "troubled" at being required to impose a life sentence); *McDade*, 639 F. Supp. 2d at 86 (calling the defendant's sentence "disproportionate"); *Angelos*, 345 F. Supp. 2d at 1261 (describing the defendant's sentence as "unjust, disproportionate to his offense, demeaning to victims of actual criminal violence—but nonetheless constitutional").

30. *Angelos*, 345 F. Supp. 2d at 1261.

31. *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 61 (2006) (noting that, even in cases in which mandatory sentences applied, judges could recommend executive clemency); George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT'G REP. 212, 213 (2004) (describing methods whereby judges would petition the President for clemency).

32. Lardner & Love, *supra* note 31, at 220 n.20.

33. DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 46–47 (1985).

34. *Cf.* Carol. S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 402 (1995) (applying a "sober second look" in the context of capital punishment).

35. FED. R. CRIM. P. 35(a) ("Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.").

36. *See* 18 U.S.C. § 3553(b)(1) (2000) ("The court shall impose a sentence of the kind, and within the range, [of the Sentencing Guidelines] . . . ."); Mistretta v. United States, 488 U.S. 361, 367 (1989) ("[Section 3553] makes the Sentencing Commission's guidelines binding on the courts.").

37. United States v. Booker, 543 U.S. 220, 245 (2005).

injustice. The only period, therefore, during which they completely lacked authority to correct disproportionate sentences was between the enactment of the mandatory Sentencing Guidelines and *Booker*, spanning the eighteen years from 1987 to 2005.[38]

Unfortunately, this period of mandatory injustice continues to manifest its influence. Absent a remedy, Angelos, Harvey, and McDade must serve out, in their entireties, sentences that the sentencing judges believed were excessive.[39] All three sentencing judges recognized the gravity of the situation and searched for a solution. Judge Paul Cassell, Angelos's sentencing judge, "believe[d] that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational."[40] He further expressed his exasperation that the sentence "is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal 'three strikes' provision."[41] Yet the judge in the end "reluctantly conclude[d] that [he had] no choice but to impose the 55 year sentence."[42] Harvey's sentencing judge, Chief Judge Howard Sachs, "was troubled by the necessity of imposing a sentence of life imprisonment without release on Harvey . . . [because] 'the prior drug offenses, although felonies, were not deemed serious enough to merit imprisonment and appear to be only technically within the statutory punishment plan.'"[43] Finally, Judge Paul Friedman, McDade's sentencing judge, wrote that the sentence imposed is "disproportionate" and "[h]ad the Sentencing Guidelines been advisory in 2002, or if *Booker* were retroactive now, the Court would vary substantially from the Guideline sentence of

38. *Booker* does not apply retroactively to cases that became final before it was decided on January 12, 2005. Duncan v. United States, 552 F.3d 442, 447 (6th Cir. 2009); United States v. Branham, 515 F.3d 1268, 1278 (D.C. Cir. 2008); Carrington v. United States, 503 F.3d 888, 890 (9th Cir. 2007); United States v. Gentry, 432 F.3d 600, 604 (5th Cir. 2005); United States v. Bellamy, 411 F.3d 1182, 1186–87 (10th Cir. 2005); Guzman v. United States, 404 F.3d 139, 144 (2d Cir. 2005); Lloyd v. United States, 407 F.3d 608, 615–16 (3d Cir. 2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005).

39. *See supra* notes 23–29 and accompanying text.

40. United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

41. *Id.*

42. *Id.* The fifty-five years are the punishment for three counts of gun possession. Angelos's total sentence includes an additional six and a half years for the drug conviction. *Id.* at 1232.

43. United States v. Harvey, 946 F.2d 1375, 1378 (8th Cir. 1991) (quoting Sachs, C.J., from the Sentencing Transcript).

324 months. This Court, however, is without authority to reduce McDade's sentence at this juncture."[44]

Under these circumstances, in which the judiciary was without legal recourse to correct unjust sentences imposed by the then-mandatory Sentencing Guidelines, all three judges resorted to one final appeal for the defendants—executive clemency. Judge Cassell put forth his recommendation:

> While I must impose the unjust sentence, our system of separated powers provides a means of redress. . . . In my mind, this is one of those rare cases where the system has malfunctioned. . . . One of the purposes of executive clemency is "to afford relief from undue harshness." . . . Given that the President has the exclusive power to commute sentences, . . . is it appropriate for me to make a commutation recommendation to the President[?] Having carefully reviewed the issue, I believe that such a recommendation is entirely proper. The President presumably wants the fullest array of information regarding cases in which a commutation might be appropriate. Moreover, the Executive Branch has indicated that it actively solicits the views of sentencing judges on pardon and commutation requests.[45]

With respect to Harvey, the Eighth Circuit agreed with Chief Judge Sachs's recommendation for executive clemency, stating that "[a]s the Supreme Court noted in *Harmelin*, executive clemency is one of the 'flexible techniques' for modifying sentences. The existence of these techniques is one reason for the Supreme Court's holding that the type of sentence imposed in this case does not violate the Eighth Amendment."[46] Similarly, Judge Friedman "urge[d] the President to consider executive clemency for McDade and to reduce McDade's sentence."[47] When judges strongly disagree with the sentences they are required to impose, the reasons for their disagreement deserve attention.

This Note argues that when sentencing judges or other judges reviewing a case believe the sentence imposed on the defendant to be overly severe, they should follow the leadership of Judges Cassell, Sachs, and Friedman and recommend executive clemency. The next Part explores legislative reform and executive clemency without a

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44. United States v. McDade, 639 F. Supp. 2d 77, 86 (D.D.C. 2009).
45. *Angelos*, 345 F. Supp. 2d at 1261 (footnotes omitted).
46. *Harvey*, 946 F.2d at 1378 (citing Harmelin v. Michigan, 501 U.S. 957, 996 (1991)).
47. *McDade*, 639 F. Supp. 2d at 86.

judicial recommendation and concludes that these measures cannot adequately correct the problem of mandatory injustice.

II. UNAVAILABLE REMEDIES: LEGISLATIVE REFORM AND EXECUTIVE CLEMENCY WITHOUT JUDICIAL CONTRIBUTION

A. Legislative Reform

Legislatures are an effective channel for creating lasting changes in the law to prevent future injustice on a large scale. It is important to have legislative amendments for such a purpose. Legislative action is not adequate, however, to correct injustices that have already occurred. The reasons are twofold. First, legislative action takes a long time, and an inmate may be forced to spend years in prison before a legislature acts.[48] A more expedient means to restore just sentences to specific defendants in a timely manner is required. Second, most reforms are not retroactive; indeed, by overturning final judgments, retroactive legislation raises constitutional questions.[49] Even if legislative reform eventually materializes, due to its

48. *See* Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 858–68 (2008) (discussing how shifting political control and the interaction between the legislative and judicial branches can lead to legislative inefficiencies); *cf.* Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 14–16 (2009) ("[J]udicial correctives are both undemocratic and inefficient, and . . . our polity would be better off with a legislative solution to this legislative process dysfunction.").

49. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) ("[S]uch legislation bears not on the problem of interbranch review but on the problem of finality of judicial judgments."); *id.* at 227 ("Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes."); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1104 (2010) ("[Unconstitutional] retroactive legislation began and has been continued, because the judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the *prestige* necessary to sustain it against the antagonism of the legislature and the bar. . . . Instead of that, it pursued a temporizing course till the mischief had become intolerable, and till it was compelled . . . to invalidate certain acts of legislation, or rather to reverse certain legislative decrees. . . . Yet the legislature attempted to divest it, by a general law it is true, but one impinging on particular rights." (quoting Greenough v. Greenough, 11 Pa. 489, 495 (1849))).

adverseness to retroactivity,[50] defendants already sentenced may be left unaided.[51] Legislative action has an eye toward the future; a retroactive solution, however, is required to solve the problem of mandatory injustice. Thus, legislative action alone is insufficient to provide remedies for defendants sentenced prior to *Booker*. A flexible instrument like judicially-recommended executive clemency could be of tremendous assistance to specific offenders.

B. Executive Clemency

To understand why a judge's role in recommending executive clemency is critical to providing relief to defendants who were sentenced unfairly during the mandatory Sentencing Guidelines period, it is imperative to understand clemency's workings and benefits, criticisms, and recent trend of disuse. The executive clemency power is firmly rooted in the U.S. Constitution: "[The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[52] The Founders adapted the clemency power from the English Crown's power to grant pardons at its complete discretion.[53]

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50. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 93 (6th ed. 2009) ("The Supreme Court has seldom had to consider how much res judicata effect is necessary.").

51. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 693 (2004) ("[R]etroactive statutes may upset settled expectations."); Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."); Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); Johnson v. New Jersey, 384 U.S. 719, 728 (1966) ("[T]he choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved.").

52. U.S. CONST. art. II, § 2, cl. 1.

53. *Washington Journal: History of Presidential Pardons* (C-SPAN television broadcast Dec. 27, 2008); *see also* Schick v. Reed, 419 U.S. 256, 260 (1974) (noting that the Founders "were well acquainted with the English Crown authority to alter and reduce punishments as it existed in 1787"). Chief Justice Marshall emphasized the clemency power as an executive act of grace. United States v. Wilson, 32 U.S. 150, 160 (1883). According to Justice Holmes, "[w]hen granted[, clemency] is the determination of the ultimate authority that the public welfare will be better served." Biddle v. Perovich, 274 U.S. 480, 486 (1927). The notion of "making exceptions . . . for the defendant's unusually hard circumstances" goes back as far as the laws of Hammurabi and classical Rome. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 1 (2005) (citing Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 83 n.2 (1998)).

Executive clemency is a broad term that includes pardons (forgiveness of both crime and punishment), commutations (substitution of a milder punishment), and reprieves (postponement of punishment).[54] Clemency is a presidential prerogative that is not subject to legislative control;[55] in fact, the president has "wide discretion, subject primarily to the constraints of the political process and the president's own personal sense of moral integrity."[56] The scope of this authority is extremely broad, covering "every offence known to the law."[57] The president is not limited by any statutory bars and has the freedom to exercise his power at any time, "either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[58] Furthermore, the president has significant leeway to devise the format of the pardon, which can be "conditional[] or absolute[]."[59] Although the president is not required to disclose the reasons for granting clemency—and such reasons vary from president to president—a study conducted in 1993 showed that 47 percent of pardon grants were due to possible innocence, 16 percent for mental illness or juvenile status, 11 percent for unfair trials, 11 percent for disproportionate sentencing, 5 percent for rehabilitation, 5 percent due to a request from the Pope, and no reason was given in 5 percent of cases.[60]

The clemency power of a state governor is found in that particular state's constitution, and it can usually be exercised in "[a]ny way [the governor] wants."[61] Approximately thirty-three states have appointed their governors as the sole decisionmaker regarding clemency, while the rest have some form of clemency board appointed by the governors.[62] Reasons for using a clemency board

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54. ADAM C. ORTIZ, AM. BAR ASS'N, CLEMENCY AND CONSEQUENCES: STATE GOVERNORS AND THE IMPACT OF GRANTING CLEMENCY TO DEATH ROW INMATES 1 (2002).

55. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 381 (1866).

56. Morison, *supra* note 53, at 31.

57. *Garland*, 71 U.S. (4 Wall.) at 380.

58. *Id.*

59. *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

60. ORTIZ, *supra* note 54, at 1.

61. Daniel Engber, *How Does a Governor Grant Clemency? With a Signed Note*, SLATE, (Nov. 30, 2005, 6:08 PM ET), http://www.slate.com/id/2131268. The basis of this latitude of discretion is rooted in its conceptualization "as an act of grace, a gift freely given." KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 8–9 (1989). "Gift-giving is not something to criticize, analyze, scrutinize, demand, refuse, or justify." *Id.* at 9.

62. Kavan Peterson, *Governors Shy from Clemency Power*, STATELINE.ORG (Jan. 30, 2003), http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&content

include "prevent[ing] the governor from being inundated with applications, . . . insulat[ing] the governor during the application process, and . . . provid[ing] a system that carefully evaluates the merits of each application."[63]

In most cases, petitioners for clemency have to follow a set of formal procedures before their applications reach the governor or the president for possible consideration.[64] At the federal level, the Department of Justice has a set of rules[65] for filing applications, investigating the petitioner, dealing with victims, corresponding with the public, and recommending a grant or denial to the president.[66] The Pardon Attorney, under the direction of the Deputy Attorney General, receives and processes all petitions for clemency.[67] If the president does not respond within thirty days of the Pardon Attorney's recommendation, it is deemed accepted.[68] Notwithstanding these formal procedures, the president can grant clemency at will without consulting anyone.[69] At the state level, regulations vary from state to state,[70] with some states implementing formal application

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Id=15145. Five states have clemency boards that make clemency decisions without the governor's participation: Alabama, Connecticut, Georgia, Idaho, and Texas. *Id.* The governor grants clemency only on the basis of recommendations by the board in nine states: Arizona, Delaware, Florida, Indiana, Louisiana, Montana, Oklahoma, Pennsylvania, and Texas. *Id.* In three states, Nebraska, Nevada, and Utah, the governor makes decisions with the board. *Id.*

63. Donald Leo Bach, To Forgive, *Divine: The Governor's Pardoning Power*, WIS. LAW., Feb. 2005, at 12, 62.

64. Some cases come to the attention of the president through informal channels. The president is not bound by formal executive clemency procedures. *See, e.g.*, Engber, *supra* note 61 ("[T]he president isn't bound by the 'official' rules for presidential pardons.").

65. For a detailed description of the procedures and roles of the officers involved, see U.S. DEP'T OF JUSTICE, *United States Attorney's Manual Standards for Consideration of Clemency Petitions*, http://www.justice.gov/pardon/petitions.htm (last visited Aug. 30, 2010).

66. Executive Clemency, 28 C.F.R. §§ 1.1–1.11 (2009). The authority of the Department of Justice in the clemency process was granted by President Grover Cleveland on June 16, 1893. GAILLARD HUNT, THE DEPARTMENT OF STATE OF THE UNITED STATES: ITS HISTORY AND FUNCTIONS 130 (1914) (ordering "all warrants of pardons and commutations of sentences . . . be prepared and recorded in the Department of Justice"); *see also* Executive Clemency, 27 Fed. Reg. 11,002, 11,002–03 (Oct. 30, 1962) (codified as amended at 28 C.F.R. §§ 1.1–1.11 (1975)) (describing the executive clemency process).

67. 28 C.F.R. §§ 0.35–0.36.

68. *Id.* § 1.8(b).

69. The language of the Constitution makes no mention of limitations or specific procedures to follow, "except in Cases of Impeachment," in which the president lacks clemency power. U.S. CONST. art II, § 2, cl. 1; *see also supra* notes 54–59 and accompanying text.

70. For a link to reports that provide a state-by-state description of the clemency process, see CRIMINAL JUSTICE POLICY FOUND., *Clemency Policy: State Clemency Resources*, http://www.cjpf.org/clemency/clemencystates.html (last visited Aug. 30, 2010).

processes[71] and others granting automatic consideration if certain criteria are met.[72]

1. *Support for Executive Clemency*. The executive clemency power is a flexible[73] "fail safe" devised in recognition of the fallibility of the criminal justice system.[74] Although the clemency power would "be redundant in a perfect administration,"[75] imperfect laws will continue to give rise to cases with "harsh, unjust, or popularly unacceptable results."[76] Due to the complexity of the criminal justice system and its inescapable dependence on human interpretation and passion, it is vulnerable to error and abuse; executive clemency is a backup system to mitigate some of these consequences.[77] Such a fail-safe reflects an acknowledgment of uncertainty and a preference for leniency in assigning punishment[78] by signaling when the criminal law and the Sentencing Guidelines are too harsh, inflexible, or otherwise

71. Examples include Alaska, Arizona, Arkansas, Indiana, Iowa, Louisiana, Nebraska, and West Virginia. *Id.* (follow appropriate hyperlink).

72. Alabama is an example. *Id.* (follow "Alabama" hyperlink).

73. *Cf.* James Iredell, Assoc. Justice of the Supreme Court of the United States, Address at the North Carolina Ratifying Convention (July 28, 1788), *in* 4 THE FOUNDERS' CONSTITUTION 17, 17 (Philip B. Kurland & Ralph Lerner eds., 1987) ("It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.").

74. Herrera v. Collins, 506 U.S. 390, 415 (1993).

75. CESARE BECCARIA, *On Crimes and Punishments*, *in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 1, 111 (Richard Bellamy ed., Richard Davies, Virginia Cox & Richard Bellamy trans., Cambridge Univ. Press 1995) (1764).

76. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 298 (1939).

77. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 284 (1993). Justice Anthony Kennedy endorses executive clemency and urges the American Bar Association to "consider a recommendation to reinvigorate the pardon process at the state and federal levels." JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, resolution 121C (2004), *available at* http://www.abanet.org/media/kencomm/rep 121c.pdf; *see also Herrera*, 506 U.S. at 417 ("[T]he traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.").

78. *See* Alan M. Dershowitz, *What's Mercy Got to Do with It?*, N.Y. TIMES BOOK REV., July 16, 1989, at 7 ("[I]n a world in which errors are inevitable, it is better to err on the side of overly lenient, rather than overly harsh, punishment."). This can be inferred from amendments V, VI, and XIV to the U.S. Constitution and the criminal defendant's presumption of innocence until proven guilty. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

in need of change.[79] A corollary consequence to such a fail-safe role is the preservation of public confidence in the legal system in spite of its occasional tendency to produce arbitrary or disparate results.[80]

In circumstances in which relief is warranted, but unavailable through other means, "a chief executive's failure to intervene . . . would be a fitting object of moral opprobrium."[81] As Justice Iredell said in 1788, "there may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy."[82] He further noted that the president's "duty [is] to watch over the public safety," which the president can accomplish by exercising the clemency power.[83] Margaret Love, a former Pardon Attorney, asserts that "the president has a duty to pardon, not just where moral desert has been established in a particular case, but also as a more general obligation of office."[84] Justice Holmes declared that clemency "is part of the Constitutional scheme. . . . [I]t is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[85]

This judicial recommendation of clemency is more than a cry for mercy for any particular defendant. In fact, "this kind of adjustment to a criminal sentence does not necessarily amount to a genuine act of mercy."[86] Rather, it is "an equitable 'bending' of the rules in order to achieve a morally just result, taking into consideration all morally relevant facts concerning the defendant and the commission of the offense."[87] Alexander Hamilton wrote that "without an easy access to

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79. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 594 (2001); *see also* Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1399 (2006).

80. *Presidential Pardon Power: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Daniel T. Kobil, Professor, Capital University Law School).

81. Morison, *supra* note 53, at 23.

82. Iredell, *supra* note 73, at 17.

83. *Id.* at 18.

84. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1506 (2000).

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

86. Morison, *supra* note 53, at 25; *see also Biddle*, 274 U.S. at 486 ("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.").

87. Morison, *supra* note 53, at 25. Legal and moral issues converge when considering liability outside the context of pardons as well. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT EC 7–8 (2009) ("[I]t is often desirable for a lawyer to point out those factors which may lead to

exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel" and clemency is "a mitigation of the rigor of the law."[88] A beneficiary of executive clemency urges that clemency be used to correct overly severe punishments and to give offenders a second chance:

> Today, I could be in federal prison still serving my 24-year sentence. Instead, I've been raising my now 13-year-old son, graduated from college in 2002 and completed a year of law school. . . . [The president's] clemency power should be used with thoughtful deliberation. Even so, it should be utilized because clemency is sometimes the only possible response to unfair and excessive penalties.[89]

Executive clemency also plays a role in current death penalty debates. As Justice Kennedy wrote in *Kennedy v. Louisiana*,[90] the law "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[91] Justice Scalia wrote in another case that the "[r]eversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success."[92] From a historical perspective, "[a]mong the World War II traitors, some were sentenced . . . to death, but by the grace of executive clemency, none were actually executed."[93] Since 1976, clemency has been granted to state death-row inmates 245 times.[94]

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a decision that is morally just as well as legally permissible."); June Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, J. TORT L., 2007, at 1, 25–26 ("[B]oth the strict liability and negligence principles offer plausible strategies for economically functional and morally just approach to liability determinations."). *But see* Joshua Wirth, Note, *Federal Regulation and Legislation in the Wake of the Subprime Mortgage Meltdown: A Legal Philosophical Analysis of Federal Government Responses to Market Bubbles*, 14 FORDHAM J. CORP. & FIN. L. 179, 207–09 (2008) (arguing that just because government regulations in response to the meltdown may be morally unjust does not mean the law failed).

88. THE FEDERALIST No. 74, at 447–49 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

89. Kemba Smith, *The Wisdom of Pardons*, AM. F. (Dec. 19, 2008, 08:22 AM), http://amforumbacklog.blogspot.com/2008/12/wisdom-of-pardons.html.

90. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

91. *Id.* at 2649.

92. Kansas v. Marsh, 548 U.S. 163, 193 (2006) (Scalia, J., concurring).

93. Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1500 (2009).

94. *Clemency*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clemency (last visited Aug. 30, 2010). Of this total, 172 were granted in Illinois, with the majority of states having granted one or two. *Id.*

Moreover, "[c]lemency petitions are a rich resource in the investigation of death penalty litigation because they go beyond the legal system to include evidence which may have been barred or excluded in prior habeas corpus appeals."[95] As Chief Justice Roberts stated in response to Senator Russ Feingold's question about the risk of innocent persons receiving death sentences,[96] "[T]here is always a risk in any enterprise that is a human enterprise like the legal system."[97] Thus, in accordance with the Chief Justice's view, "it is absolutely vital that . . . the convicted [be empowered] with the procedural tools to fight their convictions."[98]

In abused-child parricide and battered-women cases in which the law precludes using abused-child syndrome and battered-women syndrome as defenses to premeditated killings, executive clemency should be recommended because imprisonment of abused children and battered spouses is not in line with criminal justice policy.[99] One commentator asks,

> What is to be done about the many abused-child parricides currently serving lengthy prison sentences? Such long-term incarceration is a miscarriage of justice if the convicted parricide was denied a chance

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95. Leona D. Jochnowitz, *Public Access to State Clemency Petitions*, 44 CRIM. L. BULL. 176, 178 (2008).

96. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 365 (2005) (statement of Sen. Feingold, Member, S. Comm. on the Judiciary).

97. *Id.* (statement of John G. Roberts, Jr.).

98. Jonathan Aminoff, *Something Very Wrong Is Taking Place Tonight: The Diminishing Impact of the Actual Innocence Exception on Eligibility for the Death Penalty*, 46 CRIM. L. BULL. 86, 136 (2010); *see also* Saad Gul, *The Truth that Dare Not Speak Its Name: The Criminal Justice System's Treatment of Wrongly Convicted Defendants Through the Prism of DNA Exonerations*, 42 CRIM. L. BULL. 687, 690 (2006) ("[F]ederal courts may not entertain habeas petitions on grounds of actual innocence, unless the claim is coupled with an independent constitutional violation. The[] only recourse may lie in executive clemency petitions."(footnote omitted)).

99. *See* KATHLEEN M. HEIDE, WHY KIDS KILL PARENTS: CHILD ABUSE AND ADOLESCENT HOMICIDE 143 (1992) ("Whenever possible the adolescent parricide offender should not be imprisoned; prison psychological services are rarely adequate to deal with the depth of his problems."); Jessica L. Hart & Jeffrey L. Helms, *Factors of Parricide: Allowance of the Use of Battered Child Syndrome as a Defense*, 8 AGGRESSION & VIOLENT BEHAV. 671, 680 (2003) ("[S]kepticism still remains of whether battered child syndrome is a legitimate syndrome."); Rebecca A. Olla, *Redefining the Objectively Reasonable Person in Texas: A Case for Battered Child Syndrome as Pure Self-Defense for Parricide*, 17 TEX. ST. B. SEC. RPT. JUV. L. 5, 7–8 (2003) (advocating for the use of expert testimony on abused child syndrome in order to help judges and juries evaluate the reasonableness of a child's actions); Susan C. Smith, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U.L. REV. 141, 165 n.164 (1992) ("Governor Ed Herschler commuted [the child defendant's] prison sentence and ordered her on probation for one year.").

> to establish self-defense by offering expert testimony of battered child syndrome . . . . Executive clemency for those convicted abused-child parricides who have already served considerable periods of incarceration can solve this problem.[100]

In the same vein, battered women who were denied an opportunity to assert a defense could be saved by way of clemency. Missouri Governor John Ashcroft commuted the sentences of two battered women because "the law prohibited juries from hearing about the severe abuse and trauma they endured."[101] Rather than leaving them to serve out their entire life sentences, the governor restored the possibility of parole.[102]

John Locke summarizes the benefits of executive clemency perhaps most succinctly:

> [T]he Ruler should have a Power, in many Cases, to mitigate the severity of the Law, and pardon some Offenders . . . [S]ince in some Governments the Lawmaking Power . . . is usually too numerous, and so too slow, . . . there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.[103]

2. *Stigmatization and the Decline of Clemency*. Despite its critical role in carrying out justice, the clemency power is often criticized for its unreviewable "arbitrary [and] capricious" nature.[104] The lack of "procedural and substantive constraints"[105] makes clemency appear to be "[s]hroud[ed] . . . with a certain air of mystery."[106] The critics' focus is thus often not on "the substantive merits of particular cases," but rather on the procedure itself.[107] Two practical considerations

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100. Robert Hegadorn, *Clemency: Doing Justice to Incarcerated Battered Children*, 55 J. MO. B. 70, 78 (1999).

101. Virginia Young, *Sentences Cut for 2 Who Killed Husbands*, ST. LOUIS POST–DISPATCH, Dec. 17, 1992, at 1A.

102. *Id.*

103. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 421–22 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

104. Jeffrie Murphy, *Mercy and Legal Justice*, *in* FORGIVENESS AND MERCY 162, 181 (1988); *see also* Coleen E. Klasmeier, Note, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1535 (1995) (expressing unease about the "potential for arbitrary decisionmaking that inheres in the unfettered clemency power").

105. Hoffstadt, *supra* note 79, at 597

106. Morison, *supra* note 53, at 28.

107. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1350 (2008); Paul J. Haase, Note, *"Oh My Darling Clemency": Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287,

intensify this air of mystery. First, clemency applicants have legitimate interest in protecting their privacy from public scrutiny.[108] The petition process requires applicants to submit "often sensitive biographical information about their character and activities," and the system needs to prevent public disclosure of such information.[109] Second, the lack of public scrutiny allows the president or governors "to receive the frank and uninhibited advice of [their] legal and political advisers."[110]

Even though the clemency process has largely remained unchanged, criticism has grown in recent years. In the past, clemency has mostly been regarded favorably, as "a safety valve in a legal system that sometimes makes mistakes."[111] For example, between 1900 and 1989, a substantial number of clemency grants were issued from month to month, as opposed to the recent trend of executives clustering grants toward the end of their terms.[112] The decline in the number and consistency of clemency grants began with President Richard Nixon.[113] This decline is largely attributable to "two relatively new influences in the criminal justice system."[114] One gaining momentum was "the retributivist theory of 'just deserts,'"[115] which increased intolerance of sentencing reduction. The other, which quickly caught the public's attention, was "the politics of the 'war on crime.'"[116] The combination of these two movements began to decrease the frequency of clemency grants. Similarly, state governors

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1298 (2002) ("The main concern that surfaced in light of the Clinton pardons is that President Clinton bypassed the normal pardon procedures.").

108. Morison, *supra* note 53, at 28.

109. *Id.*

110. *Id.*

111. William Glaberson, *States' Pardons Now Looked at in Starker Light*, N.Y. TIMES, Feb. 16, 2001, at A1; *see also supra* notes 73–103 and accompanying text.

112. *See* P.S. Ruckman, Jr., "Last-Minute" Pardon Scandals: Fact and Fiction 16–18, 22–27 (unpublished manuscript), *available at* http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf (presenting graphs that show a fairly even distribution of pardons between each month).

113. *Id.* at 25–26.

114. Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G. REP. 5, 7 (2007).

115. *Id.*

116. *Id.*; *see also* Love, *supra* note 84, at 1506 ("[T]he duty to pardon is neither grounded in nor limited by considerations of law or morality, but is essentially one of politics."); P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development and Analysis (1900–1993)*, 27 PRESIDENTIAL STUD. Q. 251, 258 (1997) ("[W]hen explaining an administration's use of clemency powers, the partisan identification and political ideology of the president cannot be ignored.").

reduced clemency grants for fear of being criticized as being "soft on crime and . . . siding against the victims."[117] At the federal level, the political and social pressure to be "tough on crime" was exacerbated by Attorney General Griffin Bell's reforms of the Department of Justice, which "delegate[d] the clemency advisory responsibility to subordinate officials," including prosecutors.[118] In the hands of federal prosecutors, clemency recommendations to the president further declined.[119]

In addition to retributivist theory and political rhetoric, the prevalent view that "the system is open to special pleading or outright abuse" has added to the decline in grants of clemency.[120] Stories like those of Carma Storcella,[121] Lewis "Scooter" Libby,[122] Oklahoma Governor J.C. Walton,[123] and Ohio Governor Richard F. Celeste[124] contribute to the stigma. President George H.W. Bush granted a mere seventy-seven clemencies during his four years in office and President Bill Clinton only fifty-six during his first term, although he granted 313 during the last year of his second term.[125] President George W. Bush granted a total of only 200 during his two terms.[126] At the state level, taking California as an example, clemency grants drastically decreased from 1967 to the present day, with Governor Ronald

117. Peterson, *supra* note 62.

118. Love, *supra* note 114, at 7.

119. *Id.* at 8.

120. Glaberson, *supra* note 111 ("The controversy over the Clinton pardons has highlighted a concern that clemency orders nationally are often based on inconsistent or unfair policies.").

121. Carma Storcella was pardoned by New Jersey Governor Christine Todd Whitman. The media later revealed that she was an "aunt of the director of the casino commission's division of licensing, Christopher Storcella." *Id.*

122. Love, *supra* note 114, at 5 ("[T]he Libby commutation in context seemed to confirm the popular view of pardon as a personal prerogative of the president, a remnant of tribal kingship generally reserved for the well-heeled or well-connected."); *see also* Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST, July 3, 2007, at A1 ("Shortly after Libby was convicted in March, three national public opinion polls found that seven in 10 Americans said they would oppose a pardon of Libby.").

123. Oklahoma Governor J.C. Walton was removed from office for selling pardons. *100 Years of Oklahoma Governors*, OKLA. DEP'T OF LIBRARIES, http://www.odl.state.ok.us/oar/governors/Walton.htm (last visited Aug. 30, 2010).

124. Former Ohio Governor Richard F. Celeste aroused public contempt for granting clemency to sixty-eight individuals at the end of his second term. *See generally* Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655 (1991) (discussing the political controversy surrounding Celeste's grants of clemency).

125. Ruckman, *supra* note 112, at 21.

126. *Bush Grants Clemency to Ex-Border Guards*, CBS NEWS.COM (Jan. 19, 2009), http://www.cbsnews.com/stories/2009/01/19/politics/main4735156.shtml.

Reagan granting 575 from 1967 to 1975, Governor Wilson granting thirteen from 1999 to 2003, and Governor Gray Davis granting zero from 1999 to 2003.[127]

The clemency-to-execution ratio is another way to measure clemency rates.[128] As of July 2002, the national clemency-to-execution ratio is 6.14 percent, or one clemency per sixteen executions.[129] Nine states have ratios above the national average: Illinois (8.33 percent), Florida (11.76 percent), Georgia (17.24 percent), North Carolina (23.81 percent), Montana (50 percent), Maryland (66.67 percent), Idaho (100 percent), Ohio (200 percent), and New Mexico (500 percent).[130] However, twenty-three states have ratios below that national ratio.[131] Texas has one of the lowest ratios in the United States, with 0.37 percent, or one clemency per 272 executions; Oklahoma's ratio is 2 percent, with one clemency per fifty executions; and Missouri's is 3.51 percent, with one clemency per twenty-eight executions.[132] Sixteen of the twenty-three states with lower ratios have a ratio of 0 percent.[133] As such, for the convicted, "pardon is regarded as a constitutional anomaly."[134]

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127. CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMBLY, 2005-R-0065, RESEARCH REPORT, PARDON STATISTICS FROM OTHER STATES (2005), http://www.cga.ct.gov/2005/rpt/2005-R-0065.htm. Although the statistics on California are the most thorough, some data from other states suggest that current governors are less likely to grant pardons than their recent predecessors. *Cf. id.* (indicating potential decreases in Minnesota, Ohio, and Florida).

128. *See* ORTIZ, *supra* note 54, at 4 (calculating a ratio of clemencies to executions throughout the United States, in Texas, Missouri, and Oklahoma).

129. *Id.* This figure reflects that approximately six inmates were pardoned for every one-hundred executed.

130. AM. BAR ASS'N, CLEMENCY AND CONSEQUENCES: STATE GOVERNORS AND THE IMPACT OF GRANTING CLEMENCY TO DEATH ROW INMATES 8 (2002), *available at* http://www.abanet.org/crimjust/juvjus/jdpclemeffect02.pdf.

131. *Id.*

132. ORTIZ, *supra* note 54, at 4.

133. AM. BAR ASS'N, *supra* note 130, at 8.

134. Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, LITIGATION, Winter 2006, at 25; *see also* Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1310 (2004) ("During the 1990s, from one to three death row inmates were granted clemency every year in the entire nation—compared to approximately sixty to eighty executions each year. This is a dramatic shift from several decades ago, when governors granted clemency in 20% to 25% of the death penalty cases they reviewed. In Florida, one of the pillars of the 'death belt,' governors commuted 23% of death sentences between 1924 and 1966, yet no Florida death penalty sentences were commuted in the 1990s." (footnotes omitted)).

Despite the public stigma and the fear of granting clemency, as a group, presidents and governors seeking reelection have not been adversely affected.[135] Moreover, whether or not granting clemency adversely affects an executive's political popularity, "it is [the executive's] job to take risks and correct mistakes or unjust outcomes in the legal system."[136] Unfortunately, the pervasive view is that the executive clemency system today is "inefficient and unreliable, and results in very few grants."[137] As a result of the general unwillingness to grant clemency, individuals who received disproportionate sentences cannot depend exclusively on the president or governors to act.[138]

III. A VIABLE SOLUTION: JUDICIAL CONTRIBUTION TO EXECUTIVE CLEMENCY

United States v. Booker ended an eighteen-year period of mandatory injustice during which the Federal Sentencing Guidelines forced judges to impose sentences they found overly severe. Many individuals who went through the criminal justice system during this period are still serving out their sentences. This is similarly true for individuals convicted in state courts under mandatory regimes.[139] Unfortunately, neither the legislative nor the executive branch can independently provide a sufficient remedy. As discussed, legislative reform is slow and adverse to retroactivity, and executive clemency is stigmatized and seldom granted. The solution this Note proposes is judicial recommendation of executive clemency. Under the current

135. *See* ORTIZ, *supra* note 54, at 2 ("Of the 15 governors who granted clemency since 1993, only one was defeated for re-election (James) while three were re-elected or elected to higher office (Carnahan re-elected Governor, Allen, Bush, Carnahan elected Senator). Five were barred by law from seeking re-election (Wilder, Gilmore, Hunt, Glendening, Keating); two retired (Edgar, Batt); and three face re-election in 2002 or 2004 (Huckabee, Easley, Barnes)." (footnote and citation omitted)). *But see* MOORE, supra note 61, at 7 ("President Ford's pardon of Richard Nixon may have cost him reelection; several Governors have been impeached or driven from office for abusing their power to pardon.").

136. Peterson, *supra* note 62 (quoting Margaret Love, former U.S. Pardon Att'y, U.S. Department of Justice).

137. 2009 CRIMINAL JUSTICE TRANSITION COAL., *supra* note 9, at 113.

138. *See* Morison, *supra* note 53, at 11 ("[T]he reluctance of recent presidents to exercise the clemency power more generously perhaps can be criticized for displaying a certain lack of moral imagination and political courage, particularly given the advent in the last twenty years of strict mandatory minimum statutes and rigid sentencing guidelines, together with a burgeoning federal prison population.").

139. *See supra* Part I.

regime, judicial involvement in clemency is limited: it generally happens only "when a sentencing judge *is asked* to make a recommendation in a particular pardon case."[140] No law, explicitly or implicitly, calls for any judicial involvement. But no law forbids such a contribution. Thus, under current law and this Note's proposal, judges could recommend clemency at all procedural moments in a case—including at sentencing, on appeal, upon receiving a habeas petition, or during other collateral attacks.[141]

Judicial participation in the executive clemency process is valuable for three reasons. First, it would provide judges with an additional tool to craft suitable sentences. Second, if clemency is desirable—which this Note argues that it is—then judicial recommendation of clemency would reinvigorate its use. Finally, it helps to refocus clemency grants on the circumstances of the defendants rather than on arbitrary political influences.

A. A Discretionary Tool for Judges to Correct Unjust Sentences

Enabling judges to appeal to the executive for clemency provides the judiciary with a discretionary tool to correct injustice when it is bound by law to do the contrary.[142] This is most relevant for sentences imposed during the eighteen-year period during which the Sentencing Guidelines were mandatory. Until *Booker* made them advisory in 2005, the Sentencing Guidelines required judges to impose sentences within a mandated range, regardless of whether the judges found the sentences egregious under the circumstances. Even today, judges have no recourse to reduce a term of imprisonment imposed during that period. Recall the stories of Angelos, Harvey, and McDade.[143] All three were sentenced to extremely long prison terms mandated by the Sentencing Guidelines—sixty-five and a half years, life, and twenty-seven years, respectively—even though all three sentencing judges

140. 2009 CRIMINAL JUSTICE TRANSITION COAL., *see supra* note 9, at 117.

141. Chief Judge Sachs recommended clemency at sentencing, and the decision was affirmed by the Eighth Circuit. United States v. Harvey, 946 F.2d 1375, 1378–79 (8th Cir. 1991). Judge Friedman appealed to the executive branch after hearing, and rejecting, McDade's claims of ineffective assistance of counsel on collateral review. United States v. McDade, 639 F. Supp. 2d 77, 86–87 (D.D.C. 2009). Judge Cassell recommended clemency at the sentencing stage of *Angelos*. United States v. Angelos, 345 F. Supp. 2d 1227, 1262–63 (D. Utah 2004).

142. *See generally* Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43 (1998) (reasoning that clemency could either be "an act of mercy" or "an instrument of justice").

143. *See supra* Part I.

would have imposed shorter terms. In a last effort to prevent injustice, all three judges appealed to the executive branch to grant clemency. As a result of the wide latitude given to the president to grant clemency, "it is presumably not unjust for a president to grant clemency for the same sorts of reasons [as those relied upon by judges], especially where a case is beyond the reach of further judicial review."[144] The flexibility of the clemency power allows for the retroactive modification of unjust sentences that judges were forced by the pre-*Booker* Guidelines to impose.[145]

The ongoing effort to pass legislation in Congress that would reform sentencing procedures for federal courts confirms the necessity of increasing judges' discretion to guard against disproportionate sentencing. Four major legislative proposals exemplify Congressional attempts to restore sentencing discretion to judges. First, the introduction of the Major Drug Trafficking Prosecution Act of 2009[146] would eliminate the mandatory minimum sentences imposed by the Controlled Substances Act[147] and the Controlled Substances Import and Export Act[148] and return discretion to judges.[149] Second, the House of Representatives is considering the Fairness in Cocaine Sentencing Act of 2009, which would broaden judicial discretion.[150] The bill seeks to abolish the heightened penalties and mandatory minimums for drug offenses involving cocaine base[151]—such as crack cocaine—and to dispose of limitations on judges' authority to grant probation and suspended sentencing.[152] Third, a proposed expansion of the safety valve of § 3553(f)[153] puts additional discretion back in judges' hands by allowing deviations

144. Morison, *supra* note 53, at 25.

145. *See, e.g.*, United States v. Harvey, 946 F.2d 1375, 1378 (8th Cir. 1991) (recommending executive clemency to modify a convicted person's sentence).

146. Major Drug Trafficking Prosecution Act, H.R. 1466, 111th Cong. (2009).

147. Controlled Substances Act, 21 U.S.C. §§ 801–971 (2006).

148. Controlled Substances Import and Export Act, *Id.* § 951.

149. H.R. 1466 (replacing various provisions reading "which may not be less than [x] years" with "for any terms of years").

150. Fairness in Cocaine Sentencing Act, H.R. 1459, 111th Cong. (2009); H.R. 3245, 111th Cong. (2009). Both bills are sponsored by Representative Robert Scott, D-VA. Bill H.R. 1459 was introduced in the House on March 12, 2009, and bill H.R. 3245 was introduced on July 16, 2009.

151. H.R. 1459; H.R. 3245.

152. H.R. 1459. In addition to eliminating the crack–powder cocaine sentencing disparity, this bill calls for judicial discretion in other areas of drug sentencing. *Id.*

153. The safety valve allows judges to deviate below mandatory minimum sentences. 18 U.S.C. § 3553(f) (2006).

below mandatory sentences.[154] Judges have applied the law as it stands to adjust the sentences of 25 percent of all drug offenders to below mandatory minimums.[155] The proposal would broaden the reach of the safety valve to "offenders whose criminal history points overstate their actual risk of recidivism"[156] and to nondrug offenders subject to mandatory minimums.[157] Finally, the Criminal Justice Transition Coalition proposes a greater emphasis on sentencing alternatives to incarceration, such as probation and community service.[158] These proposals would entrust judges with greater discretion in sentencing, allowing them to carefully "craft sentences that more accurately punish offenders based on the severity of their offense, their culpability, and their criminal history."[159] The increased use of judicial recommendation of executive clemency proposed by this Note complements these current reforms.

B. Revitalization of Executive Clemency Grants

Increasing the use of the judicial power to recommend clemency would contribute to the revitalization of the clemency process. As discussed in Part II.B, grants of clemency have declined drastically in recent history due to the stigma associated with the clemency power. The popular view is that the clemency process is "cumbersome, arbitrary, and capricious."[160] The decline in the use of the clemency power is detrimental to the criminal justice system because clemency provides the final "means of preventing manifest injustice caused by the inherent inflexibility of the criminal law and the imperfections of its human application."[161]

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154. 2009 CRIMINAL JUSTICE TRANSITION COAL., *supra* note 9, at 38. This proposal will become moot if either bill H.R. 1459, H.R. 1466, or H.R. 3245 are enacted into law. Each bill would eliminate mandatory minimums, thereby rendering safety valves unnecessary.

155. *Id.*

156. *Id.* ("Due to the peculiarities of the sentencing guidelines' criminal history provisions, people who have been convicted of more than one very minor offense, such as driving on a suspended license or passing a bad check, can be considered to have too much criminal background to qualify for the safety valve.").

157. *Id.* at 39, 41 (noting that crimes including gun offenses, sex crimes, and identity fraud became subject to mandatory minimums without a safety valve).

158. *Id.* at 47–50.

159. *Id.* at 38.

160. *Former Inmate Believes in the Power of Pardons* (NPR radio broadcast Dec. 17, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=98399545; *see also supra* Part I.

161. Morison, *supra* note 53, at 26–27.

Judicial recommendation of clemency is beneficial to both the clemency process itself and its rejuvenation. Judicial recommendation is valuable to the clemency process because the president "presumably wants the fullest array of information regarding cases in which a commutation might be appropriate."[162] And judicial recommendation helps revitalize clemency by adding legitimacy to the executive's decision to grant clemency. This happens on two levels. First, by responding to judicial requests in some cases, an executive receives the imprimatur of the courts and is thus able to provide legal reasons for its decisions.[163] Second, judicial recommendation may serve the system of checks and balances by giving the judiciary the power to prod the executive to act when the legislature has mandated excessively harsh sentencing requirements.[164]

Helping to increase clemency grants by way of judicial recommendation is not only viable and effective but also efficient. The judges in *Angelos*, *Harvey*, and *McDade* recommended clemency in their written opinions and requested that their opinions be sent to the Office of the Pardon Attorney.[165] Hence, judges would not need additional resources to take this step: nothing needs to be done other than writing the recommendation in the opinion and mailing it to the Department of Justice or the appropriate state office.

C. Improvement of Equity in Clemency Grants

Judicial contribution to the clemency recommendation process refocuses clemency grants on the particular defendant in a particular case to increase the extent to which similarly situated defendants are treated the same way. Typically, clemency grants are based on "[p]olitical influences . . . includ[ing] . . . such factors as public opinion, the social status of a petitioner and his/her supporters, specific foreign policy concerns or the outbreak of war."[166] Other commentators have referred to "the lawyers' political affiliations and ambitions, the status of the victim's family, the proximity to a

162. United States v. Angelos, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004).

163. Murphy, *supra* note 104, at 162, 181.

164. *See, e.g.*, Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 217 (2003) ("[A]n unlimited power to make exceptions to the law depends for its legitimacy upon a process that at least appears to limit it.").

165. For the requests in each opinion, see United States v. Harvey, 946 F.2d 1375, 1378–79 (8th Cir. 1991); United States v. McDade, 639 F. Supp. 2d 77, 86–87 (D.D.C. 2009); *Angelos*, 345 F. Supp. 2d at 1230–31.

166. Ruckman, *supra* note 116, at 259 (internal quotation marks omitted).

gubernatorial election, and the perception that a governor is too soft on crime."[167] Absent from these common considerations is a factor of great import—the specific factual background of the defendant's case. The individual most familiar with the facts and circumstances of a particular case is the sentencing judge, whose recommendation may help reduce inconsistent or arbitrary clemency grants. This is largely because judges are equipped with the knowledge to decide not only on the severity of the crime, but also on the moral blameworthiness of a particular offender.[168] For example, "a person who compassionately kills his terminally ill spouse to relieve her physical suffering ought to be judged less harshly than someone who kills his spouse in order to collect the proceeds of an insurance policy, even though both have committed the crime of homicide."[169] Input by sentencing judges on the use of clemency to reduce sentences to an appropriate level provides judges with a critical tool to correct injustice and breathe life back into clemency.

IV. GUIDELINES FOR CLEMENCY RECOMMENDATION BY THE JUDICIARY

Judicial recommendation of executive clemency advances the achievement of "a morally just result"[170] by (1) providing judges with a discretionary tool to correct harsh punishments; (2) revitalizing the exercise of clemency on both the federal and state levels; and (3) improving equitability in clemency grants by focusing sentence modification via clemency on the defendant and the facts of the case rather than on political influences. Having concluded that judicial participation in executive clemency is valuable, this Part discusses some of the relevant factors to consider when evaluating a case for clemency recommendation.

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167. Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 371 (2010) (footnotes omitted); *see also* Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. REV. 349, 353–55 (2003) (discussing the reasons judges have issued clemency for capital cases, including "to achieve justice or bestow mercy" and "to prevent the loss of convictions and to conserve judicial resources"); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 87–88 (2003) ("But clemency is, at bottom, a political crapshoot that forces the innocent and guilty alike to rely on popularly elected politicians, or their political appointees, to ensure that ultimate justice is done.").

168. *See* Michael Davis, *Sentencing: Must Justice Be Even-Handed?*, 1 LAW & PHIL. 77, 86 (1982) (discussing how the circumstances of the crime may affect sentencing).

169. Morison, *supra* note 53, at 20–21.

170. *Id.* at 25.

A. Miscarriage of Justice

When the justice system mandates overly severe penalties in individual cases that cannot be corrected by other measures, executive clemency is an effective way to correct the injustice. For example, in *Angelos*, Judge Cassell reluctantly found that, although the system malfunctioned, he had no recourse at the judicial level to reduce a sentence that was "so grossly disproportionate to the crime."[171] During the sentencing stage, Judge Cassell rigorously evaluated all possible means of reducing Angelos's unjust sentence, including an equal-protection challenge and a claim that the sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment, but he concluded that they were of no use in this case.[172] He found the sentence mandated by the gun statute, as applied to Angelos, "cruel, unjust, and even irrational."[173] In *Harvey*, Chief Judge Sachs found Harvey's offense "not . . . serious enough to merit imprisonment."[174] In *McDade*, even though Judge Friedman found the sentence imposed on McDade "disproportionate,"[175] the defendant had no more recourse after losing his ineffective-assistance-of-counsel collateral claim. In these instances where the sentencing judges perceive a miscarriage of justice, judicial recommendation of executive clemency is highly valuable for ensuring proportionality in the sentence imposed.

B. The Sentence Imposed Is Long

For administrative efficiency, only cases with long sentences should be considered for clemency recommendation. This is not to say that defendants who received shorter sentences are not as worthy, but the clemency power should be exercised only when a substantial portion of the defendant's life will be spent in prison. It is difficult to provide an absolute number, but McDade was sentenced to twenty-seven years, Angelos to sixty-one and a half years, and Harvey to life. Such long sentences should, at a minimum, provoke a "sober second look."[176]

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171. United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

172. *Id.* at 1235–60.

173. *Id.* at 1230.

174. United States v. Harvey, 946 F.2d 1375, 1378 (8th Cir. 1991) (quoting Sachs, C.J., from the Sentencing Transcript).

175. United States v. McDade, 639 F. Supp. 2d 77, 86 (D.D.C. 2009).

176. Steiker & Steiker, *supra* note 34, at 402.

C. *The Underlying Crime Is Nonviolent*

Arguably, violent crimes pose greater danger to society at large than nonviolent ones. Under each justification for criminal punishment—retribution, incapacitation, deterrence, and rehabilitation[177]—this seems to hold true. From a retributivist perspective, society deems violent criminals more deserving of punishment than nonviolent criminals due to the more serious consequences that attend violent crimes. An example of how this concern affects sentencing is the enactment of § 3553(f), which allows for direct sentencing "point" reductions[178] for nonviolent criminals in the Sentencing Guidelines' offense-level calculation.[179] Turning to the other justifications, the safety of other members of society makes the incapacitation and deterrence of violent criminals more urgent than the incarceration of nonviolent criminals. And although it is arguable whether society's interest in rehabilitating a criminal changes with the degree of violence involved, rehabilitation can be considered here in terms of the extent to which it is possible and successful. Prison is not an ideal place for the rehabilitation of offenders due to the violence and generally tense atmosphere prevalent there.[180] Nonviolent

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177. JOHN KAPLAN, ROBERT WEISBERG & BUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 21 (6th ed. 2008).

178. *McDade* exemplifies how the sentencing "point" system works:

> Under the Federal Sentencing Guidelines, the Base Offense Level for 150 kilograms or more of cocaine is 38. Had Mr. McDade pled guilty, he would have received a three level downward adjustment for acceptance of responsibility pursuant to Section 3E1. 1 of the Guidelines, to Offense Level 35. As part of the plea agreement, Mr. McDade's managerial role in the conspiracy, a three level upward adjustment under Section 3B1.1, likely would have been negotiated away, leaving the Offense Level at 35. At Criminal History Category I, Mr. McDade's sentence would have been between 168 and 210 months. The Court would have imposed a sentence of 168 months.

McDade, 639 F. Supp. 2d at 86.

179. The statute, in relevant part, states that

> the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that . . . the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.

18 U.S.C. § 3553(f)(2) (2006).

180. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 831 (1994) ("[T]he penitentiary had a violent environment and a history of inmate assaults . . . and petitioner . . . would be particularly vulnerable to sexual attack."); Hudson v. Palmer, 468 U.S. 517, 526 (1984) ("Even a partial survey of the statistics on violent crime in our Nation's prisons illustrates the magnitude of the problem. During 1981 and the first half of 1982, there were over 120 prisoners murdered by fellow inmates in state and federal prisons. A number of prison personnel were murdered by

criminals should not be forced to stay in such an environment for an excessively lengthy period.[181] Long prison terms for nonviolent offenders may retard or prevent rehabilitation and may even engender violent tendencies.[182] In *Angelos*, *Harvey*, and *McDade*, the sentencing judges considered the nonviolent nature of the defendants' crimes in recommending clemency—*Angelos*: possession of marijuana and possession, but not use, of weapons; *Harvey*: possession of crack cocaine; and *McDade*: cocaine distribution. Other judges should follow Judges Cassell, Sachs, and Friedman and consider the nonviolent nature of the offense as a criterion for recommending clemency.

D. The Punishment Is Disproportionate to the Sentences Received by Codefendants

For the fair execution of criminal punishment, codefendants who were similarly involved in the crime should be sentenced to similar terms. For example, Judge Friedman noted in *McDade*,

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prisoners during this period. Over 29 riots or similar disturbances were reported in these facilities for the same time frame. And there were over 125 suicides in these institutions. Additionally, informal statistics from the United States Bureau of Prisons show that in the federal system during 1983, there were 11 inmate homicides, 359 inmate assaults on other inmates, 227 inmate assaults on prison staff, and 10 suicides. There were in the same system in 1981 and 1982 over 750 inmate assaults on other inmates and over 570 inmate assaults on prison personnel." (citations omitted)); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977) ("Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration." (citing Wolff v. McDonnell, 418 U.S. 539, 561–62 (1974)).

181. *See, e.g.*, S. REP. NO. 89-1667, at 17 (1966) ("The net effect is to confine eligibility for the benefits of the legislation to addicts accused of nonviolent crimes who show good prospects for rehabilitation, while retaining strict criminal punishment for dangerous or hardened offenders, narcotics pushers, and persons with a history of failure to respond to treatment."); Lauren M. Cutler, Note, *Arizona's Drug Sentencing Statute: Is Rehabilitation a Better Approach to the "War on Drugs"?*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 397, 419 (2009) ("[R]esearch conducted by experts in recent years has demonstrated that rehabilitation offers a more comprehensive, long-term solution to nonviolent criminals . . . ."); Jing Tsang, Note, *California's Drug Reform Policies: Past, Present, Future*, 30 WHITTIER L. REV. 887, 889 (2009) ("Due to the increasing number of nonviolent criminals in its prison system, California has made it a goal to reduce the number of nonviolent drug offenders in its prisons. It hopes to reduce the overpopulated system by offering rehabilitation programs in lieu of incarceration . . . ." (footnote omitted)).

182. S. REP. NO. 89-1667, at 17; Cutler, *supra* note 181, at 419; Tsang, *supra* note 181, at 889; *see also* Note, *Manufacturing Social Violence: The Prison Paradox & Future Escapes*, 11 BERKLEY J. AFR.-AM. L. & POL'Y 84, 108 (2009) ("The prison is not a place where prisoners rehabilitate. In fact, it seems that at a place like Terminal Island which is a middle security Federal Prison, many prisoners come in for nonviolent crimes and soon find their personalities shifting towards violence and survival." (quoting an inmate)).

> While each of [the co-defendants] pled guilty and provided substantial assistance to the government by testifying against Mr. McDade (and some provided assistance in other ways), this sentence is disproportionate. Indeed, had Mr. McDade not exercised his constitutional right to a jury trial and instead pled guilty, the likely sentence under even a mandatory Guideline regime would have been approximately 168 months, approximately half the sentence the Court was required to impose after Mr. McDade was found guilty at trial.[183]

In the interest of equity, substantial deviations of sentencing from that imposed on codefendants should be a factor in considering sentence reduction via executive clemency.

E. The Level of Punishment Is Inconsistent with the Nature of the Offense

"Where two offences are in conjunction, the greater offence ought to be subjected to severer punishment, in order that the delinquent may have a motive to stop at the lesser."[184] This is the third rule of thumb articulated in Jeremy Bentham's *Theory of Legislation*. Although the Sentencing Guidelines and various other statutes expend great efforts to adhere to this principle, these attempts sometimes fail. One such failure is the recidivist enhancement for gun possession under 18 U.S.C. § 924(c), under which Angelos was convicted.[185] The enhancement was enacted with the purpose of punishing offenders who repeatedly used weapons in subsequent crimes after serving prior convictions. The law was also used, however, to enhance the punishment of first-time offenders.[186] The Criminal Justice Transition Coalition proposed an amendment to the

183. United States v. McDade, 639 F. Supp. 2d 77, 86 (D.D.C. 2009).

184. JEREMY BENTHAM, THE THEORY OF LEGISLATION 326 (C.K. Ogden ed., Richard Hildreth trans., Kegan Paul, Trench, Trübner & Co. 1931) (1802) (emphasis omitted).

185. United States v. Angelos, 345 F. Supp. 2d 1227, 1239–43 (D. Utah 2004) (citing 18 U.S.C. § 924(c) (2000)).

186. *See* 2009 CRIMINAL JUSTICE TRANSITION COAL., *supra* note 9, at 44–45 ("For example, a defendant who, over the course of three days, carried a gun while making three drug sales (prosecuted in a single indictment resulting in three separate convictions) can be sentenced to a minimum sentence of 55 years for the gun charges, plus whatever other sentences result from the underlying conviction. This defendant, if convicted in one trial of three instances of carrying a gun in relation to a drug trafficking offense, will be sentenced to (1) whatever sentence the drug trafficking conviction carries; (2) a five-year mandatory minimum sentence consecutive to the drug sentence, and (3) two 25-year mandatory minimum sentences consecutive to the drug sentence, consecutive to the five-year mandatory minimum and consecutive to each other.").

law to clarify that offenders subject to this enhancement must be true recidivists, to avoid sentencing "a twenty-four-year-old first offender . . . to a mandatory consecutive term of 55 years based on his three convictions in the same trial for simply possessing a firearm in connection with small marijuana deals."[187] When judges find a punishment that is technically required but clearly incompatible with the purpose of the law, they should recommend clemency to the executive.

F. Clean or Low-Level Criminal History

Society has less sympathy for repeat offenders than for first-time offenders for many reasons. First, because "to err is human," society gives some leeway before harshly punishing individuals for their offenses. Upon repeated warnings, however, the system draws a line and severely punishes repeat offenders, as is reflected in California's three-strikes law[188] and the gun statute implicated in *Angelos*.[189] Second, society is more willing to give first-time offenders a second chance, especially for nonviolent crimes.[190] This willingness is intertwined with the rehabilitative goal of the justice system and reflects a belief that there is a greater likelihood of rehabilitation and reentry back into society for first-time offenders. The consideration of criminal history in sentencing calculations under the Sentencing Guidelines illustrates this view,[191] as does the consideration of criminal-history level in deciding between sentences of incarceration and probation.[192] Finally, punishing first-time offenders less severely

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187. *Id.* at 45.

188. CAL. PENAL CODE § 667(b) (West 2010) ("It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.").

189. *See supra* note 185 and accompanying text.

190. *See, e.g.*, Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 393 (2005) ("Studies have shown, for example, that public opinion tends to be much more punitive with regard to violent than nonviolent crimes." (citing Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections,* 27 CRIME & JUST. 1, 59 (2000))).

191. The Federal Sentencing Guidelines assign criminal-history levels based on the number of offenses a defendant has committed prior to the offense being sentenced. The categories range from I to VI, which puts defendants into different zones of potential incarceration lengths. 2009 GUIDELINES MANUAL, *supra* note 22, at § 5A, sentencing tbl.

192. Pablo Martinez & Joycelyn M. Pollock, *Impact of Type of Attorney on Sentencing*, 44 CRIM. L. BULL. 652, 653 (2008) ("Research on sentencing has examined what factors go into the decision to incarcerate versus giving the offender a 'second chance' with a community

than recidivists is also in line with the deterrence and incapacitation justifications. Arguably, recidivists require greater impediments to deter and incapacitate because their repeated behavior shows a lack of susceptibility to deterrence. Thus, judges should take an offender's criminal history into consideration when deciding whether to recommend clemency.

G. Immaturity of Judgment

Though young offenders not within the age range of juveniles should by no means be treated more leniently for their crimes, their youth should be a factor in recommending clemency when some or many of the other factors described are present. Both Harvey and Angelos were twenty-four years old when convicted and sentenced to life[193] and sixty-one and a half years in prison,[194] respectively. Harvey had several minor drug offenses prior to his conviction and Angelos had a clean criminal history.[195] Sixty years is a long time for punishment and provides bountiful room for rehabilitation, especially for young people.[196] Under these circumstances, judges should take defendants' immaturity of judgment into consideration.

H. Young Dependents and Future-Generation Consequences

The existing criminal justice system rarely takes familial situations into account. Even though the Sentencing Guidelines provide a downward departure for familial situations, it is rarely

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supervision sentence. Obvious factors that have been examined include: crime of conviction, criminal history, race, and gender.").

193. United States v. Harvey, 946 F.2d 1375, 1378 (8th Cir. 1991).

194. United States v. Angelos, 345 F. Supp. 2d 1227, 1231–32 (D. Utah 2004).

195. *See supra* notes 23–28 and accompanying text.

196. Delo v. Lashley, 507 U.S. 272, 288 (1993) (Stevens, J., dissenting) ("[I]mportant protections that the law has traditionally provided to youthful offenders because of their . . . greater potential for rehabilitation [should be observed]."); Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) ("The only mitigating circumstance [against the death penalty the sentencing judge] found was petitioner's youth."); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 91 (2009) ("Crimes committed by still-developing young people, these scholars urge, are less blameworthy than equivalent acts by adults; further, youths' developmental plasticity makes them more likely to stop offending—if, that is, we provide them with conditions conducive to rehabilitation." (citing ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 13–16 (2008))).

applied.[197] On the one hand, it is not difficult to comprehend why familial conditions rarely warrant a departure; most defendants have relatives whose lives would be affected by the defendants' incarceration. Offenders with young, dependent children, however, deserve closer examination. Take McDade, for example. He had four children, all below the age of ten when he was incarcerated. He held two jobs to support his family and was actively involved with the children's school and his community church. The court put McDade in prison for twenty-seven years.[198] The criminal justice system does not take into account the effects of its laws on future generations of children. Society does not gain much by incarcerating a child's nonviolent, first-time-offender father for the duration of the child's youth; rather, society may suffer a significant loss by creating unproductive new members, or even new criminal offenders.[199] Judges could effectively remedy the lack of next-generation consideration in the criminal justice system by considering the potential impact on the convict's children when deciding whether to recommend clemency.

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197. 2009 GUIDELINES MANUAL, *supra* note 22, at § 5H1.6 ("[F]amily ties and responsibilities are *not* ordinarily relevant in determining whether a departure may be warranted." (emphasis added)).

198. *See supra* note 28 and accompanying text.

199. *See, e.g.*, Mogens Nygaard Christoffersen, Brian Francis & Keith Soothill, *An Upbringing to Violence? Identifying the Likelihood of Violent Crime Among the 1966 Birth Cohort in Denmark*, 14 J. FORENSIC PSYCHIATRY & PSYCHOL. 367, 367 (2003) ("First-time convicted offenders have an increased risk of coming from seriously disadvantaged families . . . ."); DeAnna Pratt Swearingen, Comment, *Innocent Until Arrested?: Deliberate Indifference Toward Detainee's Due-Process Rights*, 62 ARK. L. REV. 101, 103 (2009) ("[E]arly American scholars attributed deviant behavior to the poor upbringing of the offender and the vices of the community."); *Crime: What The Country* Really *Thinks: Children's Upbringing Seen as Key to a Law-Abiding Society*, INDEPENDENT (London), May 7, 1994, at 3 ("Raising the moral climate started off as the most outstandingly popular tactic for tackling crime: teaching children the difference between right from wrong was identified by more than 90 per cent of people as one of the most effective ways of tackling crime, parents spending more time with their children by 85 per cent and firmer discipline in schools by 83 per cent."). Although the sources cited above also speak to this point, the lyrics of a popular song may paint a clearer picture:

> Oh, there ain't no rest for the wicked / Money don't grow on trees / I got bills to pay / I got mouths to feed / There ain't nothing in this world for free. / I know I can't slow down / I can't hold back / Though you know, I wish I could / No there ain't no rest for the wicked / Until we close our eyes for good.

CAGE THE ELEPHANT, AIN'T NO REST FOR THE WICKED (Jive Records 2009) (quoting a prostitute, a street robber, and an embezzler).

CONCLUSION

Even though the Sentencing Guidelines were enacted with the goal of mitigating "[d]isparity in sentencing" and establishing "certainty of punishment,"[200] they required sentences that judges deemed unjust.[201] Largely due to its flexibility, executive clemency is an efficient method to cure individual injustices caused by the malfunctioning of mandatory sentencing schemes. Judicial recommendation of executive clemency gives judges the discretion to call specific cases to the attention of the executive branch for clemency consideration.

That said, judicial recommendation of clemency is not limited to correcting sentences imposed during the mandatory-injustice period. Due to sentencing judges' familiarity with their cases and the flexibility of executive clemency, judicial recommendation of executive clemency could play a significant role in revitalizing and reinvigorating clemency grants at both the federal and state levels.[202] Given the usefulness of executive clemency as a last resort for justice, its current unpopularity and declining use represents a loss to the criminal justice system. Judicial approval of clemency grants can help revive clemency by providing an additional level of legitimacy. Furthermore, judicial recommendation of clemency improves equitability in clemency grants by focusing sentence modifications on the defendant and the facts of the case rather than on political influences. Thus, a more frequent use of clemency recommendations by the judiciary can play a significant role in correcting injustice and avoiding disproportionate sentences.

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200. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2009), *available at* http://www.ussc.gov/general/USSC_overview_200906.pdf.

201. *See supra* Part I.

202. *See supra* notes 73–89 and accompanying text.